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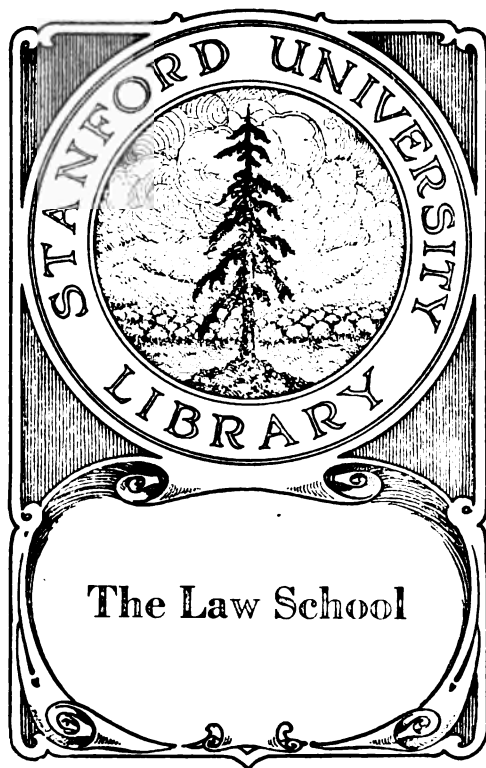
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# THE LAW OF CONTRACTS

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IN FOUR VOLUMES

VOLUME II

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### § 601. Necessity for interpretation of contracts.

The only question of interpretation with which this treatise is concerned relates to contracts. Interpretation of wills or of statutes may involve different principles.<sup>1</sup>

[The interpretation of a contract is the process of determining from the expressions of the parties what external acts must happen or be performed in order to conform to what the law considers their will.] Generally, the question of interpretation does not arise broadly but concerns only a particular act or forbearance of one or both of the parties which has been made

<sup>1</sup> So the question of the meaning of an entry made in the usual course of business which a witness seeks to use may involve a different principle, since it is wholly a unilateral act. In *Norman Printers' Supply Co. v. Ford*, 77 Conn. 461, 59 Atl. 499, the words "on contract" appeared in a book of original entries offered by the plaintiff in support of its claim. The court allowed testimony that these words had "a well defined meaning in the

plaintiff's business" and always denoted "a conditional lease or sale." It was as proper, the court said, "as if a private cipher had been used, it would have been to explain that." It will be observed that the witness could have given oral testimony that a conditional lease or sale was involved; and if he was accustomed to make a cross or write the words "on contract" whenever he made such a sale, he could presumably show that also.



the subject of litigation or dispute. Acts as well as words may be used in the formation of contracts, and acts as well as words must be interpreted. A wave of the hand, as well as a sentence may be ambiguous. Only on the supposition that every act or word in the formation of a contract can have but one possible sense can interpretation lose its importance. Even on this supposition interpretation still is a logical necessity, but would be involved in learning the language. Blackacre, whether the word is spoken or written, is not the same thing as a certain piece of ground which goes by that name, even though no other land is so called; and the law must decide in any litigation on a contract referring by name to Blackacre that the word is applicable to some particular piece of land.<sup>2</sup>

[Interpretation does not include the discovery of all the effects which the words or symbols used by the parties may have upon the external world. The law may attach consequences to these words or symbols for other reasons than because the parties appear to wish those consequences.] A mortgage may provide in terms that the mortgaged property shall be forfeited if the debt is not paid on the law day. This provision will not be enforced. The mortgagor will be allowed a right of redemption,<sup>3</sup> but it is a vicious terminology which would classify this legal effect of the mortgage upon the mortgaged property as within the scope of interpretation or construction.

### § 602. Construction and interpretation.

A distinction has been taken between the interpretation of contracts and their construction.<sup>4</sup> Interpretation is thus defined: "Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them

<sup>2</sup> "We are turning signs and symbols into their equivalent realities. This must always be done to some extent, no matter how many are the identifying tokens. 'In every case, the words used must be translated into things and facts by parol evidence.' Holmes, J., in *Doherty v. Hill*, 144 Mass. 468, 11 N. E. 583; *Mead v.*

*Parker*, 115 Mass. 413, 15 Am. Rep. 110, 4 Wigmore on Evidence, § 2454." Cardozo, J., in *Marks v. Cowdin*, 226 N. Y. 138, 123 N. E. 139, 141.

<sup>3</sup> *Seton v. Slade*, 7 Ves. 264, 273.

<sup>4</sup> Lieber, *Hermeneutics* (Hammond's ed.), 11, 44. See also 2 Elliott, *Contracts*, § 1505.

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actual intent unless expressed in some way in the writing is ineffective, except when it can be made the basis for reformation of the writing.<sup>31</sup> It is true that it is commonly said that the court in the interpretation of contracts is endeavoring to find the intention of the parties. The natural meaning of this language is that the court is endeavoring to find as a controlling factor what, as has just been seen, may be wholly ineffectual. In contracts of which no memorial is made and no writing required by law, it is doubtless true that where parties have made a bargain which both of them understand in a certain sense, their intent (which at least has been made plain to one another)

<sup>31</sup> *Eyre, C. B.*, in *Gibson v. Minet*, 1 H. Bl. 569, 615: "All latitude of construction must submit to this restriction—namely, that the words may bear the sense which by construction is put upon them." So the court said in *Vinton Petroleum Co. v. Sun Co.*, 230 Fed. 105, 107, 144 C. C. A. 403, "To adopt the construction contended for on behalf of the appellant would require giving to the agreement a meaning not expressed by the language used. This is not permissible." See also expressions in *Bank of New Zealand v. Simpson*, [1900] A. C. 182, 189; *Bijur Motor Lighting Co. v. Eclipse Mach. Co.*, 243 Fed. 600, 156 C. C. A. 298; *Miller v. New York L. Ins. Co.*, 179 Ky. 246, 200 S. W. 482; *Old Colony St. Ry. Co. v. Brockton, etc.*, St. Ry. Co., 218 Mass. 84, 105 N. E. 866; *Woburn Nat. Bank v. Woods*, 77 N. H. 172, 89 Atl. 491; *Griffith v. Adair*, 74 W. Va. 646, 82 S. E. 749. In *Strong v. Carver*, 197 Mass. 53, 83 N. E. 328, 14 L. R. A. (N. S.) 274, the court said: "In an action to recover royalties under a contract in writing granting the defendant a license to manufacture and sell 'automatic feed attachments' under a certain patent, which by the plain meaning of its words covers only the manufacture and sale of attachments for which the patent was granted, it cannot be shown by oral evidence that the contract was intended to include

automatic feed attachments which were not within the terms of the patent and were not protected by it." In *Canterberry v. Miller*, 76 Ill. 355, 357, the court said: "These papers, offered in evidence as a contract, do not appear to be an agreement between two or more parties. The one signed by appellant, *Canterberry*, reads that he has bought of *himself* 100 head of hogs, for which he agrees to pay *himself* \$4.50 per hundred. The one executed by Appellee, *Miller*, reads that he has sold to *himself* 100 head of hogs, for which *he* agrees to pay \$4.50 per hundred.

"The language used in these instruments is clear and pointed, no ambiguity exists, and it is clearly expressed as words can do it, that appellant buys of himself, and that appellee sells to himself a certain number of hogs, and we are aware of no rule of construction by which we can hold this to be a contract wherein appellant sells and appellee buys a certain quantity of hogs.

"It is no part of the duty of courts to make contracts for parties, and we are aware of no manner in which these instruments can be held to be a contract between appellant and appellee, unless the court should make a radical alteration in the terms of the two instruments." See also *Benjamin v. McConnell*, 4 Gilm. 536, 46 Am. Dec. 474.

must be sought, however inadequately it may have been expressed. But in contracts of the other class, this is not true, and though courts say they are seeking the intention of the parties, the assertion is even more emphatic that this intention can be found only in the expressions of the parties in the writing. In effect, therefore, it is not the real intent but the intent expressed or apparent in the writing which is sought.<sup>32</sup>

<sup>32</sup> In *Mallan v. May*, 13 M. & W. 511, 517, 518, Pollock, C. B., said: "We must apply the ordinary rules of construction to this instrument; and though, by so doing, we may, in some instances, probably in this, defeat the real intention of the parties, such a course tends to establish a greater degree of certainty in the administration of the law. One of these rules is, that words are to be construed according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect; and subject always to the observation, that the meaning of a particular word may be shewn, by parol evidence, to be different in some particular place, trade, or business, from its proper and ordinary acceptation."

"Nor is there any difficulty in carrying this instrument into effect, by understanding the word 'London' in its strict sense; and there is no parol evidence of any understanding of the word in a different sense, in the trade or business to which this contract relates. The statement in the case, that London has a popular or colloquial sense, in which Great Russell street would be understood to be within its limits, is by no means sufficient for the purpose of causing us to put a different construction on that word in this instrument."

In *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Iowa, 83, 159 N. W. 465, 473, the court said: "Section 4617 of the Code provides that when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other party understood it, but it has been held under this that the statute cannot be invoked to show that a written contract was according to the understanding and intent of the parties to be performed in a way different from that expressed in the contract itself. *Walker v. Manning*, 6 Iowa, 519."

In *Letts-Parker Grocer Co. v. Marshall*, 232 Mass. 504, 122 N. E. 647, the court said of a contract: "Even if the parties may have misapprehended its terms, or it may be obscure, or difficult of satisfactory construction, these are no reasons for setting the contract aside. It can be enforced unless it is wholly unintelligible. . . . 'When a party enters into a written contract, in the absence of fraud or imposition he is conclusively presumed to understand the terms and legal effect of it and to assent to them. *Rice v. Dwight Mfg. Co.*, 2 Cush. 80.'"

In *Zimmermann v. Loft*, 125 N. Y. App. Div. 725, 729, the court said: "If the contract as signed does not clearly express the agreement of the parties, that may be a reason why it should be reformed, but until reformed it is the duty of the court to enforce it according to its terms."

In *Reagan v. Bruff*, 49 Tex. Civ.

### § 611. An exclusively mutual standard is not applicable.

Few decisions can be found which countenance the view that where a contract is incorporated in a writing which naturally bears a reasonable meaning, if a local standard is applied, a different meaning can be given to it by the court because, by private convention, or otherwise, the parties understood the contract to mean something different from the natural meaning of their written words at the place where the writing was made between parties of the sort who entered into it. Moreover, the

Appeals, 226, 229, the court said: "The Court will not always construe a contract to mean that which the parties to it meant; but will give it the construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law, will permit.

If words employed were those intended to be used, but their actual meaning was totally different from that which the parties supposed and intended them to bear, still their actual meaning is generally held to be their legal meaning." See also *Parkhurst v. Smith*, Willes, 332; *Shove v. Wilson*, 9 C. & F. 355, 365; *McConnel v. Murphy*, L. R. 5 P. C. 203, 219; *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 So. 715; *Silva v. Silva*, 32 Cal. App. 115, 162 Pac. 142; *Shuler v. Allam*, 45 Colo. 372, 101 Pac. 350; *West Haven Water Co. v. Redfield*, 58 Conn. 39, 18 Atl. 978; *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247; *Millikin v. Starr*, 79 Ill. App. 443, aff'd 180 Ill. 458, 54 N. E. 328; *Schneider v. Turner*, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164 n.; *Bearss v. Ford*, 108 Ill. 16; *Brenzel v. Kirschner*, 128 Ill. App. 136; *Bobb v. Bancroft*, 13 Kans. 123; *Illinois Central R. Co. v. Vaughn*, 33 Ky. L. Rep. 906, 111 S. W. 707; *Pratt v. McCoy*, 128 La. 570, 615, 54 So. 1012; *Maryland Coal Co. v. Cumberland, etc., R. Co.*, 41

Md. 343, 352; *Smith v. Abington Sav. Bank*, 171 Mass. 178, 50 N. E. 545; *Chase v. Ainsworth*, 135 Mich. 119, 97 N. W. 404; *Cottrell v. Michigan United Traction Co.*, 184 Mich. 221, 150 N. W. 857; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Ellis v. Harrison*, 104 Mo. 270, 279, 16 S. W. 198; *Laclede Construction Co. v. Moes Tie Co.*, 185 Mo. 25, 62, 84 S. W. 76; *Curtin-Clark Hardware Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476; *Webb v. Missouri State Life Ins. Co.*, 134 Mo. App. 576, 115 S. W. 481; *Dent v. North American S. S. Co.*, 49 N. Y. 390; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; *Zimmerman v. Loft*, 125 N. Y. App. Div. 725, 110 N. Y. S. 499; *Royal v. Southerland*, 168 N. C. 405, 84 S. E. 708; *Hyland v. Oregon Paving Co.*, 74 Or. 1, 144 Pac. 1160, L. R. A. 1915 C. 823; *City Messenger Co. v. Postal Telegraph Co.*, 74 Or. 433, 145 Pac. 657; *Heirs of Watrous v. McKie*, 54 Tex. 65; *Collier v. Robinson* (Tex. Civ. App.), 129 S. W. 389; *Crawford v. El Paso Land Imp. Co.* (Tex. Civ. App.), 201 S. W. 233; *Clark v. Lillie*, 39 Vt. 495; *Cranes Nest Coal, etc., Co. v. Virginia Iron, etc., Co.*, 105 Va. 785, 54 S. E. 884; *Book v. Thomas*, 61 Wash. 607, 610, 112 Pac. 917; *Smith v. Merrill*, 134 Wis. 227, 233, 114 N. W. 508; *Zohrlaut v. Mengelberg*, 144 Wis. 564, 124 N. W. 247, and *supra*, § 607.

many expressions in the cases which assert that the normal meaning will be given to language <sup>33</sup> and which assert that if language is clear and unambiguous, there is no room for construction,<sup>34</sup> though they may go too far for accuracy, at least indicate that the law is not likely to adopt the private meaning of the parties as the ultimate test for the construction of their written contracts. [Certainly where the law requires a contract to be in writing, the requirement must be regarded as demanding a standard which, so far as the ambiguity of language permits will furnish to the court evidence of the transaction in a form not wholly dependent for its meaning on the ideas of the parties to it. A code which is known only to the two parties using it, and is not itself in writing, is a language which does not fulfil such a purpose.] If a memorandum made by a buyer and seller who orally agree to sell, states in conformity with a private convention between them adopted for secrecy, that they agree to buy, such a written memorandum is of little use in preventing fraud or perjury,<sup>35</sup> and it cannot be admitted that such a memorandum would satisfy the requirements of the Statute of Frauds, if regarded as a mere memorandum and not as an agreed memorial of the bargain. If the parties have assented to the writing as a memorial of their bargain, the statute would indeed be satisfied, and an enforceable contract would arise, though its terms would be what the words of the parties naturally meant, not what they by special oral agreement had determined that they should. In any case where the parties have assented to a written record of their bargain, whether the law requires a writing or not, the purpose of the so-called parol evidence rule, or one of its purposes, precludes the parties not only from applying a standard which is based on their individual mental understanding but also one based on their individual oral agreement. [As Judge Holmes says: <sup>36</sup> "You cannot prove a mere private convention between the two parties to give language a different meaning from its common one. It would open too great risks, if evidence were admissible to show that when they said five hundred feet they agreed it

<sup>33</sup> See *supra*, § 608.

<sup>35</sup> *Goode v. Riley*, 153 Mass. 585, 28

<sup>34</sup> See *supra*, § 609.

N. E. 228.

<sup>36</sup> See 4 Wigmore, Evidence, p. 3481.

should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church."

It should be added that though a private convention is not competent to change the meaning of five hundred feet to one hundred inches, or the meaning of Bunker Hill Monument to the Old South Church, the local or technical usage, if different from ordinary or normal usage, may be competent to produce this result. The view expressed by Judge Holmes is undoubtedly that generally held.<sup>37</sup> And for the same reason that words

<sup>37</sup> In *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 So. 715, 717, the court said: "The Court properly excluded the proposed evidence of the defendant as to what was the agreement or understanding between him and plaintiff with reference to the meaning of the words, 'to be advertised until sold,' contained in the written contract of sale—the order executed by defendant. The writing itself, construed with reference to the nature of the transaction and in the light of surrounding circumstances, is the sole evidence of the agreement, and parties cannot be allowed to alter or vary its terms by evidence of a contemporaneous parol agreement or understanding as to the meaning of its language."

In *Adams v. Turner*, 73 Conn. 38, 45, 46 Atl. 247, offer having been made to prove conversations and acts of the parties to show that they attached a peculiar meaning to the words "new and useful improvements" the court said: "It thus appears that the words 'new and useful improvements' in this contract, when read in connection with the rest of it, and without the aid of extrinsic evidence, mean actually existing improvements, and that their meaning in this respect is neither ambiguous nor uncertain. Under such circumstances the evidence extrinsic to the writing, offered to show that the parties attached a different meaning to the words in question than the one

expressed in the writing, was properly excluded."

The same court in *Falletti v. Carrano*, 92 Conn. 636, 103 Atl. 753, 754, said: "Where an agreement in writing is expressed in technical or incomplete terms, parol evidence is admissible to explain that which taken alone would be unintelligible, when such explanation is not inconsistent with the written terms of the instrument. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings, or the terms be vague and general, or have diverse meanings, as 'household furniture,' 'stock,' 'freight,' 'factory prices,' and the like, in all these and the like cases parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain the meaning in any other respect."

In the contract in suit in *Cooper v. Cleghorn*, 50 Wis. 1 3, 123, 6 N. W. 491, "plaintiffs agreed to furnish 'four runs best quality of four-foot old stock French burr millstones, *faced and furrowed*.' Such stones were actually furnished, but the defendants sought to show by parol that, from conversation with one of the plaintiffs prior to the execution of the contract, they were led to suppose that stones which

cannot be given a meaning peculiar to the parties, a sign which the parties agree upon as meaning something but which is meaningless to others, will not be treated as a written agreement. "An 'indecipherable scrawl' does not constitute a contract. When the parties undertake to put their agreement in writing and express its crucial terms by characters or symbols so illegible that the tribunal established to try the facts cannot determine the signification of that which is on the paper, then no contract in writing has been made." <sup>28</sup>

were 'faced and furrowed' would be in a condition for immediate use—that is to say, would be dressed; whereas it was necessary to expend \$500 in rendering them fit to use. It clearly appeared that the words 'faced and furrowed,' among millers, did not imply that the stones would be dressed and in a condition to use. It is evident that the defendants sought to add to and vary the written contract by showing previous negotiations and understanding of the parties as to the meaning of the words 'faced and furrowed.' This evidence was inadmissible."

Broom's Legal Maxims (8th Eng. ed.), 460, sums up the matter thus: "In some cases indeed it is possible that any construction which the court may adopt may be contrary to the real meaning of the parties; and, if parties make use of such uncertain terms in their contracts, the safest way is to go by the grammatical construction." Cf., however, *Buckbee v. Hohenadel, Jr., Co.*, 224 Fed. 14, 26, 139 C. C. A. 478, where the subject-matter of two contracts was named "Chicago Pickle" in one and "Improved Chicago Pickling" in the other. The court said: "The plaintiff for support of its contention that both were used alike to designate 'Westerfield Chicago Pickle'—an old and well-known variety 'especially desirable for pickling purposes'—introduced (as heretofore various seedmen who testified that

the names were so used and known in the trade. This testimony was controverted, but, irrespective of such disagreement, we understand the alleged usage to constitute circumstantial evidence only of the meaning of the uncertain terms employed in the writing; that, although uniform usage may have strong probative force in the issue of fact thus raised, other circumstances attending the making are equally admissible to ascertain the mutual intention of the parties "therein." The defendant offered proof that the variety tendered for purchase by him was 'Haskell' seed described with certainty; that he then quoted the 'Westerfield' variety at 85 cents per pound, and the 'Haskell' at 70 cents per pound, as optional for purchase; that the plaintiff selected the 'Haskell' tender accordingly for purchase; that they then adopted, as designation for the seed so purchased, the arbitrary name 'Improved Chicago Pickling,' as theretofore applied by the defendant; that 'the witness knew of no other strain or variety or kind of cucumber seed that was being sold under' such name; and that the name was so 'inserted in the contract by Mr. Hohenadel.' We are of opinion that the testimony thus offered was admissible for submission upon the above-defined issue, and that error is well assigned for its rejection."

<sup>28</sup> *Aradalous v. New York &c. R.*, 225 Mass. 235, 114 N. E. 297, 299.

### § 612. Codes and abbreviations.

It may be suggested that if the code language used by the parties has no meaning either normally or locally a different result should be reached from that appropriate in a case where the words used apparently had a clear significance which the code of the parties contradicted. But even in such a case it seems true at least that the Statute of Frauds would not be satisfied.<sup>39</sup> If the contract was in writing, but not required to be by the Statute of Frauds, whether the parol evidence rule would invalidate it is more open to question.<sup>40</sup>

Frequently in written contracts abbreviations are used which are only intelligible to those engaged in a particular business. Parol evidence is admissible to show the special meaning that such abbreviations had, under the circumstances, surrounding the making of the contract.<sup>41</sup> This is true though the contract is within the Statute of Frauds.<sup>42</sup> Even if an abbreviation was in fact not understood by one party, yet if the abbreviation was in such common use under similar circumstances that either party was justified in assuming knowledge by the other, it would seem that the local meaning of the abbreviation could be shown.<sup>43</sup> (Wigmore strongly argues for the universal rec-

<sup>39</sup> See *supra*, § 576.

<sup>40</sup> In *Carland v. Western Union Telegraph Co.*, 118 Mich. 369, 76 N. W. 762, 43 L. R. A. 280, 74 Am. St. Rep. 394, the plaintiff sent a telegram reading "Buy 3 May." He was allowed to testify in an action against the Telegraph Company for failure to deliver the message that the dispatch meant "Buy 3000 bushels of May wheat." The court intimated that the question would have been different had the Statute of Frauds been involved. See also *Western Union Telegraph Co. v. Collins*, 45 Kans. 88, 25 Pac. 187, 10 L. R. A. 515.

<sup>41</sup> *Mouton v. Louisville & N. Railway Co.*, 128 Ala. 537, 29 So. 602 ("K. D. and released"); *Berry v. Kowalsky*, 95 Cal. 134, 27 Pac. 286, 30 Pac. 202, 29 Am. St. Rep. 101 ("S. 87 Wheat"); *Wilson v. Coleman*,

81 Ga. 297, 6 S. E. 693 (C. L. R. P. oats); *Savannah, etc., Ry. Co. v. Collins*, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87; *Penn Tobacco Co. v. Leman*, 109 Ga. 428, 34 S. E. 679; *Conestoga Cigar Co. v. Finke*, 144 Pa. 159, 22 Atl. 868, 13 L. R. A. 438.

<sup>42</sup> See *supra*, § 576.

<sup>43</sup> It has been held that the meaning of an abbreviation where there is no such justifiable belief in its intelligibility cannot be shown. *Rosenfeld v. Peoria D. & E. Ry. Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500. "L. & O. Ex. \$20. R. R. val." was not allowed to be explained as meaning "Leaks and outs excepted \$20 R. R. valuation," without proof that the shipper knew the meaning of the abbreviation. It seems open to argument, however, that one who accepts a contract written in a language which



ognition of a purely mutual standard, and in defending this standard as that which should be applied, he says: "Chief Justice Tindal, in his apprehensions that under any other rule 'no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it,'<sup>45</sup> apparently assumes that under the traditional rule an ideal facility and certainty of interpretation can be had.") No such assumption, however, is necessary in order to lead one to prefer a narrower standard than that of the understanding of the parties themselves. By the narrower standard, a facility and certainty of interpretation is obtained, which though not ideal is so much greater than is obtainable under the view favored by Wigmore as to be more than an adequate compensation for the slight restriction put upon the power to grant and contract according to words defined merely by a mutual standard.

The principle is often expressed in the statement that direct evidence of intention is inadmissible. But the rule is not one of evidence but of substantive law. If actual intention were of legal importance, there is no reason why evidence of the intention should not be admitted. That the rule is one of substantive law and not of evidence is clear from the fact that an admission by both parties to a contract that they meant something different from what the contract states when interpreted according to the standard adopted by the law, is ineffectual to change the meaning of the writing.<sup>46</sup> An admission

he does not understand, whether that language is French or shorthand abbreviations, should inform himself as to the meaning of the language, and will be bound by the proper meaning thereof if there is a proper meaning, if he fails to make the necessary inquiry. In the Indiana decision the court seemed to assume that the abbreviations in question had no meaning in the absence of a mutual understanding between the parties, and further that the abbreviations if interpreted as claimed contradicted clear language in the bill of lading in question.

<sup>45</sup> Wigmore on Evidence, § 2462.

<sup>46</sup> Attorney General v. Shore, 11 Sim. 592, 631.

<sup>46</sup> Therefore a plea setting up a different intent from that which the writing expresses is demurrable. Langley v. Owens, 52 Fla. 302, 42 So. 457. See also cases cited *infra*, § 623, to the effect that the construction put by the acts of the parties themselves upon a contract will not change the construction of it if that is unambiguous. The acts of the parties are an admission of their understanding, and these decisions necessarily hold such an admission relates to an immaterial fact.

is a waiver of proof, and if a fact is of legal importance, it may always be established by waiver of proof. Since in this case the waiver is ineffectual, the inference is plain that the actual intention of the parties is of no legal consequence.

**§ 613. Meaning peculiar to the parties may be given to words if the words appropriately express that meaning.**

If words are used by the parties in a special sense even though this meaning is not fully defined, it may be shown provided the words actually used are appropriate under the local standard to express that sense. "John Smith" in a writing means a particular John Smith whom the parties intended. "Blackacre" means a particular Blackacre. The names used are accurate designations, not simply according to the individual standard but under either the local or normal standard.

The infirmity of language which uses the same symbol for different things, alone creates a difficulty. The user of the symbol may properly say—"this is no special convention of mine, the symbol I use is the normal and proper one to express my meaning, therefore it is the symbol of that meaning."

It is sometimes supposed that this principle is confined to proper names,<sup>47</sup> but this seems erroneous. An "advertising chart" may be both as accurate and as ambiguous a term as "John Smith." A "business card" may similarly mean one of several cards; and there seems no more reason for requiring one who uses the term "business card" when dealing with another who understands what business card he refers to, to define by further description the particular business card he has in mind than to make the same requirement of one who uses the words "John Smith," "Blackacre," or "Peerless."<sup>48</sup>

<sup>47</sup> The Theory of Legal Interpretation by O. W. Holmes, 12 Harv. L. Rev. 417, 418.

<sup>48</sup> In *Stoopes v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85, the defendant contracted for the insertion of his business card in 200 copies of the plaintiff's "advertising chart." On being sued for the agreed price, the defendant offered to prove that the advertising chart meant a chart of cloth

to be publicly posted near Worcester and that no such chart had been made and posted. The evidence was held admissible, Wells, J., saying: "The purpose of all such evidence is, to ascertain in what sense the parties themselves used the ambiguous terms in the writing which set forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the

It is often said that direct evidence of intention is admissible in case of equivocation, and most of the illustrations put in this section would be regarded as illustrations of this principle.

best definition to be applied in the interpretation of the contract itself. The effect must be limited to definition of the terms used, and identification of the subject-matter. If so limited, it makes no difference that the language of the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract. Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit. They are not the less effective for the purposes of explanation and definition because they purport to carry the force of obligation. The contract in suit may illustrate this principle in a point that is not in dispute. The defendant agrees to pay fifty dollars 'for inserting business card,' etc. In applying this stipulation, if the defendant had a business card distinctly known and recognized as such, there would be no difficulty in giving effect to the contract. But the identification of that card would involve the whole principle of admitting parol evidence for the interpretation and application of written contracts to the subject-matter. It could be done only by the aid of parol testimony. Suppose he had several business cards, differing in form and contents, but one was selected and agreed upon for the purpose at the time the contract was signed; or that one had been prepared specially for the purpose. Clearly parol testimony would be competent to identify the card so selected or prepared, and to prove that the parties assented to and adopted it as the card to which the contract would apply. Suppose, thirdly, that no such card had been selected or prepared, but its form, contents and style

had been described verbally and assented to, and the plaintiff had agreed to insert it as so described. Such evidence may be resorted to, not for the promise it contains, but for the aid it affords in fixing the meaning and applying the general language of the written contract. The same conditions render the evidence offered by the defendant competent for similar purposes. The term 'his advertising chart' requires to be practically applied. The representations of the plaintiff are in the nature of a description of the vehicle by which the publication of the business card was to be effected; and his account of the disposition he proposed to make of the charts was a description of the extent and the sense in which it was to be an 'advertising chart.'"

In *Ganson v. Madigan*, 15 Wis. 144, 153-4, the court said: "If evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time of their understanding of them, ought not to be excluded. Such declarations, if satisfactorily established, would seem to be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial." Accordingly, in that case, the action of the circuit court in admitting evidence by the defendant of the meaning put upon the words "a good team," in a contract containing a warranty that a certain machine should be capable with one man and a *good team* "of cutting and raking off twelve to twenty acres of grain a day," was sustained. The court

But it should be observed that it is not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used. The fact that the parties intended their words to bear a certain meaning, would be immaterial were it not for the fact that the words either normally or locally might properly bear such meaning,<sup>49</sup> and this is the basis of the rule in regard to equivocation.

**§ 614. Technical meaning is sometimes given to language in violation of apparent intention.**

The early lawyers dreamed of "a lawyer's paradise where all words have a fixed precisely ascertained meaning, and where if the writer has been careful, a lawyer having a document referred to him may sit in his chair, inspect the text and answer questions without raising his eyes."<sup>50</sup> Though little is left of this dream at the present day, there are some technical words and phrases that have acquired so definite a meaning in the law that it would be difficult to induce a court to give a contrary construction to the words especially in a formal instrument, though from the whole document and from the surrounding circumstances it was highly improbable that the parties attached to the words their technical signification. The

continued: "The word '*team*,' as used in the contract, is of doubtful signification. It may mean horses, mules, or oxen, and two, four, six or even more of either kind of beasts. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible, and has no settled meaning, but that it at the same time admits of several interpretations, according to the subject-matter in contemplation at the time. It is an uncertainty arising from the indefinite and equivocal meaning of the word, when an interpretation is attempted without the aid of surrounding circumstances." It was earnestly insisted it meant any team that was necessary to pull the machine, whereas

the proof admitted showed the reference was to a team of two horses only. This case was cited and quoted from with approval in *Laclede Construction Co. v. Moss Tie Co.*, 185 Mo. 25, 68, 84 S. W. 76. See also *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859, where a particular meaning was given to the word "order."

<sup>49</sup> Thus the mere fact that a note sued on was ambiguous as to the capacity in which defendants signed did not render admissible their testimony as to their undisclosed intentions in signing. *Planters' Chemical & Oil Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

<sup>50</sup> Quoted from Thayer's *Preliminary Treatise on Evidence*, in 4 *Wigmore, Evidence*, § 2462.

rule in *Shelley's* case when applied must often have been recognized as violating the natural sense of a deed.<sup>51</sup> So in insurance policies, conditions by repeated construction of the court acquire a definite meaning which it would be difficult if not impossible to overthrow in a particular case, however clearly extrinsic evidence might show that the parties attached another meaning to their words and one which, as an original question, they might reasonably bear. Especially in Marine Insurance policies this is true. Early decisions and customs established the meaning of the forms then in use, and "Since those decisions, and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract."<sup>52</sup> It is obvious that this presumption that parties know the technical legal meaning of the language which they use, and thereupon adopt that meaning may often be very artificial;<sup>53</sup> and it is a reasonable expectation and in accordance with the tendencies of the law, that the disposition of courts will be to give language less and less frequently an artificial meaning at variance with the apparent intention of the parties.<sup>54</sup>

"See *Broom, Legal Maxims* (8th Eng. ed.), 426 *et seq.*, for this and other cases of artificial meanings given to special words in wills. It must be supposed that the same construction would be given to the same words in settlements *inter vivos* or in contracts to make such settlements or wills.

"*Lohre v. Aitchison*, 3 Q. B. D. 558, 562.

"See *infra*, §§ 618, 650.

"In *Utica City Nat. Bank v. Gunn*, 22 N. Y. 204, 118 N. E. 607, 608, the court said: "The proper legal meaning, however, is not always the meaning of the parties. Surrounding circumstances may stamp upon a contract a popular or looser meaning. . . . To take the primary or strict meaning

is to make the whole transaction futile. To take the secondary or looser meaning is to give it efficacy and purpose. In such a situation, the genesis and aim of the transaction may rightly guide our choice." See also *Mill Wood & Coal Co. v. Flint River Cypress Co.*, 16 Ga. App. 636, 85 S. E. 943; *Hill v. Philo*, 155 N. Y. S. 922. The common judicial attitude is shown by the language of the court in *Propper v. Colson*, 86 N. J. Eq. 399, 99 Atl. 385, 386. "The present case does not involve the meaning of words in a conversation between laymen, but of words used in a formal written instrument, the purpose of which is to express the mutual rights and obligations of the parties to it. In construing such in-

### § 615. Adoption of existing law into a contract

It is commonly said that existing laws form part of a contract and are incorporated in it.<sup>55</sup> If this is literally true, the

struments the general rule, subject to few exceptions, is that the words contained therein shall be given their ordinary legal significance." See also *infra*, § 618. In *Wallis v. Pratt*, [1911] A. C. 394 (reversing s. c., [1910] 2 K. B. 1003), one who innocently sold seed which was in fact "giant sainfoin" as "common English sainfoin" was held liable though the contract between buyer and seller provided "the sellers give no warranty expressed or implied as to growth, description or any other matters," on the ground that the seller had made a breach of "condition" though giving no warranty. It may be thought that the court was applying its own technical meaning to "warranty" rather than seeking the natural meaning of their words to the parties. See also *Cotter v. Luckie*, [1918] N. Zeal. L. R. 811.

<sup>55</sup> *Van Hoffman v. Quincy*, 4 Wall. 535, 550, 18 L. Ed. 403; *Rees v. Watertown*, 19 Wall. 107, 121, 22 L. Ed. 72; *Edwards v. Kearsey*, 96 U. S. 595, 601, 24 L. Ed. 793; *Seibert v. Lewis*, 122 U. S. 284, 295, 7 S. Ct. 1190, 30 L. Ed. 1161; *Northern Pac. R. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905; *Southern Ry. Co. v. Boulknight*, 70 Fed. 442, 446, 17 C. C. A. 181, 30 L. R. A. 823; *Armour Packing Co. v. United States*, 153 Fed. 1, 19, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400 n.; *Seaboard Air Line R. Co. v. Railroad Commission of Alabama*, 155 Fed. 792, 800; *Martin v. Kennecott Copper Corp.*, 252 Fed. 207; *State v. Tampa Water Works Co.*, 56 Fla. 858, 47 So. 358, 19 L. R. A. (N. S.) 183; *McCaskill v. Union Naval Stores*, 59 Fla. 571, 52 So. 961; *Lynch v. Baltimore & Co. R. Co.*, 240 Ill. 567, 571, 88 N. E. 1034; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Long v. Straus*, 107 Ind. 94, 6 N.

E. 123, 7 N. E. 763, 57 Am. Rep. 87; *Swabey v. Boyers*, 274 Mo. 332, 203 S. W. 204; *Norris v. Tower*, 102 Neb. 434, 167 N. W. 728; *Hutchinson v. Ward*, 114 N. Y. App. Div. 156, 99 N. Y. S. 708, 709; *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914 C. 565; *Hogan v. Utter*, 175 N. C. 332, 95 S. E. 565; *Weight v. Bailey*, 45 Utah, 207, 147 Pac. 899; *Hawes v. Wm. R. Trigg Co.*, 110 Va. 165, 65 S. E. 538. See also *Haugen v. Sundseth*, 106 Minn. 129, 134, 118 N. W. 666; *Snider v. Yarbrough*, 43 Mont. 203, 115 Pac. 411.

In *Seaboard Air Line Ry. Co. v. Railroad Commission*, 155 Fed. 792, 800, the court said of foreign corporations: "All their contracts, save in the exceptional cases stated, are made subject to the right of the state to expel them at pleasure. As 'the laws which exist at the time and place of the making of the contract, and where it is to be performed, enter into and perform part of it,' their contracts are made subject to the exercise of the right, and their expulsion after coming into the state and making contracts does not, therefore, deprive them of property without due process, or deny them the equal protection of the laws, or impair the obligation of their contracts, at least so far as they are concerned."

In *Hutchinson v. Ward*, 114 N. Y. App. Div. 156, 99 N. Y. S. 708, 709, the court said: "They were New Jersey contracts, and it must be assumed that it was intended by the parties that they should be controlled by the existing laws of that state; not only as to their binding force but as to their manner of enforcement. Existing laws giving rights to parties to a contract or limiting their rights, become a

whole law governing the performance of contracts is reduced to part of the construction of the contract; for on the supposition in question rules of law determining the rights of the parties would not be properly regarded as operating upon them irrespective of their expressed intention; but rather as based upon such intention. To be sure no great difference of result would generally be produced whether rules of law are sought first and it is then said that the parties have contracted to be guided by these rules, or whether some natural standards of interpreting the contract are first applied and then appropriate rules of law imposed upon the contract as thus interpreted. The former method of statement, however, is obviously artificial; and it seems unfortunate as a matter of terminology to put in the form of a fiction matters which may be stated accurately. To assume first that everybody knows the law, and, second, that everybody thereupon makes his contract with reference to it and adopts its provisions as terms of the agreement, is indeed to pile a fiction upon a fiction, and certainly without any necessity, for where different conclusions are reached by means of the fiction than would be reached without it, they are not preferable to the opposite ones. The fiction is analogous in its essence to that of the "social contract" and, like that, has a long history. It seems to have originated with Dumoulin, a French jurist of the seventeenth century as a doctrine of the conflict of laws in its application to the contract of marriage,<sup>56</sup> and it is obvious that a reason is furnished for

part of the contract as though specially set forth therein." Citing *Union Natl. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614; *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397; *Bronson v. Kinsie*, 1 How. 311, 11 L. Ed. 143.

<sup>56</sup> In *Saul v. His Creditors*, 5 Martin (N. S.), 569, 599, it is said: "It is evident, the opinions of the greater number of those who think that on the dissolution of the marriage, the law of the place where it was contracted should regulate the rights of the spouses to the property possessed by

them, is founded on an idea which first originated with Dumoulin, that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.

<sup>57</sup> It is particularly worthy of remark, that Dumoulin, the founder of this system, was of opinion, that the statute regulating the community was real, and that it was to escape from the consequences of this opinion he supposed a tacit contract, which, like an express one, followed the parties

the application of the law of the place of the contract where that differs from the law of the forum, if it can be said that the former law is literally part of the contract. This method of reaching a conclusion in favor of the place of the contract is not that usually adopted, but has been in bankruptcy cases. It has been held that a party to a contract made and to be performed in England is not discharged from liability under such contract by discharge in bankruptcy under the law of a foreign country in which he is domiciled,<sup>57</sup> and Lord Esher gives as a reason for this conclusion that "parties are taken to have agreed that the law of such country [i. e. that where the contract was made] shall be the law which is applicable to the contract."<sup>58</sup> The court assumed that the law of France where the defendant was domiciled would hold the debt discharged; yet the law of France, as well as that of England, purports to carry out what the parties agreed. The same kind of question has arisen in the United States, with the further complicating circumstance that the Constitution of the United States forbids the individual States from passing laws impairing the obligation of contracts.

If the reasoning quoted above from Lord Esher is sound it should follow that in the converse case where the contract is made and to be performed in a jurisdiction where the defendant is discharged, the discharge should be a defence though the creditor is a citizen of another State. Such, however, is not the American law.<sup>59</sup>

wherever they went. Such, at least, was the opinion which Boullenois entertained of Dumoulin's sentiments; and it appears supported by quotations which he makes from his works. Boullenois, *Traité de personnalité et de réalité des lois*. Obs. 29, pp. 740, 757, 758.

"Some of those who have adopted the conclusions of Dumoulin in regard to the marriage contract, treat the idea of a tacit agreement as one which exists in the imagination alone. But the greater number seem to have embraced it; and we are satisfied it is the main ground on which the doctrine

now rests in France. So far, therefore, as great names can give weight to any opinion, it comes to us in a most imposing shape, but to our judgment it is quite unsatisfactory."

<sup>57</sup> *Gibbs v. La Société Industrielle*, 25 Q. B. D. 399.

<sup>58</sup> 25 Q. B. D. 399, 405.

<sup>59</sup> In *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589, 590, 24 N. E. 917, it was held that a Massachusetts discharge in insolvency was no bar to an action on a promissory note made by a Massachusetts debtor in Massachusetts and payable in Massachusetts to a citizen of another State who did not



Doubtless, law frequently is adopted by the parties as a portion of their agreement. Whether it is or not in any particular case, should be determined by the same standard of interpretation as is applied to their expressions in other respects. A contract providing for a forfeiture for failing to pay taxes for three months after the taxes "become due and payable" incorporates a statute stating when they are due and payable.<sup>60</sup> A contract evidenced by a written statement that \$1,600 has been "received on deposit" is fairly interpreted as a con-

prove his claim in the insolvency proceedings.

Holmes, J., said at page 590: "There is no dispute that the letter of the discharge and of our statute covers the plaintiff's claim: Pub. Sts. c. 157, §§ 80, 81; and the argument in the favor of giving them effect according to their letter is, that unless the statute is void we are bound to follow it; that the law of the place where the contract is made and is to be performed, which is in force at the time of making and for performing it, enters into the contract so far as to settle everywhere what acts done at that place shall discharge it (*May v. Breed*, 7 Cush. 15); and that a discharge in accordance with that law cannot be said to impair the obligation of a contract which contemplated it, or to deprive the contractee of property without due process of law when that property was created subject to destruction in that way.

"We express no opinion upon the weight of this argument. Although it formerly prevailed with this court (*Scrbnier v. Fisher*, 2 Gray, 43; *Burrall v. Rice*, 5 Gray, 539), it may be that there is a distinction as to a discharge by legal proceedings. It may be that statutes providing for a discharge by an insolvency court do not enter into the contract in such a sense as to bind the contractee to adopt and submit himself to the jurisdiction as an implied

condition of the promisor's undertaking. It does not follow, because the discharge, if effective, does not impair the obligation of the contract, that absolute liability to it is a part of the substantive obligation. The substantive promise and the obligation of the contract are different things; and apart from this consideration it may be that by sound principle the plaintiff is to be taken to have subjected itself Massachusetts proceedings only to the extent that, that if the Massachusetts courts could acquire jurisdiction over it in the ordinary modes by which jurisdiction of the person is acquired, it would be bound everywhere by a discharge granted here."

In *Pullen v. Hillman*, 84 Me. 129, 24 Atl. 795, 30 Am. St. Rep. 340, it was held that a Maine discharge did not affect a debt contracted within the State between citizens of the State when at the time of the insolvency proceedings the creditor was no longer a citizen of the State.

*Cf.*, however, the statement of Fuller, C. J., in *Cole v. Cunningham*, 133 U. S. 107, 115, 33 L. Ed. 538, 10 Sup. Ct. 269: "State Insolvent Laws are . . . binding upon such persons as were citizens of the State at the time the debt was contracted." Fuller, however, was probably not considering the case of citizens who subsequently left the State, but of those who did not become citizens until after the debt arose.

tract to repay that sum on demand.<sup>61</sup> A contract to "equip completely" a restaurant kitchen, is perhaps properly construed as requiring equipment in conformity with laws prescribing sanitary contrivances for such kitchens.<sup>62</sup> "When a statute is in force giving special force and effect to a particular contract, parties who enter into such a contract are held to assent to the force and effect attributed to it by such statute."<sup>63</sup> But "it is a dangerous thing to read too many things into a contract that are not placed in the contract by the parties to it"<sup>64</sup> and this is not infrequently recognized. The obligation imposed by law on one who breaks a contract to convey land, to restore any portion of the price which he has received has been held not to form part of the contract and a different statute of limitations applied from that applicable to breach of contract.<sup>64</sup>

#### § 616. Respective functions of the court and the jury.

It is obvious that the meaning of language is a question of fact. The code or standard by which it is sought to test the meaning must be discovered frequently by evidence of the facts and circumstances concerning the making of the contract.

<sup>60</sup> *McCaskill v. Union Naval Stores Co.*, 59 Fla. 571, 52 So. 961.

<sup>61</sup> *Long v. Straus*, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87.

<sup>62</sup> *Manvell v. Weaver*, 53 Wash. 406, 102 Pac. 36. See also *Long v. Owen*, 21 Idaho, 243, 121 Pac. 99, Ann. Cas. 1913 D. 465. Cf. *Cronin v. Pace*, 82 Conn. 252, 73 Atl. 137.

<sup>63</sup> *Lorando v. Gethro*, 228 Mass. 181, 117 N. E. 185, 188 (a contract of casualty insurance).

<sup>64</sup> *Leindecker v. Aetna Indemnity Co.*, 52 Wash. 609, 611, 101 Pac. 219. In this case it was contended that sureties on a building contract were discharged by premature payments on account of the price. No time for payment was stated in the contract and it was urged that payment was therefore not due until the work was completed, and that any payment

prior thereto discharged the sureties. The court held otherwise, however, citing, *Reed v. McGregor*, 62 Minn. 94, 64 N. W. 88, and *Miller v. Eccles*, 155 Pa. St. 36, 25 Atl. 776. In *Cronin v. Pace*, 82 Conn. 252, 254, 73 Atl. 137, the court said of a building contract and of certain statutory building requirements: "This statute imposes a duty for the owner. A contractor's duty is defined by his contract. The contract in the present case did not provide that the plaintiff should construct the building in conformity with statutory requirements."

<sup>65</sup> *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899; *Duncan v. Gibson*, 17 Utah, 209, 53 Pac. 1044. As to whether a warranty implied in law is part of the contract between buyer and seller, see 30 Harv. L. Rev. 296.

Even though the question concerns merely the normal meaning of a word as found in dictionaries, it is still a question of fact, if the word fact is used in a literal sense. But as Professor Thayer has said:<sup>65</sup>

"The judges have always answered a multitude of questions of ultimate fact, of fact which forms part of the issue. It is true that this is often disguised by calling them questions of law." The reason for this seems to have been a distrust of the jury's ability to answer questions of fact that call for nice discrimination and an educated mind. The construction of written documents has largely been withdrawn from the jury in this way. The general rule is that construction of a writing is for the court.<sup>66</sup> Where, however, the meaning of a writing is uncertain or ambiguous, and parol evidence is introduced in aid of its interpretation, the question of its meaning should be left to the jury.<sup>67</sup> It is obvious that if the contention

<sup>65</sup> Preliminary Treatise on Evidence, 202.

<sup>66</sup> *Lyle v. Richards*, L. R. 1 H. L. 222, 241; *Hamilton v. Insurance Company*, 136 U. S. 242, 255, 10 S. Ct. 945, 34 L. Ed. 419; *Storm v. Montgomery*, 79 Ark. 172, 85 S. W. 149; *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 800; *Zeigler v. Illinois T. & S. Bank*, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112; *Lexington & B. S. Ry. Co. v. Moore*, 140 Ky. 514, 131 S. W. 257; *Waldstein v. Dooskin*, 220 Mass. 232, 107 N. E. 927; *Klemik v. Henriksen Jewelry Co.*, 128 Minn. 490, 151 N. W. 203; *Peru Plow & I. Co. v. Johnson*, 86 Neb. 428, 125 N. W. 595; *Grueber Engineering Co. v. Waldron*, 71 N. J. Law, 597, 60 Atl. 386; *Smith v. United Tract, etc., Co.*, 168 N. Y. 597, 61 N. E. 1134; *Marshall v. Sackett & Wilhelms Co.*, 166 N. Y. App. Div. 141, 151 N. Y. S. 1045; *Brown v. Davidson*, 42 Okl. 598, 142 Pac. 387; *Veitch v. Jenkins*, 107 Va. 68, 57 S. E. 574; *Southern Flour & Grain Co. v. McGeehan*, 144 Wis. 130, 128 N. W. 879.

<sup>67</sup> *Simpson v. Margitson*, 11 Q. B. 23;

*Hutchison v. Bowker*, 5 M. & W. 535; *Goddard v. Foster*, 17 Wallace, 123, 21 L. Ed. 589; *Luse v. Martin*, 215 Fed. 28, 131 C. C. A. 336; *Wilkes v. Stacy*, 113 Ark. 556, 169 S. W. 796; *Holland v. Long*, 57 Ga. 36; *McAvoy v. Long*, 13 Ill. 147; *Smith v. Faulkner*, 12 Gray, 251; *Paine v. Ringold*, 43 Mich. 341, 5 N. W. 421; *Blocher v. Mayer Bros. Co.*, 127 Minn. 241, 149 N. W. 285; *Newberry v. Durand*, 87 Mo. App. 290; *Fruin v. Crystal R. Co.*, 89 Mo. 397, 14 S. W. 557; *Rosenthal v. Ogden*, 50 Neb. 218, 69 N. W. 779; *Philadelphia v. Stewart*, 201 Pa. 526, 51 Atl. 348; *Blaisdell v. Davis*, 72 Vt. 295, 48 Atl. 14; *Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404; *Kieburts v. Seattle*, 84 Wash. 196, 146 Pac. 400. In *Morrell v. Frith*, 3 M. & W. 402, Lord Abinger, C. B., said: "One case in which the effect of a written document must be left to a jury is, where it requires parol evidence to explain it, as in the ordinary case of mercantile contracts, in which peculiar terms and abbreviations are employed." The use of the word "sell" in the memoranda of the initiatory part of a contract, the result

heretofore made is sound that the circumstances surrounding the formation of a contract are always admissible in evidence, a division cannot be drawn between cases where parol evidence is admissible and cases where it is not. The distinction must rather be taken between cases where the surrounding circumstances do not tend to show that the words of the contract had a special local meaning, and cases where such a special local meaning is possible in view of the evidence introduced. The jury's function in the construction of documents then will arise wherever, in view of the surrounding circumstances and usages offered in evidence, the meaning of the writing is not so clear as to preclude doubt by a reasonable man of its meaning. If the meaning after taking the parol evidence, if any, into account, is so clear that no reasonable man could reach more than one conclusion as to the meaning of the writing under the circumstances, the court will properly decide the question of fact for itself as it may any question of fact which is equally clear. Also if such uncertainty or ambiguity as there may be in a writing does not arise from, and cannot be solved by, any special local meaning of the words used, or any usage or surrounding circumstances, the court will deal with the matter itself, as the difficulty of construction must be solved from the writing alone. Even though a contract is oral, if the exact words used by the parties are not in dispute, the court will deal with the matter in the same way as if the contract was written.<sup>68</sup> *A fortiori* if a written contract has been destroyed or lost, the court will construe the meaning of the contract after proof has been given of the destruction or loss of the contents of the writing.<sup>69</sup>

#### § 617. Methods of determining the local meaning of a writing.

The inquiry of a court which has before it a writing demanding interpretation should be then.—What was the meaning of the writing at the time and place it was made between per-

of several conferences and conversations, has been held not conclusive, as matter of law, as to the nature of the contract."

<sup>68</sup> *Morrell v. Frith*, 3 M. & W. 402; *Globe Works v. Wright*, 106 Mass.

207; *Rogers v. Colt*, 21 N. J. L. 704; *Elliott v. Wanamaker*, 155 Pa. 67, 25 Atl. 826.

<sup>69</sup> *Berwick v. Horsfall*, 4 C. B. (N. S.) 450; *Wellman v. Jones*, 124 Ala. 580, 27 So. 416.

sons of the kind or class who were parties to it? The rules laid down to aid the court in this inquiry are all subordinate to this main object. The general intent so far as it is manifested is more important than particular words.<sup>70</sup> "In general, in questions depending on the construction of contracts, cases are of little value; for all agreed that the construction is to be according to the intention appearing by the words: and the words rarely are the same."<sup>71</sup> Rules of interpretation, so far as they have value, are based on the natural and logical processes of determining the meaning of language according to the standard adopted by the law.<sup>72</sup> Such rules may be divided into two classes, primary and secondary. The primary rules are those which are always applicable, whether the writing seems clear or ambiguous. The secondary rules are those which are applicable only where after the primary rules or principles have been applied, the local meaning of the writing is still uncertain or ambiguous. The same rules are applicable to informal parol agreements, but, as has been seen,<sup>73</sup> the standard there sought to be applied is slightly different. Though there are different rules of substantive law as to the effect of sealed and unsealed written contracts, and as to their variation by parol after they have been entered into, the rules of interpreting them at the present day are the same.<sup>74</sup> So courts of law and equity have no different rules for determining the meaning of a contract.<sup>75</sup>

<sup>70</sup> *Erickson v. United States*, 107 Fed. 204; *Field v. Leiter*, 118 Ill. 17, 26, 6 N. E. 877; *Gibbs v. People's Nat. Bank*, 198 Ill. 307, 312, 64 N. E. 1060; *Kennedy v. Kennedy*, 150 Ind. 636, 50 N. E. 756; *United Boxboard, etc., Co. v. McEwan Bros. Co.* (N. J. Eq.), 76 Atl. 550, 553; *Bristol v. Bostwick*, 139 Tenn. 304, 202 S. W. 61; *Collins v. Lavelle*, 44 Vt. 230.

<sup>71</sup> *Lord Blackburn in Calcutta, etc., Steam Navigation Co. v. DeMattos*, 32 L. J. (N. S.) 332, 330.

<sup>72</sup> *Hoffman v. Eastern Wisconsin, etc., Light Co.*, 134 Wis. 603, 115 N. W. 333.

<sup>73</sup> See *supra*, § 605.

<sup>74</sup> *Dwy v. Connecticut Co.*, 89 Conn.

74, 92 Atl. 883, L. R. A. 1915 E. 800; *Kane v. Hood*, 13 Pick. 281. In *Robertson v. French*, 4 East, 130, 134, Lord Ellenborough said: "The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance." Cf. *Doe v. Benson*, 4 B. & Ald. 588, where the court held that in a parol lease "Lady Day" might be shown by usage to mean old "Lady Day" not the day then fixed by statute, but approved of an earlier case which held the contrary, because the lease there was by deed and "evidence is not admissible to explain a deed."

<sup>75</sup> *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497.

### § 618. Primary rules of interpretation.

1. The common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to it. Ordinary language may bear locally an extraordinary meaning in some circumstances, but in the vast majority of cases it does not.<sup>76</sup> 2. Technical terms or words of art will be given their technical meaning,<sup>77</sup> unless the context or local usage shows a contrary intention,<sup>78</sup> and under this principle mercantile terms in mercantile contracts will be given the meaning which merchants ordinarily give them.<sup>79</sup> This rule,

<sup>76</sup> "The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." Lord Wensleydale, in *Grey v. Pearson*, 6 H. L. C. 61, quoted by *Ld. Blackburn, Caledonian Ry. v. North British Ry.*, 6 Ap. Cas. 114, 131, and by *Swayze, J.*, in *Thompson v. Trenton Water Power Co.*, 77 N. J. L. 672, 73 Atl. 410; *Fowell v. Tranter*, 3 H. & C. 458, 461, per *Bramwell, B.*; *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71. See also *Cowles Elec. Smelting Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616, 47 U. S. App. 531; *Fitzgerald v. First Nat. Bank*, 114 Fed. 474, 52 C. C. A. 276; *Wege v. Safe-Cabinet Co.*, 249 Fed. 696, 161 C. C. A. 606; *Wolf v. Schwill*, 282 Ill. 189, 118 N. E. 414; *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556; *Smith v. Ramsey*, 116 Va. 530, 82 S. E. 189.

<sup>77</sup> *Taylor v. St. Helen's Corp.*, 6 Ch. D. 264; *Lloyd v. Kehl*, 132 Cal. 107, 64 Pac. 125; *Weinreich Estate Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102;

*Louisville & N. R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448, 51 N. E. 824; *Maryland Coal Co. v. Cumberland, etc., R. Co.*, 41 Md. 343, 352; *Hattiesburg Plumbing Co. v. Carmichael*, 80 Miss. 66, 31 So. 536; *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453; *McDonough v. Jolly*, 165 Pa. 542, 30 Atl. 1048, *Frost v. Martin* (Tex. Civ. App.), 203 S. W. 72; *Roanoke v. Blair*, 107 Va. 639, 60 S. E. 75.

<sup>78</sup> See cases cited *supra*, §§ 614, 560.

<sup>79</sup> *Robertson v. French*, 4 East, 130; *Mallan v. May*, 13 M. & W. 511, 517; *Holt v. Collyer*, 16 Ch. D. 718; *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198, 7 L. R. A. 381 ("Reserve" in a ball player's contract); *Beach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 Atl. 768; *Cleveland, etc., R. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, 66 Am. St. Rep. 296; *Wood v. Allen*, 111 Ia. 97, 82 N. W. 451; *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856; *New England Granite Works v. Bailey*, 69 Vt. 257, 37 Atl. 1043. In *Robertson v. French*, 4 East, 130, 135, Lord Ellenborough said: "It is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the sub-

however, will yield if the application of other primary rules show a contrary meaning. Thus, if the circumstances or context show that a technical word was not used in its proper technical sense, another meaning may be given it.<sup>80</sup> So an ordinary word may from the context (or surrounding circumstances) be given an unusual meaning.<sup>81</sup> 3. The writing will be read as a whole, and every part will be construed with reference to the whole; and if possible it will be so construed as to give effect to its general purpose.<sup>82</sup> The context and subject-matter of a contract may show that in a particular sentence an ordinary word has an unusual meaning;<sup>83</sup> or that

ject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." Quoted by Abbott, C. J. (Lord Tenterden), in *Lang v. Anderson*, 3 B. & C. 495, 500, and in *Hunter v. Leathley*, 10 B. & C. 858, 871.

<sup>80</sup> *Gruenewald v. Neu*, 215 Ill. 132, 74 N. E. 101; *Fisher Electric Co. v. Bath Iron Works*, 116 Mich. 293, 74 N. W. 493; *Mansfield, etc., R. Co. v. Veeder*, 17 Ohio, 385; *Lehigh &c. Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919.

<sup>81</sup> *Simmons v. Groom*, 167 N. C. 271, 83 S. E. 471.

<sup>82</sup> 2 Coke Inst. 173 ("et antecedentibus et consequentibus fit optima interpretatio"); *Coles v. Hulme*, 8 B. & C. 568; *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415; *O'Brien v. Miller*, 168 U. S. 287, 42 L. Ed. 469, 18 Sup. Ct. 140; *Canadian Northern R. Co. v. Northern Miss. R. Co.*, 209 Fed. 758, 126 C. C. A. 482; *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424; *Fort Smith Light, etc., Co. v. Kelley*, 94 Ark. 461, 127 S. W. 975; *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622; *McCaskill v.*

*Union Naval Stores Co.*, 59 Fla. 571, 574, 52 So. 961; *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; *Gibbs v. People's Nat. Bank*, 198 Ill. 307, 312, 64 N. E. 1060; *Warrum v. White*, 171 Ind. 574, 86 N. E. 959; *Landry State Bank v. Meyers*, 52 La. Ann. 1769, 28 So. 136; *Smith v. Davenport*, 34 Me. 520; *McGaw v. Hanway*, 120 Md. 197, 87 Atl. 666, Ann. Cas. 1915 A, 601; *Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461; *Cutler v. Spens*, 191 Mich. 603, 158 N. W. 224; *Webb v. Missouri State L. I. Co.*, 134 Mo. App. 576, 580, 115 S. W. 481; *Jackson v. Phillips*, 57 Neb. 189, 77 N. W. 683; *Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; *Sattler v. Hallock*, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686; *First Nat. Bank v. Jones*, 219 N. Y. 312, 114 N. E. 349; *Spencer v. Jones*, 168 N. C. 291, 84 S. E. 261; *German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; *Friedheim v. Walter H. Hildie Co.*, 104 S. Car. 378, 89 S. E. 358; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; *Toellner v. McGinnis*, 55 Wash. 430, 104 Pac. 641; *Southern Flour, etc., Co. v. McGeehan*, 144 Wis. 130, 128 N. W. 879.

<sup>83</sup> *Brush, etc., Co. v. Montgomery*, 114 Ala. 433, 21 So. 960; *Kohl v.*

a word whose meaning, taken by itself, is clear, has been inaccurately used.<sup>84</sup> "*Noscitur a Sociis*" is an old maxim which summarizes the rule both of language and of law that the meaning of words may be indicated or controlled by those with which they are associated.<sup>85</sup> 4. The circumstances under which a writing was made may always be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made;<sup>86</sup> and all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract. The importance of this rule and the fact that it is sometimes supposed to be applicable only in the case of an ambiguous writing makes necessary some discussion in a subsequent section as well as some definition of what is meant by surrounding circumstances.

**§ 619. Secondary rules. The main purpose of the instrument will be given effect.**

It not infrequently happens that even after the application of the primary principles which have been considered and obtaining all possible light from surrounding circumstances, usages, the nature of the business, and the object of the bargain, it is still uncertain what the contract legally means. Under these circumstances certain rules are recognized as helpful in arriving at a conclusion.

Frederick, 115 Ia. 517, 88 N. W. 1055; Atkinson v. Sinnott, 67 Miss. 502, 7 So. 289; Simmons v. Groom, 167 N. Car. 271, 83 S. E. 471; Pendleton v. Saunders, 19 Or. 9, 24 Pac. 506; Lehigh, etc., Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919; Kentzler v. Accident Assoc., 88 Wis. 589, 60 N. W. 1002.

<sup>84</sup> "There is a distinction between an inaccuracy and an ambiguity of language. Language may be inaccurate without being ambiguous, and it may be ambiguous though perfectly accurate. . . . The language may be inaccurate but if the court can determine the meaning of this inaccurate language without any other guide than a knowledge of the simple facts upon which, from the nature of lan-

guage in general, its meaning depends, the language though inaccurate, could not be ambiguous." Donovan v. Boeck, 217 Mo. 70, 116 S. W. 543, quoting from Riggs v. Myers, 20 Mo. 239."

<sup>85</sup> Elliott v. Bishop, 10 Exch. 496, 519, 11 Exch. 113; State v. Western Union Tel. Co., 196 Ala. 570, 72 So. 99; Morse v. Fire &c. Ins. Co., 30 Wis. 534, 537, 11 Am. Rep. 587. So in the construction of statutes. State v. Liffing, 61 Ohio St. 39, 50, 55 N. E. 168, 46 L. R. A. 334, 76 Ann. St. Rep. 358; Blake v. Blake, 75 Wis. 339, 43 N. W. 144.

<sup>86</sup> Batchelder v. Batchelder, 220 Mass. 42, 107 N. E. 455. See *infra*, § 629.



1. The court will if possible give effect to all parts of the instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable;<sup>87</sup> and if this is impossible a construction which gives effect to the main apparent purpose of the contract will be favored.<sup>88</sup> Indeed, in giving effect to the general meaning of a writing particular words are sometimes wholly disregarded,<sup>89</sup> or supplied.<sup>90</sup> Thus "or" may be given the meaning of "and," or vice versa, if the remainder of the agreement shows that a reasonable person in the position of the parties would so understand it.<sup>91</sup>

<sup>87</sup> *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 60 L. Ed. 1058, 36 S. Ct. 662; *Greil v. Stollenwerck* (Ala.), 78 So. 79; *English v. Shelby*, 116 Ark. 212, 172 S. W. 817; *New Brantner Extension Ditch Co. v. Kramer*, 57 Colo. 218, 141 Pac. 498; *Grimes v. Bardollar*, 58 Colo. 421, 148 Pac. 256; *Sanitary District v. McMahon & Montgomery Co.*, 110 Ill. App. 510; *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488, 26 N. W. 762; *Caledonia Coal Co. v. Consolidated Coal Co.*, 181 Mich. 431, 148 N. W. 187; *Home Mut. F. Ins. Co. v. Pittman*, 111 Miss. 420, 71 So. 739; *McGavock v. Omaha Nat. Bank*, 64 Neb. 440, 90 N. W. 230; *Fleischman v. Furgueson*, 223 N. Y. 235, 119 N. E. 400; *Reynolds v. Stockman*, 109 S. Car. 112, 95 S. E. 341; *McKay v. Barnett*, 21 Utah, 239, 60 Pac. 1100, 50 L. R. A. 371; *Burt v. Stringfellow*, 45 Utah, 207, 143 Pac. 234; *Smith v. Ramsey*, 116 Va. 530, 82 S. E. 189.

<sup>88</sup> *Dimech v. Corlett*, 12 Moo. P. C. 199, 228. In *Marx v. American Malting Co.*, 169 Fed. 582, 584, 95 C. C. A. 80, the court said: "It is a fundamental rule in the interpretation of agreements that we should ascertain the prime object and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the main purpose." . . .

"In many cases a more stringent rule has been laid down, which is that, if the minor provision of the contract is irreconcilable with the obvious general intent, it would for that reason be sacrificed altogether for the promotion of the general purpose of the agreement."

<sup>89</sup> *Edwards v. Jefferson Standard L. Ins. Co.*, 173 N. Car. 614, 92 S. E. 695; *Withington v. Gypsy Oil Co. (Okl.)*, 172 Pac. 634. Thus in a bond for which the condition provided that a debt should not be paid which was recited in the instrument as an obligation, the word "not" was rejected. *Wilson v. Wilson*, 5 H. L. C. 40.

<sup>90</sup> To carry out the main intention manifested in a writing, "words may be transposed, rejected or supplied, if necessary to make its meaning more clear." *Potthoff v. Safety Armorite Conduit Co.*, 143 N. Y. App. Div. 161, 163, 127 N. Y. S. 994. See also *Parkhurst v. Smith, Willes*, 327, 332; *Pacific Surety Co. v. Toye*, 224 Mass. 98, 112 N. E. 653.

<sup>91</sup> *Dumont v. United States*, 98 U. S. 142, 25 L. Ed. 65; *Manson v. Dayton*, 153 Fed. 258, 82 C. C. A. 588; *Chicago, B. & Q. R. Co. v. Bartlett*, 120 Ill. 603, 11 N. E. 867; *Decker v. Carr*, 11 N. Y. App. Div. 432, 42 N. Y. S. 243, *affd.* 154 N. Y. 764, 49 N. E. 1096; *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. 223; *Bettman v. Harness*, 42

Clerical or grammatical errors may be corrected;<sup>92</sup> singular or plural language may be treated as if it were the other;<sup>93</sup> and other illustrations might be given of the same principle.<sup>94</sup> Punctuation will be disregarded if the words of a contract indicate that it has been erroneously inserted or omitted;<sup>95</sup> but it may aid in determining the meaning of doubtful language. The freedom of construction permissible is, however, necessarily limited by the principle that unexpressed intention is of no legal effect. The reason for interpolating, omitting or disregarding specific words is that in the remainder of the writing an intention is expressed which makes it evident that particular words were erroneously used.

Therefore where there is a repugnancy between general clauses and specific ones, the latter will govern;<sup>96</sup> and even if

W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. Cf. with *Atlantic Terra Cotta Co. v. Masons' Supply Co.*, 180 Fed. 332, 103 C. C. A. 462; *Bridgers v. Ormond*, 153 N. C. 113, 68 S. E. 973.

<sup>92</sup> *Wood v. Coman*, 56 Ala. 283; *Cox v. Britt*, 22 Ark. 567; *Sprague v. Edwards*, 48 Cal. 239; *Kellogg v. Mix*, 37 Conn. 243; *Atlanta, etc., Railroad Co. v. Spear*, 32 Ga. 550; *Calumet, etc., Canal & Dock Co. v. Russell*, 68 Ill. 426; *Aulick v. Wallace*, 12 Bush, 531; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *King v. Merritt*, 67 Mich. 194, 34 N. W. 689; *Fowler v. Woodward*, 26 Minn. 347, 4 N. W. 231; *Brookman v. Kursman*, 94 N. Y. 272; *Hoffman v. Riehl*, 27 Mo. 554; *Tenney v. Lumber Co.*, 43 N. H. 343; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Dodd v. Bartholomew*, 44 Ohio St. 171, 5 N. E. 866; *Watters v. Bredin*, 70 Pa. 235; *Jenkins v. Jenkins*, 148 Pa. 216, 23 Atl. 985; *Eatherly v. Eatherly*, 1 Coldw. 461, 78 Am. Dec. 495; *Carnagy v. Woodcock*, 2 Munf. 234, 5 Am. Dec. 470; *Liston v. Jenkins*, 2 W. Va. 62.

<sup>93</sup> *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Cowles Electric, etc., Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616,

47 U. S. App. 531; *Leith v. Bush*, 61 Pa. 395.

<sup>94</sup> *Boykin v. Bank of Mobile*, 72 Ala. 262, 47 Am. Rep. 408; *Irwin v. Nichols*, 87 Ark. 97, 112 S. W. 209; *Berry v. Kowalsky*, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101; *Richelieu Hotel Co. v. International M. E. Co.*, 140 Ill. 248, 28 N. E. 1044, 33 Am. St. Rep. 234; *Schroeder v. Griggs*, 80 Kans. 357, 102 Pac. 469; *Way v. Greer*, 196 Mass. 237, 81 N. E. 1002; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626.

<sup>95</sup> *Holmes v. Phenix Ins. Co.*, 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308; *Cowles Electric Smelting Co. v. Lowrey*, 79 Fed. 331, 24 Fed. 616; *Allen v. United States Fidelity, etc., Co.*, 269 Ill. 234, 109 N. E. 1035; *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850; *General Accident, etc., Co. v. Louisville Home Tel. Co.*, 175 Ky. 96, 193 S. W. 1031, L. R. A. 1917 D. 952; *Perry v. J. L. Mott Iron Works Co.*, 207 Mass. 501, 93 N. E. 798; *Rice v. Lincoln & N. W. R. Co.*, 88 Neb. 307, 129 N. W. 425.

<sup>96</sup> *English v. Shelby*, 116 Ark. 212, 172 S. W. 817.

there is no actual repugnancy if the words of the contract are taken literally, yet when from the whole instrument it appears that the purpose of the parties was solely directed towards the particular matter to which the special clause or words relate the general words will be restrained.<sup>97</sup> Thus the recital of a bond may restrain the literal terms of the condition.<sup>98</sup> It is also an accepted principle that "the general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given;"<sup>99</sup> and indeed it has been laid down broadly that general words in any contract relating to a particular subject shall be construed as meaning things of the same kind as the particular matters referred to.<sup>99a</sup> But "general words following an enumeration of particular things may include other things not *ejusdem generis*, if such appears to have been the intention of the parties."<sup>1</sup>

\* *Browning v. Wright*, 2 B. & P. 13; *Hesse v. Stevenson*, 3 B. & P. 565, 574; *Linton v. Allen*, 154 Mass. 432, 438, 28 N. E. 780; *Whalon v. Kauffman*, 19 Johns. 97; *Bricker v. Bricker*, 11 Ohio St. 240. See also *Hollerbach v. United States*, 233 U. S. 165, 58 L. Ed. 898, 34 S. Ct. 553.

\* *Bell v. Bruen*, 1 How. 169, 183, 11 L. Ed. 89; *Union Pacific Co. v. Artist*, 60 Fed. 365, 19 U. S. App. 612, 23 L. R. A. 581, 9 C. C. A. 14; *Canton Inst. v. Murphy*, 156 Mass. 305, 31 N. E. 285; *Kellogg v. Scott*, 58 N. J. Eq. 344, 44 Atl. 190; *National Mech. Bkg. Assn. v. Conkling*, 90 N. Y. 116, 43 Am. Rep. 146. "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." *Ex parte Dawes*, 17 Q. B. D. 275, 286; quoted with approval in *Williams v. Bartley*, 165 N. Y. 48, 57, 58 N. E. 765.

\* *Directors, etc., of the S. W. Ry.*

*Co. v. Blackmore*, L. R. 4 H. L. 610, 623; *Fire Ins. Assoc. v. Wickham*, 141 U. S. 564, 581, 35 L. Ed. 860, 12 S. Ct. 84; *Lumley v. Wabash Railway Co.*, 76 Md. 66, 22 C. C. A. 60; *French v. Arnett*, 15 Ind. App. 674, 44 N. E. 551; *Blair v. Chicago & A. R. Co.*, 89 Mo. 383, 1 S. W. 350; *McIntyre v. Williamson*, 1 Edw. Ch. 34; *Jeffreys v. Southern Ry. Co.*, 127 N. C. 377, 37 S. E. 515; cp. *Jackson v. Ely*, 57 Ohio St. 450, 49 N. E. 792.

\*\* *Agar v. Athenaeum Life Assur. Soc.*, 3 C. B. (N. S.) 725; *Hendricks v. Webster*, 159 Fed. 927, 87 C. C. A. 107; *Fisher Electric Co. v. Bath Iron Works*, 116 Mich. 293, 74 N. W. 493; *Meyers v. Wood*, 173 Mo. App. 564, 158 S. W. 909; *New York Metal Ceiling Co. v. New York*, 133 N. Y. App. Div. 110, 117 N. Y. S. 632; *Smith's Est.*, 210 Pa. 604, 60 Atl. 255; *Daly v. Old*, 35 Utah, 74, 99 Pac. 460, 28 L. R. A. (N. S.) 463; *Jones v. Island Creek Coal Co.*, 79 W. Va. 532, 539, 91 S. E. 391, 394.

<sup>1</sup> *Lindeke v. Associates' Realty Co.*, 146 Fed. 630, 77 C. C. A. 56; *Shaw v. Pope*, 80 Conn. 206, 209, 67 Atl. 495.

**§ 620. Secondary rules: The instrument will be construed if possible so that it shall be effective and reasonable.**

A construction which makes the contract lawful will be preferred over one which would make it unlawful;<sup>2</sup> a construction which renders the contract valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless;<sup>3</sup> a construction which

In *Webb v. Missouri State Life Ins. Co.*, 134 Mo. App. 576, 115 S. W. 481, and in *Hoffman v. Eastern Wisconsin &c. Light Co.*, 134 Wis. 603, 115 N. W. 383, the rule of *ejusdem generis* was not applied to the words "or otherwise."

<sup>2</sup> "It is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." Co. Lit. 42 a; *Fussell v. Daniel*, 10 Exch. 581, 597, by Martin, B.; *Mills v. Dunham*, [1891] 1 Ch. 576, 590; *Manning v. Ellicott*, 9 App. D. C. 71; *Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940; *United States Fidelity Co. v. Board of Commissioners*, 145 Fed. 144, 76 C. C. A. 114; *Wiggin v. Federal Stock Co.*, 77 Conn. 507, 59 Atl. 607; *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 96 Am. St. Rep. 177; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Briody v. De Kimpe*, 91 N. J. L. 206, 102 Atl. 688; *Lorillard v. Clyde*, 86 N. Y. 384; *North Pacific Lumber Co. v. Spore*, 44 Or. 462, 75 Pac. 890; *Carolina Spruce Co. v. Black Mountain R. Co.*, 139 Tenn. 137, 201 S. W. 1034; *McCoy v. Bankers' Trust Co.* (Tex. Civ. App.), 209 S. W. 1138; *Pulp Wood Co. v. Green Bay Paper Co.*, 157 Wis. 604, 147 N. W. 1058.

<sup>3</sup> "All contracts should if possible be construed *ut res magis valeat quam pereat*." Byles, J., in *Shoreditch Ves-*

*try v. Hughes*, 17 C. B. (N. S.) 137, 162; *Broom v. Batchelor*, 1 H. & N. 255; *Columbus Construction Co. v. Crane Co.*, 98 Fed. 946, 40 C. C. A. 35; *Cole Motor Car Co. v. Hurst*, 228 Fed. 280, 142 C. C. A. 572; *American Tie & Timber Co. v. Naylor Lumber Co.*, 190 Ala. 319, 67 So. 246; *Sinclair v. National Surety Co.*, 132 Iowa, 549, 107 N. W. 184; *Berry v. Frisbie*, 120 Ky. 337, 27 Ky. L. Rep. 724, 86 S. W. 558; *North River Ins. Co. v. Dyche*, 163 Ky. 271, 173 S. W. 784; *McEvoy v. Security Fire Ins. Co.*, 110 Md. 275, 73 Atl. 157, 22 L. R. A. (N. S.) 964, 132 Am. St. Rep. 428; *Black v. Bachelder*, 120 Mass. 171; *Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72; *Millen v. Potter*, 190 Mich. 262, 157 N. W. 101; *National Bank of Commerce v. Flanagan Mills &c. Co.*, 268 Mo. 547, 188 S. W. 117; *Horton v. Rohlf*, 69 Neb. 95, 95 N. W. 36; *Vickers v. Electrozone Co.*, 67 N. J. L. 665, 52 Atl. 467; *Griffey v. New York Central Ins. Co.*, 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; *Rice v. Miner*, 151 N. Y. S. 983, 89 N. Y. Misc. 395; *Johnson v. Rhode Island Ins. Co.*, 172 N. C. 142, 90 S. E. 124; *Pulp Wood Co. v. Green Bay Paper Co.*, 157 Wis. 604, 147 N. W. 1058. Thus a writing which recited that it was an agreement between the parties, which was signed by both parties, and by which one party agreed to sell to the other its make of butter for a certain period at a certain price, is a binding agreement for the sale, although it contains no express prom-

makes the contract fair and reasonable will be preferred to one which leads to harsh or unreasonable results.<sup>4</sup> Therefore, construction of a contract which would lead to a forfeiture will not be favored.<sup>5</sup> For the same reason, a restriction in a deed on the use of property will be construed in favor of the grantee;<sup>6</sup> and when contracts are optional in respect to one party, they are strictly construed in favor of the party bound and against the party that is not bound.<sup>7</sup> But the mere fact that parties have made an improvident bargain will not lead a court to make unnatural implications or artificial constructions.<sup>8</sup>

**§ 621. Secondary rules. Language will be construed most strongly against the party using it.**

Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language

is by the buyer to pay. *Roundy & McMurray Co. v. Nicholson Produce Co.*, 166 Ia. 39, 147 N. W. 305.

<sup>4</sup> *A. Leschen & Sons Co. v. Mayflower, etc.*, Min. Co., 173 Fed. 855, 97 C. C. A. 465; *Pressed Steel Car Co. v. Eastern Ry. Co.*, 121 Fed. 609, 57 C. C. A. 635; *Little Cahaba Coal Co. v. Etna L. Ins. Co.*, 192 Ala. 42, 68 So. 317, Ann. Cas. 1917 D. 863; *Letchworth v. Vaughan*, 77 Ark. 305, 90 S. W. 1001; *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536; *Savage v. Smith*, 170 Cal. 472, 150 Pac. 353; *MacDonald v. Etna Indemnity Co.*, 90 Conn. 226, 96 Atl. 926; *Hars v. Peterson*, 80 Ill. App. 21; *R. F. Conway Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703; *Blitz v. Union Steamboat Co.*, 51 Mich. 553, 17 N. W. 55; *B. Siegel Co. v. Codd*, 183 Mich. 145, 149 N. W. 1015; *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131; *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292; *Wigand v. Bachmann-Bechtel Brewing Co.*, 222 N. Y. 272, 118 N. E. 618; *Fleischman v. Fergusson*, 223

N. Y. 235, 119 N. E. 400; *Bingell v. Royal Ins. Co.*, 240 Pa. 412, 87 Atl. 955; *Bank of Old Dominion v. McVeigh*, 32 Gratt. 530; *Allemong v. Augusta Nat. Bank*, 103 Va. 243, 48 S. E. 897.

<sup>5</sup> *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845; *Dumphy v. Commercial Union Assur. Co.*, 107 Tex. 107, 174 S. W. 814; *Sparkman v. Davenport* (Tex. Civ. App.), 160 S. W. 410; *Adams v. Fidelity Lumber Co.* (Tex. Civ. App.), 201 S. W. 1034; *Pagel v. United States Casualty Co.*, 158 Wis. 278, 148 N. W. 878. In *Hunt v. Held*, 90 Ohio, 280, 107 N. E. 765, it was held that where a right to enforce a restrictive covenant in a conveyance is doubtful, all doubts should be resolved in favor of the free use of the property for lawful purposes by the owner of the fee.

<sup>6</sup> *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768; *Grubb v. Grubb*, 101 Pa. 11.

<sup>7</sup> *Frank Oil Co. v. Bellevue Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260.

<sup>8</sup> *In re P. J. Sullivan Co.*, 247 Fed.

are resolved in favor of the latter;<sup>9</sup> and as he will ordinarily be the promisee of the promise in question, it is sometimes stated that the contract, if ambiguous, will be construed in favor of the promisee.<sup>10</sup> This rule finds frequent application to policies of insurance which are ordinarily prepared solely by the insurance company and the words, therefore, are construed most strongly against it.<sup>11</sup> This has been so held even in case of standard policies the terms of which are fixed by statute;<sup>12</sup> but it seems rather that the reason of the rule ceasing, the rule also should cease in such a case; and this view has been taken by some courts,<sup>13</sup> though doubtless a construction already

139; *Kanaskat Lumber Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15.

<sup>9</sup> *Bacon's Maxims, Tracts*, 42; *Sheppard's Touchstone*, 87, 88; *Mayer v. Isaac*, 6 M. & W. 605; *Wilson v. Cooper*, 95 Fed. 625; *Marx v. American Malting Co.*, 169 Fed. 582, 95 C. C. A. 80; *Bijur Motor Lighting Co. v. Eclipse Mach. Co.*, 237 Fed. 89; *Denson v. Caddell (Ala.)*, 77 So. 720; *Allen-West Commission Co. v. People's Bank*, 74 Ark. 41, 84 S. W. 1041; *Clark v. J. R. Watkins Medical Co.*, 115 Ark. 166, 171 S. W. 136; *Asmussen v. Post Printing Co.*, 26 Colo. App. 416, 143 Pac. 396; *Mueller v. Northwestern University*, 95 Ill. App. 258, *affd.* 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194; *Maney Milling Co. v. Baker-Wignall & Co.*, 186 Ill. App. 390; *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769, 28 So. 136; *Wier v. American Locomotive Co.*, 215 Mass. 303, 102 N. E. 481; *Wetmore v. Patison*, 45 Mich. 439, 8 N. W. 67; *Ardis v. Grand Rapids &c. R. Co.*, 200 Mich. 400, 167 N. W. 5; *Belch v. Schott*, 171 Mo. App. 357, 157 S. W. 658; *Flory v. Supreme Tribe*, 98 Neb. 160, 152 N. W. 295; *Marshall v. Sackett & Wilhelms Co.*, 166 N. Y. App. Div. 141, 151 N. Y. S. 1045; *Hyland v. Oregon Hassam Pav. Co.*, 74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915 C. 823, *Ann. Cas.* 1916

E. 941; *In re Eighth Ave.*, 82 Wash. 398, 144 Pac. 533.

<sup>10</sup> 2 Bl. Comm. 380; Cal. Civ. Code, § 1654; *Byron v. First Nat. Bank*, 75 Or. 296, 146 Pac. 516.

<sup>11</sup> *Notman v. Anchor Ass. Co.*, 4 C. B. (N. S.) 476; *Fowkes v. Manchester & London Association*, 3 B. & S. 917; *Joel v. Law Union & Crown Ins. Co.*, [1908] 2 K. B. 863, 890; *Philadelphia Casualty Co. v. Feehheimer*, 220 Fed. 401, 136 C. C. A. 25; *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 So. 923; *Petello v. Teutonia Fire Ins. Co.*, 89 Conn. 175, 93 Atl. 137, L. R. A. 1915 D. 812; *McEachern v. New York Life Ins. Co.*, 15 Ga. App. 222, 82 S. E. 820; *American Surety Co. v. Pangburn*, 182 Ind. 116, 105 N. E. 967, *Ann. Cas.* 1916 E. 1126; *Sinclair v. National Surety Co.*, 132 Ia. 549, 107 N. W. 184; *Paskusz v. Philadelphia Casualty Co.*, 213 N. Y. 22, 106 N. E. 749; *Moore v. Etna Life Ins. Co.*, 75 Or. 47, 146 Pac. 151.

<sup>12</sup> *Cottingham v. Maryland Motor Car Ins. Co.*, 168 N. C. 259, L. R. A. 1915 D. 344, *Ann. Cas.* 1917 B. 1237, 84 S. E. 274; *Gazzam v. German Union F. Ins. Co.*, 155 N. C. 330, 71 S. E. 434.

<sup>13</sup> *Mick v. Royal Exchange Assur.*, 87 N. J. L. 607, 91 Atl. 102; *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472, 475, 74 N. E. 421.

established by the courts for certain words before the adoption of a standard policy should be given to the same words in a standard policy.<sup>14</sup>

**§ 622. Secondary rules: Written matter in a contract is given greater effect than printed matter.**

Where part of the contract is in writing and part is in printing, the writing will be given effect if there is repugnancy between the two portions of the instrument.<sup>15</sup> "This rule is applied with greater liberality where it appears that the printed matter is in obscure type or placed where it would not be likely to be seen or where the printed matter was evidently not intended to be incorporated in the contract. In such cases the printed matter has been accorded little influence in changing the clear and explicit language of a contract;"<sup>16</sup> but of course

<sup>14</sup> *Davis v. Insurance Co.*, 115 Mich. 382, 73 N. W. 393.

<sup>15</sup> *Robertson v. French*, 4 East, 130, 136; *Joyce v. Realm Ins. Co.*, L. R. 7 Q. B. 580, 583; *Magee v. Lavell*, L. R. 9 C. P. 107, 113; *Dudgeon v. Pembroke*, 2 App. Cas. 284; *Glynn v. Margetson*, [1893] App. Cas. 351; *Breyman v. Ann Arbor R. Co.*, 85 Fed. 579; *Lipschitz v. Napa Fruit Co.*, 223 Fed. 698, 139 C. C. A. 228; *Augusta Factory v. Mente*, 132 Ga. 503, 64 S. E. 553; *Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725; *Urbany v. Carroll*, 176 Iowa, 217, 157 N. W. 852; *Mansfield Machine Works v. Common Council*, 62 Mich. 546, 29 N. W. 105; *Sprague Electric Co. v. Board of Commissioners*, 83 Minn. 262, 86 N. W. 332; *Eager v. Mathewson*, 27 Nev. 220, 74 Pac. 404; *Collins v. Knuth*, 51 N. Y. App. Div. 188, 64 N. Y. S. 549; *Fagan v. Ulrich*, 166 N. Y. App. D. 342, 152 N. Y. S. 37; *Eighme v. Holcomb*, 84 Wash. 145, 146 Pac. 391.

In *Baumvoll Manufactur von Scheibler v. Gilchrest*, [1891] 2 Q. B. 310, 317, Charles, J., said: "In construing a charter party, no greater effect can be given to writing than to

print, although a different rule may prevail with reference to policies of insurance. *Alsager v. St. Katherine Docks Co.*, 14 M. & W. 794." This distinction, however, seems unreasonable. The decision was reversed by the Court of Appeal on points not necessarily involving the passage quoted, in [1892] 1 Q. B. 253, and the Court of Appeals was sustained in [1893] A. C. 8. See *Harding v. Cargo of Coal*, 147 Fed. 971, 973.

<sup>16</sup> *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619, 623; citing *Sturtevant Co. v. Fireproof Film Co.*, 216 N. Y. 199, 110 N. E. 440; *Sturm v. Boker*, 150 U. S. 312, 327, 14 S. Ct. 94, 37 L. Ed. 1093; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007. The New York court added: "When the printed matter is not evidently intended to be incorporated in the contract and the understanding of the parties is doubtful, it is to be determined, as similar issues are determined, as a question of fact in the light of the surrounding circum-

if the printed and written matter can by any reasonable construction be reconciled, this will be done.<sup>17</sup>

**§ 623. Secondary rules: An interpretation given by the parties themselves will be favored.**

The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court,<sup>18</sup>

stances. *Sturtevant Co. v. Fireproof Film Co.* *supra*; *Clark v. Woodruff*, 83 N. Y. 518, 522. In the present case the printed clauses are to the left of the signature of the defendant. They are printed in clear type, under a caption printed in type larger than the other type, which caption plainly reads: 'Conditions on which the above order is given.' The printed clauses are at least as plain and as prominently displayed upon the face of the order as the written matter contained therein. They are not in conflict with that which is written. Under these circumstances they must be deemed to be a part of the order and cannot be eliminated therefrom by the court upon an inference as to the intention of the parties, which is not reflected in the order or in any evidence that was received upon the trial."

<sup>17</sup> *Harding v. Cargo of Coal*, 147 Fed. 971, 973; *Hardie-Tynes Foundry Co. v. Glen Allen Oil Mill*, 84 Miss. 259, 36 So. 262; *Eager v. Mathewson*, 27 Nev. 220, 74 Pac. 404; *Gabbert v. William &c. Oil Co.*, 76 W. Va. 718, 86 S. E. 671.

<sup>18</sup> *Fitzgerald v. First Nat. Bank*, 114 Fed. 474, 52 C. C. A. 276; *Nelson v. Ohio Cultivator Co.*, 188 Fed. 620, 112 C. C. A. 394; *Bunday v. Huntington*, 224 Fed. 847, 140 C. C. A. 415; *Bransford v. Regal Shoe Co.*, 237 Fed. 67, 150 C. C. A. 269; *Birmingham Waterworks Co. v. Windham*, 190 Ala. 634, 67 So. 424; *Clark v. J. R. Watkins Medical Co.*, 115 Ark. 166, 171 S. W. 136; *S. R. Watkins Medical Co. v.*

*Williams*, 124 Ark. 90, 187 S. W. 653; *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951; *New Brantner Ditch Co. v. Kramer*, 57 Col. 218, 141 Pac. 498, Ann. Cas. 1916 B. 1225; *Reeves v. Daniel*, 143 Ga. 569, 85 S. E. 756; *Geithman v. Eichler*, 265 Ill. 579, 107 N. E. 180; *Windmiller v. People*, 78 Ill. App. 273; *Roush v. Roush*, 154 Ind. 562, 55 N. E. 1017; *Indiana Natural Gas Co. v. Stewart*, 45 Ind. App. 554, 559, 90 N. E. 384; *Pratt v. Prouty*, 104 Ia. 419, 73 N. W. 1035, 65 Am. St. Rep. 472; *Nicholl v. Wetmore*, 174 Iowa, 132, 156 N. W. 319; *W. T. Tilden Co. v. Densten Hair Co.*, 216 Mass. 323, 103 N. E. 916; *Klemik v. Henriksen Jewelry Co.*, 128 Minn. 490, 151 N. W. 203; *Williams v. Chicago, etc., Ry. Co.*, 153 Mo. 487, 54 S. W. 689; *St. Louis v. Laclede Gaslight Co.*, 155 Mo. 1, 55 S. W. 1003; *Williams v. Auten*, 68 Neb. 28, 93 N. W. 943; *Wilhoit v. Stevenson*, 96 Neb. 751, 148 N. W. 963; *Van Dyke v. Anderson*, 83 N. J. Eq. 568, 91 Atl. 593; *Jarvie v. Arbuckle*, 163 N. Y. App. Div. 199, 148 N. Y. S. 189; *American Soda Fountain Co. v. Gerrers Bakery*, 14 Okl. 258, 78 Pac. 115; *Wiebener v. Peoples*, 44 Okl. 32, 142 Pac. 1036, Ann. Cas. 1916 E. 748; *Gillespie v. Iseman*, 210 Pa. 1, 59 Atl. 266; *McMillin v. Titus*, 222 Pa. 500, 503, 72 Atl. 240; *Tustin v. Philadelphia, etc., Iron Co.*, 250 Pa. 425, 95 Atl. 595; *Hassett v. Cooper*, 20 R. I. 585, 40 Atl. 841; *Phetteplace v. British, etc., Ins. Co.*, 23 R. I. 28, 49 Atl. 33; *Williamson v. Eastern Building & Loan Co.*, 54 S. Car. 582, 32 S. E. 765, 71 Am. St.



and to this end not only the acts<sup>19</sup> but the declarations of the parties<sup>20</sup> may be considered. But if the meaning of the contract is plain, the acts of the parties cannot prove a construction contrary to the plain meaning.<sup>21</sup> Such conduct of the parties, however, may be evidence of a subsequent modification of their contract.<sup>22</sup>

Rep. 822; *Herndon v. Wardlaw*, 100 S. Car. 1, 84 S. E. 112; *State v. Board of Trust*, 129 Tenn. 279, 164 S. W. 1151; *Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848; *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810; *Hairston v. Hill*, 118 Va. 339, 87 S. E. 573; *Lovett v. West Virginia Central Gas Co.*, 73 W. Va. 40, 79 S. E. 1007.

<sup>19</sup> *Lette v. Pacific Mill Co.*, 88 Fed. 957, *affd.* 94 Fed. 968, 36 C. C. A. 587; *Clark v. University of Illinois*, 103 Ill. App. 261; *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722; *Baxter Springs v. Baxter Springs L. & P. Co.*, 64 Kans. 591, 68 Pac. 63; *Lewiston &c. R. Co. v. Grand Trunk R. Co.*, 97 Me. 261, 54 Atl. 750; *Winchester v. Glazier*, 152 Mass. 316, 25 N. E. 728; *Reynolds v. Boston Rubber Co.*, 160 Mass. 240, 245, 35 N. E. 677; *C. D. Smith Drug Co. v. Saunders*, 70 Mo. App. 221; *Kopper v. Fulton*, 71 Vt. 211, 44 Atl. 92; *Clark v. Lambert*, 55 W. Va. 512, 47 S. E. 312; and see cases in the preceding note.

<sup>20</sup> *Laclede Construction Co. v. T. J. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76; *Ganson v. Madigan*, 15 Wis. 144, 153, 82 Am. Dec. 659. In *Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 482, 43 So. 427, the court said: "If it be true, even in the case of a written contract the terms of which are doubtful or ambiguous, that the construction placed thereon by the parties themselves may be shown and shall govern, as the cited cases hold, with how much more force does this principle apply to oral contracts? The principles of technical nicety cannot be strictly applied in the construc-

tion of these everyday oral contracts made by plain business men in their course of trade and traffic. To do so would frequently result in overthrowing the meaning and understanding of the parties."

<sup>21</sup> *Northeastern R. Co. v. Hastings*, [1900] App. Cas. 280; *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Cowles Electric Smelting Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616; *Lesamis v. Greenberg*, 225 Fed. 449, 140 C. C. A. 481; *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247; *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N. E. 263; *Finch v. Theiss*, 267 Ill. 65, 107 N. E. 898; *Western Ry. Equipment Co. v. Missouri Malleable Iron Co.*, 91 Ill. App. 28; *Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162; *Clarke v. Rogers*, 159 Ky. 762, 169 S. W. 485; *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579; *Cowles Elec. Smelting Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616; *O'Brien v. Peck*, 198 Mass. 50, 84 N. E. 325; *Boeing v. Fordney*, 184 Mich. 153, 150 N. W. 852; *Meissner v. Standard Equipment Co.*, 211 Mo. 112, 133, 109 S. W. 730; *Cincinnati v. Gas Light, etc., Co.*, 53 Ohio St. 278, 41 N. E. 239; *Howell v. Johnson*, 38 Or. 571, 64 Pac. 659; *Sternbergh v. Brook*, 225 Pa. 279, 74 Atl. 166, 133 Am. St. Rep. 877, 24 L. R. A. (N. S.) 1078; *Rea v. Pennsylvania Canal Co.*, 245 Pa. 589, 91 Atl. 1053; *Fass v. South Atlantic L. Ina. Co.*, 105 S. Car. 107, 89 S. E. 558.

<sup>22</sup> *O'Brien v. Peck*, 198 Mass. 50, 84 N. E. 325; *Matgolys v. Mollenick*, 98 N. Y. S. 849.

**§ 624. Secondary rules: Conflict between prior and subsequent clauses.**

It was early laid down "That, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received, and the latter rejected."<sup>23</sup> The same doctrine has been held in some modern cases applicable to contracts generally.<sup>24</sup> It is obvious, however, that such a rule is extremely artificial, and can only be accepted as a last resort. In most recent cases where it has been applied the later clause was inconsistent with the general purpose of the contract, and for this reason alone might have been disregarded. If, however, the first clause is general in terms, and the latter is particular,<sup>25</sup> or if the latter clause is repugnant only to part of the earlier, it seems that the latter clause would be given full effect, and the earlier subjected to such qualifications as the latter might make necessary.<sup>26</sup> The true rule seems to be as stated in a recent Maine decision:<sup>27</sup>

"When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the principal or more important clause."

**§ 625. Secondary rules: Guaranties.**

A contract binding a surety, it has been held, should if pos-

<sup>23</sup> 2 Bl. Comm. 381.

<sup>24</sup> *Employers' Liability Assur. Corporation v. Morrill*, 143 Fed. 750, 74 C. C. A. 640; *Henne v. Summers*, 16 Cal. App. 67, 71, 116 Pac. 86; *Jones v. Pennsylvania Casualty Co.*, 140 N. C. 262, 52 S. E. 578; *Straus v. Wanamaker*, 175 Pa. 213, 226, 34 Atl. 648; *Smith v. Clinkscapes*, 102 S. Car. 227, 85 S. E. 1064; *Dustin v. Interstate &c. Assoc.*, 37 S. Dak. 635, 159 N. W. 395, L. R. A. 1917 B. 319; *Bean v. Aetna Life Ins. Co.*, 111 Tenn. 186, 78 S. W. 104; *Wisconsin, etc., Ins. Co. v. Wilkin*, 95 Wis. 111, 118, 69 N. W. 354, 60 Am. St. Rep. 86.

<sup>25</sup> *English v. Shelby*, 116 Ark. 212, 172 S. W. 817.

<sup>26</sup> In *Williams v. Hathaway*, 6 Ch. D. 545, 549, Jessel, M. R., said: "It is said that if you find a personal covenant, followed by a proviso that the covenantor shall not be personally liable under the covenant, the proviso is repugnant and void. I agree that this is the law; but that by no means applies to a case where the proviso limits the personal liability under the covenant without destroying it, thus leaving a portion of the original covenant remaining; in that case the proviso is perfectly valid. There is no authority against that view."

<sup>27</sup> *Union Water Power Co. v. Lewiston*, 101 Me. 564, 65 Atl. 67.

sible be construed in his favor.<sup>28</sup> But there seems little propriety in such a rule and it is opposed to a number of decisions.<sup>29</sup> Certainly if such a rule exists, it must be confined to cases of sureties for accommodation. A guaranty given for the business advantage of the guarantor, and written by him instead of being construed in his favor indeed comes within the rule so often applied to insurance policies, "that the words of the writer of the contract shall be taken most strongly against him."<sup>30</sup> This has been so held frequently in recent years in regard to the contracts of surety companies.<sup>31</sup> The question whether slight variations of risk shall discharge a surety from liability under his contract is often confused with questions

<sup>28</sup> *Nicholson v. Paget*, 1 C. & M. 48. See also *Melville v. Hayden*, 3 B. & A. 593; *Bell v. Bruen*, 1 How. 169, 11 L. Ed. 89; *Sterling v. Wolf*, 163 Ill. 467, 45 N. E. 218; *Jewel Tea Co. v. Shepard*, 172 Ia. 480, 154 N. W. 755; *Ryan v. Williams*, 29 Kans. 487, 497; *State v. Dayton*, 101 Md. 598, 61 Atl. 624. Numerous other decisions say that the surety's contract should be "strictly" construed.

<sup>29</sup> *Lawrence v. McCalmont*, 2 How. 426, 450, 11 L. Ed. 326; *Weinreich Est. Co. v. A. J. Johnston Co.*, 28 Cal. App. 144, 151 Pac. 667 (under Cal. C. C., § 2837); *Gamble v. Cuneo*, 21 N. Y. App. Div. 413, 47 N. Y. S. 548, *affd.*, 162 N. Y. 634, 57 N. E. 110; *United States Rubber Co. v. Silverstein*, 161 N. Y. S. 369; *Daly v. Old*, 35 Utah, 74, 83, 99 Pac. 460; *Noyes v. Nichols*, 28 Vt. 159, 173.

<sup>30</sup> In *Hargreave v. Smee*, 6 Bing. 244, 248, *Tindal, C. J.*, said: "The words employed are the words of the Defendant in this cause, and there is no reason for putting on a guaranty a construction different from that which the Court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must

be taken most strongly against him." To the same effect is *Drummond v. Prestman*, 12 Wheat. 515, 6 L. Ed. 712; *United States Rubber Co. v. Silverstein*, 161 N. Y. S. 369.

<sup>31</sup> *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552; *Tebbets v. Mercantile &c. Co.*, 73 Fed. 95, 38 U. S. App. 431, 19 C. C. A. 281; *Topeka v. Federal Union Surety Co.*, 213 Fed. 958, 130 C. C. A. 364; *Equitable Surety Co. v. Bank of Hazen*, 121 Ark. 422, 181 S. W. 279, 1200; *New Haven v. Eastern Paving Brick Co.*, 78 Conn. 689, 702, 63 Atl. 517; *Van Buren County v. American Surety Co.*, 137 Ia. 490, 115 N. W. 24, 126 Am. St. Rep. 290; *Streator Clay Mfg. Co. v. Henning Vineyard Co.*, 178 Ia. 297, 155 N. W. 1001; *Hormel v. American Bonding Co.*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, and note; *Rule v. Anderson*, 160 Mo. App. 347, 142 S. W. 358; *Farmers' Bank v. Ogden*, 192 Mo. App. 243, 182 S. W. 501; *Bank of Tarboro v. Fidelity &c. Co.*, 128 N. C. 366, 38 S. E. 908; *Cowles v. United States Fidelity &c. Co.*, 32 Wash. 120, 72 Pac. 1032; *United American &c. Co. v. American Bonding Co.*, 146 Wis. 573, 131 N. W. 904, 40 L. R. A. (N. S.) 661.

of the interpretation of his promise, but should be considered separately.<sup>32</sup>

### § 626. Secondary rules: Contracts affecting a public interest.

Grants of franchises and contracts affecting the public interest are to be construed liberally in favor of the public.<sup>33</sup> It will be observed that this rule is based on a different reason from ordinary rules of interpretation. There is no reason to suppose that the parties in fact intended to favor the public, and when a court so assumes, it does so because it is for the public interest so to assume. If interpretation and construction are to be distinguished, this rule as well as that favoring sureties (if such a rule exists) is a rule of construction.

### § 627. Latent and patent ambiguities.

Lord Bacon divided ambiguities in written instruments into latent and patent ambiguities. Those which are not apparent on the face of the instrument are latent; and, according to Lord Bacon, may be explained by pleading and parol proof. But patent ambiguities, Lord Bacon says, cannot be helped by averment "because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment which is of inferior account in law."<sup>34</sup> This rule has been applied to written contracts.<sup>35</sup> But it is chiefly in regard to wills that the maxim has given trouble. Certainly so far as contracts are concerned, it may be wholly disregarded. It was

<sup>32</sup> See *infra*, §§ 1222 *et seq.*

<sup>33</sup> *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 11 S. Ct. 243, citing, *Parker v. Great Western R. Co.*, 7 Scott, N. R. 835, 870; *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1, 14; *Southbridge Canal Co. v. Wheeley* 1, 14; *Stourbridge Canal Co. v. Wheeley*, 2 Barn. & Ad. 792; *Blake-more v. Glamorganshire Canal Nav. Co.*, 1 Myl. & K. 154, 165; *Lee v. Milner*, 2 Younge & C. (Exch.), 611, 618; *Ware v. Regents Canal Co.*, 28 L. J. (N. S.) Ch. 153, 157; *Gray v. Liver-*

*pool & B. R. Co.*, 4 Ry. & C. Cas. 235, 240. See also *Washington-Oregon Corp. v. Chehalis*, 202 Fed. 591; *Ex parte Russell*, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914 A. 152; *People v. Detroit United R. Co.*, 162 Mich. 460, 125 N. W. 700, 127 N. W. 748, 139 Am. St. Rep. 582.

<sup>34</sup> Bacon's Maxims, Rule 23.

<sup>35</sup> *Hollier v. Eyre*, 9 C. & F. 1; *Romine v. Hoag* (Mo.), 178 S. W. 147; *Douglas v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

always and still is as Professor Thayer has said,<sup>36</sup>; "an unprofitable subtlety."<sup>37</sup>

### § 628. Interpretation of several connected writings.

Where a writing refers to another document, that other document, or so much of it as is referred to in it, is to be construed as part of the writing.<sup>38</sup> How far the requirements of the Statute of Frauds when that statute is applicable affect this principle has previously been considered.<sup>39</sup> Even where a writing does not refer to another writing, if such other writing was made as part of the same transaction, the two should be construed together.<sup>40</sup> It is usually said that the two writings

<sup>36</sup> Preliminary Treatise on Evidence, 434.

<sup>37</sup> See also Wigmore, Evidence, § 2472.

<sup>38</sup> *Piedmont, etc., Co. v. Motor Co.* (Ala.), 12 So. 768; *Gray v. Cotton*, 166 Cal. 130, 134 Pac. 1145; *Chicago, etc., Bank v. Chicago, etc., Trust Co.*, 190 Ill. 404, 60 N. E. 586; *Levin v. Strempler*, 194 Ill. App. 299; *White v. McLaren*, 151 Mass. 553, 24 N. E. 911; *W. T. Tilden Co. v. Densten Hair Co.*, 216 Mass. 323, 103 N. E. 916; *Grieb v. Cole*, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; *Patrick v. Y. M. C. A.*, 120 Mich. 185, 79 N. W. 208; *Watson v. O'Neil*, 14 Mont. 197, 35 Pac. 1064; *McGeragle v. Broemel*, 53 N. J. L. 59, 20 Atl. 857; *Hicks v. British America Assurance Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Philadelphia v. Jewell's Estate*, 135 Pa. 329, 19 Atl. 947, 20 Atl. 281; *Stewart v. Morris*, 84 S. C. 148, 65 S. E. 1044; *Houghton v. Hoy*, 102 Wash. 358, 172 Pac. 1148.

<sup>39</sup> See *supra*, § 581.

<sup>40</sup> *In re Phoenix Bessemer Steel Co.*, 44 L. J. Ch. 683; *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 11 S. Ct. 243; *Philippi Collieries Co. v. Thompson*, 163 Fed. 23, 89 C. C. A. 501; *Prichard v. Miller*, 86 Ala. 500, 5 So. 784; *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724,

1006; *Getz v. Federal Salt Co.*, 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114; *Gibbs v. Wallace*, 58 Colo. 364, 147 Pac. 686; *Beach's Appeal*, 58 Conn. 464, 20 Atl. 475; *Sherman's Sons Co. v. Industrial & Mfg. Co.*, 82 Conn. 479, 74 Atl. 773; *Hunter v. Clarke*, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; *Illinois Match Co. v. Chicago, etc., R. Co.*, 250 Ill. 396, 95 N. E. 492; *Leach v. Rains*, 149 Ind. 152, 48 N. E. 858; *Kurt v. Lanyon*, 72 Kans. 60, 82 Pac. 459; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394; *Macpherson v. Bacon's Ex.*, 180 Ky. 773, 203 S. W. 744; *American Gas, etc., Co. v. Wood*, 90 Me. 516, 38 Atl. 548, 43 L. R. A. 449; *Washburn, etc., Mfg. Co. v. Salisbury*, 152 Mass. 346, 25 N. E. 724; *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79, 13 Am. St. Rep. 344; *Cutler v. Spens*, 191 Mich. 603, 158 N. W. 224; *Myrick v. Purcell*, 95 Minn. 133, 103 N. W. 902; *American Poster Co. v. Cammack*, 139 Minn. 372, 166 N. W. 501; *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373; *Talbott v. Heinze*, 25 Mont. 4, 63 Pac. 624; *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; *Jacobs v. Mitchell*, 46 Ohio St. 601, 22 N. E. 768; *Maffett v. Thompson*, 32 Ore. 546, 52 Pac. 565, 53 Pac. 854; *Beekman v. Beekman*, 86 Wis.

together form one contract.<sup>41</sup> Though this is generally true, it is not always accurate, even though the several writings are part of the same bargain. Where one of the writings is a formal document it cannot be incorporated in an ordinary writing. A note and a mortgage to secure it are not strictly one contract, though doubtless each is to be construed in connection with the other in order to determine its meaning.<sup>42</sup> It seems further that a contemporaneous writing known to the parties may shed light on the construction of a contract without being

655, 659, 57 N. W. 1117. *Cf.* the statement in *Ingersoll-Rand Co. v. United States F. & G. Co.*, 92 N. J. L. 403, 105 Atl. 236.

"The rule is that unsigned specifications, not contained in the contract nor in terms made a part thereof by the contract itself, but referred to therein and annexed thereto, must be construed therewith. *North Bergen Board of Education v. Jaeger*, 67 N. J. L. 39, 50 Atl. 583; *Monmouth Park Ass'n. v. Warren*, 55 N. J. L. 598, 27 Atl. 932; *McGeragle v. Broemel*, 53 N. J. L. 59, 20 Atl. 857.

"But it is also the rule that, where the specifications are referred to for a specific purpose only, they become a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes. *Short v. Van Dyke*, 50 Minn. 286, 52 N. W. 643; *Harvey v. Radkey*, 1 White & W. Civ. Cas. Ct. App. 276; *Noyes v. Butler*, 98 Minn. 448, 108 N. W. 839; *Guerini Stone Co. v. P. J. Carlin Constr. Co.*, 240 U. S. 284, 36 S. Ct. 300, 60 L. Ed. 636; *White v. McLaren*, 151 Mass. 553, 24 N. E. 911; *Moreing v. Weber*, 3 Cal. App. 14, 84 Pac. 220; *Cruthers v. Donahoe*, 85 Conn. 629, 84 Atl. 322, Ann. Cas. 1913 C. 221; *Hayes v. Wagner*, 113 Ill. App. 229, aff'd 220 Ill. 256, 77 N. E. 211."

"Part only of another writing may be incorporated in a contract. *Guerini Stone Co. v. P. J. Carlin Const. Co.*,

240 U. S. 284, 36 S. Ct. 300, 60 L. Ed. 636.

"Even where the whole bargain is in one document, a similar difficulty may arise. In *Biery v. Haines*, 5 Whart. 563, 566, Kennedy, J., said:—"And if it be so, that Lucas Haines originally executed the instrument upon which the plaintiff founds his claim by setting his name and affixing his seal to it; and that John Shaffer and Adam Haines, at the same time, set their names merely thereto, declining to affix their seals: then it may be that Lucas Haines would be liable upon it, as his specialty, to the plaintiff in a separate action brought against him; and that John Shaffer and Adams Haines would be liable upon it as their notes of hand to the plaintiff, either jointly or severally in actions brought against them. In the body of the instrument it is true that the three promise jointly as well as severally, to pay, yet I apprehend that although according to the rules of law it cannot take effect as a joint obligation upon the three, still in order that it may avail, and be a security to the plaintiff, according to the main design of the parties for the payment of the money therein mentioned, rather than be considered altogether inoperative it ought to be regarded as the separate obligation of Lucas Haines, and as the joint and several promissory note of John Shaffer and Adam Haines to pay the money." 2 Bl. Com. 379; Co. Litt. 42, 2 b.

part of the contract.<sup>42</sup> And though the writings in question were neither executed on the same day,<sup>43</sup> nor made by the same parties<sup>44</sup> the later writing may so far pertain to the same transaction as the earlier that its meaning at the time and place that it was made can be understood only by reference to the earlier writing. If the writings do not pertain to the same matter it is certainly true that they are not parts of a single contract;<sup>45</sup> and if not between the same parties, or not known to both of them,<sup>46</sup> they are generally irrelevant to aid in the interpretation of one another; yet it should be observed that the existence of an earlier writing or statements made in such a writing if known to both parties to a later writing, are part of the surrounding circumstances, and however disconnected the transactions may be which gave rise to the two writings, the existence or contents of the earlier may explain the meaning of the later, and if so should be admissible in evidence. How far printing on the top of an invoice or letter heading is to be regarded as part of an offer or contract written below upon a paper has been considered elsewhere.<sup>47</sup> Doubtless if the writing below is repugnant to the printing above, the writing should be given effect rather than the printing; both because in ambiguous contracts the written portion will always be given effect rather than the print, if both cannot be made harmonious,<sup>47a</sup> and also because the position of the printing in the case supposed is such as to make it reasonable to suppose that in case of repugnancy the real meaning of the transaction is expressed by the writing, rather than the printing.<sup>48</sup>

<sup>42</sup> See *Belding v. Vaughan*, 108 Ark. 306, 157 S. W. 400; *Roberts v. Vonnegut*, 58 Ind. App. 142, 104 N. E. 321.

<sup>43</sup> *Chicago, etc., Bank v. Chicago, etc., Trust Co.*, 190 Ill. 404, 60 N. E. 586, 83 Am. St. Rep. 138; *Mt. Morris v. Thomas*, 158 N. Y. 450, 53 N. E. 214.

<sup>44</sup> *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723; *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; *Delogny v. Mercer*, 43 La. Ann. 205, 8 So. 903; *Shaw v. First Baptist Church*, 44 Minn. 22, 46 N. W. 146.

<sup>45</sup> *Clark v. Neumann*, 56 Neb. 374, 76 N. W. 892.

<sup>46</sup> *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

<sup>47</sup> *Supra*, § 90.

<sup>47a</sup> See *supra*, § 622.

<sup>48</sup> In *Sturm v. Boker*, 150 U. S. 312, 37 L. Ed. 1093, 14 S. Ct. 99, the court held that clear statements in a written contract could not be varied by the terms of a printed billhead on an invoice of goods. A similar decision is *Schenck v. Saunders*, 13 Gray, 37. In *Yorston v. Brown*, 178 Mass. 103, 59

### § 629. Surrounding circumstances may always be shown.

If the local standard is that by which the meaning of a contract is to be decided, it follows that the local meaning of the language of the writing may be proved to establish the correct application of the language to the things described. To do this involves proof of the time and place of the contract, and of any facts then and there existing which may throw light not on the intention of the parties, but on the local meaning of the writing. Therefore to put the court in the same position as the parties the circumstances under which the contract was made should always be admissible so far as they tend to show the local meaning of the language of the contract, whether or not that language is ambiguous if judged by the normal or ordinary meaning of the words; and the prevailing rule permits this.<sup>49</sup> The court

N. E. 654, however, the court held that a printed heading on a blank furnished by the plaintiff to the defendant for use in making out an order for an engraved portrait might be referred to in order to show that the order was given to the plaintiff as the publisher of a specific book, and therefore required the inclusion of the engraving in that book, and was not simply an order for an engraved portrait.

<sup>49</sup> "In the construction of written contracts the court 'is entitled to place itself in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and to judge of the meaning of the words and of the correct application of the language to the things described.' *Nash v. Towne*, 5 Wall. 699, 18 L. Ed. 527." *Phoenix Pad Mfg. Co. v. Roth*, 127 Md. 540, 96 Atl. 762, 763. See also *Oliver v. Baldwin*, 201 Mich. 336, 167 N. W. 910; *Withington v. Gypsy Oil Co. (Okl.)*, 172 Pac. 634. In *Chicago, Rock Island & P. Railway Co. v. Denver & Rio Grande R. Co.*, 143 U. S. 596, 609, 12 S. Ct. 479, 36 L. Ed. 277, the court said: "There can be no doubt whatever of the general proposition that, in the interpreta-

tion of any particular clause of a contract, the court is not only at liberty, but required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed." This was cited and applied in *Western Lumber Co. v. Willis*, 160 Fed. 27, 30, 87 C. C. A. 183. In *Nelson v. Ohio Cultivator Co.*, 188 Fed. 620, 623, 112 C. C. A. 394, this court said: "Notwithstanding the apparent meaning of the language of his obligation of October 27th, considering it in the light of the circumstances which surrounded its execution, evidence of which was admissible, . . .

It must be held to mean, on the record submitted, that the security it called for was to be furnished the defendant before it entered upon the manufacture of the machines." In *Lexington & Big Sandy R. Co. v. Moore*, 140 Ky. 514, 517, 131 S. W. 257, the court said: "In aid of what the parties intended it is admissible in the construction of many contracts that are on their face free from ambiguity to consider their situation and the circumstances and conditions sur-



will put itself in the position of the parties.<sup>50</sup> If the normal standard were the test, the rule would properly be as it is still not infrequently stated that only where the language is ambiguous on the face of the writing, can the circumstances under which the contract was made be admitted.<sup>51</sup>

rounding them at the time the contract was entered into,—not for the purpose of modifying or enlarging or curtailing its terms, but to shed light upon the intention of the parties.” And see cases cited *supra*, § 608, *ad fin.*; also *Bank of New Zealand v. Simpson*, [1900] A. C. 182; *Bradley v. Steam Packet Co.*, 13 Pet. 89, 99, 10 L. Ed. 72; *Alaska Treadwell Gold Min. Co. v. Alaska Gastineau Min. Co.*, 214 Fed. 718, 131 C. C. A. 24; *Jorgensen v. Tuolumne County*, 205 Fed. 612, 123 C. C. A. 628; *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 So. 715; *Roach v. McDonald*, 187 Ala. 64, 65 So. 823; *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845; *Hastings Industrial Co. v. Copeland*, 114 Ark. 415, 169 S. W. 1185; *Shaw v. Pope*, 80 Conn. 206, 209, 67 Atl. 495; *Goldfarb v. Cohen*, 92 Conn. 277, 102 Atl. 649; *Schurger v. Moorman*, 20 Idaho, 97, 108, 117 Pac. 122, 36 L. R. A. (N. S.) 313; *Geithman v. Eichler*, 265 Ill. 579, 107 N. E. 180; *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722; *Pratt v. Prouty*, 104 Ia. 419, 422, 73 S. W. 1035, 65 Am. St. Rep. 472; *Anse, etc., Oil Co. v. Babb*, 122 La. 415, 425, 47 So. 754; *Phoenix Pad Mfg. Co. v. Roth*, 127 Md. 540, 96 Atl. 762; *Sweat v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; (“Horn chains” were shown by extrinsic facts to mean chains made partly of hoof and partly of horn); *Interior Linseed Co. v. Becker-Moore Paint Co.*, 273 Mo. 433, 202 S. W. 566; *Kenyon Printing & Mfg. Co. v. Barnsley Bros. Cutlery Co.*, 143 Mo. App. 518, 522, 127 S. W. 666; *Mecca Realty Co. v. Kellogg’s Toasted Corn Flakes Co.*, 151 N. Y. S. 750, 166 N. Y. App.

Div. 74; *Simmons v. Groom*, 167 N. C. 271, 83 S. E. 471; *McCulsky v. Klosterman*, 20 Oreg. 108, 25 Pac. 368, 10 L. R. A. 785; *McMillin v. Titus*, 222 Pa. 500, 503, 72 Atl. 240; *Phetteplace v. British, etc., Ins. Co.*, 23 R. I. 26, 49 Atl. 33; *Cohen v. P. E. Harding Const. Co. (R. I.)*, 103 Atl. 702; *Berry v. Marion County Lumber Co.*, 108 S. Car. 108, 93 S. E. 328, Ann. Cas. 1918 E. 877; *Lipscomb v. Fuqua*, 103 Tex. 585, 589, 131 S. W. 1081; *Elswick v. Deskina*, 75 W. Va. 109, 83 S. E. 283.

<sup>50</sup> *Wright v. Vocalion Organ Co.*, 148 Fed. 209, 79 C. C. A. 183; *O. H. Jewell Filter Co. v. Kirk*, 200 Ill. 382, 65 N. E. 698; and see cases in the preceding note.

<sup>51</sup> *Carr v. Montefiore*, 5 B. & S. 408, 428. “The contract of insurance, though a mercantile instrument, is to be construed according to the same rules as all other written contracts, namely, the intention of the parties, which is to be gathered from the words of the instrument interpreted together with the surrounding circumstances. If the words of the instrument are clear in themselves the instrument must be construed accordingly, but if they are susceptible of more meanings than one, then the Judge must inform himself by the aid of the jury and the surrounding circumstances which bear on the contract.” (*Cf.* the English decisions in § 608, *ad fin.*, to the effect that apparently unambiguous language may be shown to bear other than its apparently clear meaning.)

So in Massachusetts it is said: “If there is no ambiguity in the agreement

In regard to some of these statements, it may be guessed that the court in denying the admissibility of evidence of surrounding circumstances to vary the meaning of an apparently clear writing, meant no more than that in the particular case the evidence offered would not persuade any reasonable man that the writing meant anything other than the normal meaning of its words would indicate and that therefore it was useless to hear the evidence. On the other hand, in many cases where evidence of surrounding circumstances has been admitted, the language of the contract in question, if given its normal meaning, was in fact ambiguous, so that no necessity arose for the court to decide whether admission of such evidence is dependent upon ambiguity. The correct principle has been well summarized in a recent decision.<sup>52</sup> "All the attendant facts constituting the setting of a contract are admissible, so long as

itself, the answer must be found from the terms of the instrument alone." *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 107, 72 N. E. 345; *Strong v. Carver Cotton Gin Co.*, 197 Mass. 53, 59, 83 N. E. 328; *Hodgens v. Sullivan*, 209 Mass. 533, 95 N. E. 969; *Waldstein v. Dooskin*, 220 Mass. 232, 107 N. E. 927.

In *Zohrlaut v. Mengelberg*, 124 N. W. 247, 252, 144 Wis. 564, the court said: "In answer to the contention of counsel that testimony of the circumstances surrounding and leading up to the making of a written contract are always admissible for the purpose of putting the court in the position of the parties at the time the contract was made, this court has said: 'Not so. Where there is no ambiguity in the contract, either in its literal sense, or when it is applied to the subject thereof, it must speak for itself, entirely unaided by extrinsic matters. Where such ambiguity does exist, then evidence of the circumstances under which the contract was made is proper to enable the court, in the light thereof, to read the instrument in the sense the parties intended, if that can

be done without violence to the rules of language or of law.' *Johnson v. Pugh*, 110 Wis. 167, 170, 85 N. W. 641, 642. Parties cannot use terms with a fixed and certain meaning, and then disclaim such meaning." See also *New Brantner Ditch Co. v. Kramer*, 57 Col. 218, 141 Pac. 498; *Jacobs v. Parodi*, 50 Fla. 541, 555, 39 So. 833; *Adams v. Gordon*, 265 Ill. 87, 106 N. E. 517; *Indiana Natural Gas Co. v. Stewart*, 45 Ind. App. 554, 559, 90 N. E. 384; *Chanute Brick Co. v. Gas Belt Fuel Co.*, 82 Kans. 752, 109 Pac. 398; *Crawford v. Elliott*, 78 Mo. 497, 500; *Hodgens v. Sullivan*, 209 Mass. 533, 95 N. E. 969; *United Boxboard, etc., Co. v. McEwan Bros. Co.* (N. J. Eq.), 76 Atl. 550, 553; *Neal v. Camden Ferry Co.*, 166 N. C. 563, 82 S. E. 878; *Mosier v. Parry*, 60 Oh. St. 388, 54 N. E. 364; *Burton v. Forest Oil Co.*, 204 Pa. 349, 355, 54 Atl. 266; *Daly v. Old*, 35 Utah, 74, 99 Pac. 460; *Burt v. Stringfellow*, 45 Utah, 207, 143 Pac. 234; *McMillan v. Holley*, 145 Wis. 617, 627, 130 N. W. 455.

<sup>52</sup> *Eustis Mining Co. v. Beer*, 239 Fed. 976, 985, by Learned Hand, J.

they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might 'contradict' the contract—that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. Yet, as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include." Whatever may be the propriety of admitting evidence of extrinsic facts where the meaning of the instrument is apparently clear, there is no question that such evidence is admissible in every jurisdiction where there is no clear apparent meaning.<sup>53</sup> It must be kept in mind, however, that the only purpose for which such evidence is ever admissible in an action on the contract, is to interpret the writing. So far as the evidence tends to show not the meaning of the writing but an intention wholly unexpressed in the writing, it is irrelevant.<sup>54</sup>

### § 630. Previous negotiations.

The only kind of evidence which may be offered under a rule admitting proof of surrounding circumstances which is likely to cause difficulty, is that relating to previous negotiations between the parties, especially if these negotiations lead to the formation of the subsequent written contract in question. There is an apparent inconsistency in asserting that the interpretation of the writing depends on the meaning of the language contained in it according to a local standard, and yet admitting evidence which may tend to show an intent of the parties at variance with the natural meaning of the words of the writing at the time and place when the writing was made. Such negotiations, however, may be logically relevant for two purposes, the second of which is legally permissible, though the first is not:—(1) to prove an actual intent of the

<sup>53</sup> See cases in this section *passim*, also *Quarry Co. v. Clements*, 38 Ohio St. 587, 43 Am. Rep. 442.

<sup>54</sup> See *supra*, § 610.

parties at variance with the words of the writing when those words are given their appropriate local meaning; and, (2) to prove the meaning of the written words not by showing that the parties intended them to mean something different from what other persons at the same time and place, and dealing with the same subject-matter would attach to them, but to prove that the parties were dealing in regard to a matter or to secure an object, or under circumstances where local usage would give a particular meaning to the language; or in case the local meaning is ambiguous, to show that the parties attached one appropriate meaning to their words, rather than another equally appropriate meaning.<sup>55</sup> If the parties were dealing in regard to rabbits, and locally at that time when rabbits were in question, 1,000 bore the meaning of 1,200, it could be shown

<sup>55</sup> *Birch v. Depeyster*, 1 Stark. 210. (By his contract a ship captain was to receive certain pay instead of "privilege and primage." Evidence was held admissible of a conversation before the writing was made relating to the right of the captain to use the cabin for transporting goods. This evidence explained the meaning otherwise doubtful of the quoted words); *Macdonald v. Longbottom*, 1 El. & El. 977 (prior conversation between the parties was admitted to prove that the words "your wool" included not only wool from the plaintiff's own sheep, but also wool that the plaintiff had contracted for); *Mumford v. Gething*, 7 C. B. (N. S.) 305. (The word "ground" was proved to mean the midland district in order to determine whether the contract in question was in restraint of trade); *Bank of New Zealand v. Simpson*, [1900] A. C. 182. (oral preliminary negotiations admitted to show the meaning of "total cost"); *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361. ("Dollars" was proved to mean confederate money by proof of contemporaneous agreement); *Kelly v. Fejervary*, 111 Ia. 693, 83 N. W. 791 (negotiations were

admitted to prove whether "liquidated damages" provided for were in reality a penalty); *Blair v. Corby*, 37 Mo. 313 (the meaning to the parties of "hard-pan" was shown by oral agreement not to include hardened earth); *Almgren v. Dutilh*, 5 N. Y. 28 (conversation was permitted to prove that "necessary" in a contract did not mean indispensable). See also *Merriam v. United States*, 107 U. S. 437, 27 L. Ed. 531, 2 S. Ct. 536; *English v. Shelby*, 116 Ark. 212, 172 S. W. 817; *Millikin v. Starr*, 79 Ill. App. 443, 448; *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85; *Sweat v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 200, 80 N. E. 527, 9 L. R. A. (N. S.) 966, 120 Am. St. Rep. 539; *Putnam-Hooker Co. v. Hewins*, 204 Mass. 426, 430, 90 N. E. 983; *Tufts v. Greenewald*, 66 Miss. 360, 6 So. 156; *Field v. Munson*, 47 N. Y. 221; *Quarry v. Clements*, 38 Ohio St. 587, 43 Am. Rep. 442; *McMillin v. Titus*, 222 Pa. 500, 503, 72 Atl. 240; *Hart v. Hammett*, 18 Vt. 127; *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659; *Beason v. Kurz*, 66 Wis. 448, 29 N. W. 230.

to explain a written contract which did not name the kind of animals to which it related that the oral negotiation of the parties related to rabbits, though it could not be shown, had they been dealing in regard to horses, that they specially agreed that as between themselves 1,000 should bear the meaning of 1,200. The importance of facts existing at the time when the written contract was entered into, as an aid to the interpretation of the writing, will generally be dependent on the knowledge by the parties of these facts. This may be shown by their previous negotiations;<sup>56</sup> though if the facts are of general notoriety the parties' knowledge of them will be presumed.<sup>57</sup> If, then, facts known to the parties to the agreement may be shown, it may be urged that not only are the negotiations and agreements between the parties prior to the formation of the written contract in question facts like any others but that their intentions orally manifested as to the meaning of their contract are also facts and may therefore be shown. It is true that even such intentions are facts within

<sup>56</sup> In *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 200, 80 N. E. 527, 9 L. R. A. (N. S.) 986, 120 Am. St. Rep. 539, the court said: "When the parties by the language they have employed leave their meaning obscure and uncertain when applied to the subject-matter, then the expressions and general tenor of speech used in the previous negotiations, even if coming as they usually must from one or the other of the parties themselves, are admissible to show the conditions existing at the time the transaction was under consideration."

In *Laclede Construction Co. v. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76, the court said: "Now, the words, 'the ties you may need' during 1899, or 'ties as needed,' while plain words, are susceptible of various meanings according as the context in which they appear may throw light upon them or the subject-matter with respect to which they are used. We instinctively ask, 'needed' for what? Merely for

repairs of the railway then constructed, or 'needed' for new extensions which were made known to defendant when it contracted to furnish them, or 'needed' in the sense of all ties to the number of one million that the plaintiff might elect to purchase for *general commercial purposes*? We think clearly it was competent to show the circumstances in which the contract was made and the declaration of plaintiff's president as to the purpose for which he would need them.

In *Ward's Adm'r v. Preferred Accident Ins. Co.*, 80 Vt. 321, 67 Atl. 821, 822, the court said: "In the construction of contracts, the circumstances in which the parties contract may be looked at, and their common knowledge and understanding is sometimes, and is here, such a circumstance."

<sup>57</sup> *Anse La Butte Oil, etc., Co. v. Babb*, 122 La. 415, 425, 47 So. 745; *Woodruff v. Woodruff*, 52 N. Y. 53; *McMillin v. Titus*, 222 Pa. 500, 503, 72 Atl. 240.

the natural meaning of that word, but the law distinguishes such facts from other facts surrounding the transactions. Their value from the standpoint of logical relevancy is merely to indicate by the oral statements of the parties themselves the terms of the contract they intended to make when they entered into the written contract. It is a consequence of the parol evidence rule that such intentions are ineffectual. The writing merges the prior oral agreements,<sup>58</sup> and evidence of them is

<sup>58</sup> *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 57 U. S. App. 638, 30 C. C. A. 532, *certiorari*, denied, 171 U. S. 687, 18 S. Ct. 944; *Kessler v. Perillou*, 132 Fed. 903, 66 C. C. A. 113; *United States v. Conkling*, 135 Fed. 508, 68 C. C. A. 220; *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758; *Lefler v. New York Life Ins. Co.*, 143 Fed. 814, 74 C. C. A. 488; *Lambie v. Sloss Iron Works*, 118 Ala. 427, 24 So. 108; *Sellers v. Dickert*, 185 Ala. 206, 64 So. 40; *Tedford Auto Co. v. Thomas*, 108 Ark. 503, 158 S. W. 500; *Anderson v. Wainwright*, 67 Ark. 62, 53 S. W. 566; *United Iron Works v. Outer Harbor Dock, etc., Co.*, 168 Cal. 81, 141 Pac. 917; *Heard v. Tappan*, 116 Ga. 930, 43 S. E. 375; *Adams v. Bridges*, 141 Ga. 418, 81 S. E. 203; *Borggard v. Gale*, 107 Ill. App. 128, 205 Ill. 511, 68 N. E. 1063; *Ellis v. Conrad Seipp Brewing Co.*, 207 Ill. 291, 69 N. E. 808; *Carr v. Hays*, 110 Ind. 408, 11 N. E. 25; *Ralya v. Atkins*, 157 Ind. 331, 61 N. E. 726; *Burgher v. Chicago, etc., Ry. Co.*, 105 Ia. 335, 75 N. W. 192; *Kinney v. Reed*, 164 Ia. 337, 145 N. W. 900; *Sexton v. Lamb*, 237 Kans. 426; *Van Fossen v. Gibbs*, 91 Kans. 866, 139 Pac. 174; *Singer Mfg. Co. v. Witt*, 118 Ky. 344, 80 S. W. 1124; *McLeod v. Johnson*, 96 Me. 271, 52 Atl. 760; *Scott v. Baltimore, etc., R. Co.*, 93 Md. 475, 49 Atl. 327; *Marr v. Washburn & M. Mfg. Co.*, 167 Mass. 35, 44 N. E. 1062; *Loomer v. Harlow*, 214 Mass. 415, 102 N. E. 333; *Went-*

*worth v. Manhattan Market Co.*, 216 Mass. 374, 103 N. E. 1105; *Sax v. Detroit, etc., R. Co.*, 129 Mich. 502, 89 N. W. 368; *Hapke v. Davidson*, 180 Mich. 138, 146 N. W. 624; *Thompson v. Thompson*, 78 Minn. 379, 81 N. W. 204, 543; *Chicago, etc., Mfg. Co. v. Higginbotham (Miss.)*, 29 So. 79; *Hall v. Small*, 178 Mo. 629, 77 S. W. 733; *Largey v. Leggat*, 30 Mont. 148, 75 Pac. 950; *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843; *Shattuck v. Robbins*, 68 N. H. 565, 44 Atl. 694; *Alexander v. Ferguson*, 73 N. J. L. 479, 63 Atl. 998; *King v. Hudson River Realty Co.*, 210 N. Y. 467, 104 N. E. 926; *Disbrow v. Disbrow*, 46 N. Y. App. Div. 111, 61 N. Y. S. 614, *affid.* 167 N. Y. 606, 60 N. E. 1110; *Townsend v. Greenwich Ins. Co.*, 86 N. Y. App. Div. 323, 83 N. Y. S. 909, *affid.* 178 N. Y. 634, 71 N. E. 1140; *Spencer v. Huntington*, 100 N. Y. App. Div. 463, 91 N. Y. S. 561, *affid.* 183 N. Y. 506, 76 N. E. 1109; *Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okl. 579, 585, 69 Pac. 936; *Hilgar v. Miller*, 42 Ore. 552, 72 Pac. 319; *Johnson v. Stewart*, 243 Pa. 485, 90 Atl. 349; *Zanturjian v. Boornesian*, 25 R. I. 151, 55 Atl. 199; *Saunders Ex. v. Weeks (Tex. Civ. App.)*, 55 S. W. 33; *McCall Co. v. Jennings*, 26 Utah, 459, 73 Pac. 639; *Carlin v. Fraser*, 105 Va. 216, 53 S. E. 145; *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Providence, etc., Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679; *Vogt v. Shienebeck*, 122 Wis. 491, 100 N. W.

inadmissible subject to three exceptions—(1) If reformation or rescission of the writing is in question. (2) If the words of the writing will express equally well the intention shown by the oral negotiations, and another intention. The negotiations may then be used to show the actual intention of the parties not to subject them to a contract not expressed in the writing, but to show that the words of the writing bear a particular meaning.<sup>59</sup> (3) Where the writing is not a complete integration of the parties' agreement, and the oral agreement is intended to retain an independent collateral existence. The limits of this principle are hereafter considered.

### § 631. Parol evidence rule.

The interpretation or construction of writings cannot be fully discussed without reference to the parol evidence rule. That rule, in spite of its name, is not only not a rule of evidence, as has been abundantly shown by Thayer and Wigmore, but is not a rule of interpretation or of construction. It is a rule of substantive law which, when applicable, defines the limits of a contract. It fixes the subject-matter for interpretation, though not itself a rule of interpretation.<sup>60</sup> Except in suits for the rescission or reformation of contracts, or where a suit for specific performance is resisted on the ground of mistake, the rule is as fully applicable to suits in equity as to actions at law.<sup>61</sup>

820, 67 L. R. A. 756, 106 Am. St. Rep. 989.

<sup>59</sup> See *supra*, § 613.

<sup>60</sup> *Goldenberg v. Tagliano*, 218 Mass. 357, 359, 105 N. E. 883; *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490. A contract, said Pollock, C. B., in *Nichol v. Godts*, 10 Exch. 191, 194, "must be read according to what is written by the parties, for it is a well-known principle of law, that a written contract cannot be altered by parol. If A. and B. make a contract in writing, evidence is not admissible to show that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it.

If that sort of evidence were admitted, every written document would be at the mercy of witnesses who might be called to swear anything." See also *Bank of Australasia v. Palmer*, [1897] A. C. 540, 545.

<sup>61</sup> *Martin v. Pycroft*, 2 DeG. M. & G. 785, 795; *Sawyer v. Hovey*, 3 Allen, 331, 333, 81 Am. Dec. 659; *Ferry v. Stephens*, 66 N. Y. 321, 324. In *Vermont Marble Co. v. Eastman*, 91 Vt. 425, 101 Atl. 151, 161, the court said: "This action [a bill in equity to settle boundaries] does not involve the reformation of any instrument of conveyance given by Mead; and it can serve no good purpose to conjec-

Most commonly the rule is invoked when suit is brought upon the written contract in order to preclude an attack upon the terms of the writing as the complete statement of the contract, but the rule also denies validity to a subsidiary agreement within its scope if sued on as a separate contract, although except for the parol evidence rule, the agreement fulfils all the requisites of a valid contract.<sup>62</sup>

In a discussion of the parol evidence rule a distinction should be observed between

1. Contracts under seal;
2. Contracts required by law to be in writing;
3. Contracts which are in fact in writing but not under seal, or required by law to be written.

It was a rule long established of the English law and accepted in the United States that a contract under seal could not subsequently be varied either by oral agreement or by written unsealed agreement. This rule persisted until recently, and to some degree still persists in some jurisdictions.<sup>63</sup> Moreover, a rule, relics of which still remain, estopped the maker of a deed to deny the truth of its recitals.<sup>64</sup> In many jurisdictions even to-day, a conveyance must be under seal, and so must releases or promises made without consideration. The effect of parol promises upon such instruments may be governed by the circumstance that they are under seal, not merely in writing.

ture why, in making the description of the land in the bonds and in the deeds given pursuant to the bonds, the survey and the plan made by Brown were not followed. The departure therefore in each instance is so material and so marked as to indicate a change of purpose. The descriptions adopted show unusual care and precision in their framing. Whatever may have been previously done or said by the parties to the transactions, relative to that survey and plan, such acts and declarations were merged in the written instruments subsequently executed on the one hand and accepted on the other; and neither the survey nor the plan can have any force in this

case, beyond what bearing it may have, if any, by reason of its subsequent use by the parties in connection with the asserted recognition of, or acquiescence in, the line now claimed by defendants. Extrinsic evidence is not admissible to show that, by mistake, one tract of land instead of another was inserted in either of those deeds, thereby really establishing a different contract. *McDuffie v. Magoon*, 26 Vt. 518; *Pitts v. Brown*, 49 Vt. 86, 24 Am. Rep. 114."

<sup>62</sup> See, e. g., *O'Malley v. Grady*, 222 Mass. 202, 109 N. E. 829, and cases cited *infra*, § 643.

<sup>63</sup> See *infra*, § 1849.

<sup>64</sup> See *supra*, § 115a, *infra*, § 647.



Where the Statute of Frauds requires a contract to be in writing the whole contract must be in writing, and oral changes or additions either contemporaneous or subsequent are necessarily invalid apart from the parol evidence rule.<sup>65</sup>

The application to unsealed contracts of a prohibition of contemporary oral agreements seems to have been first made owing to a mistaken analogy with sealed instruments.<sup>66</sup> But the analogy of sealed instruments has not been completely followed and it is important to observe that the reasons which forbid the addition of oral extensions to formal contracts and to contracts within the Statute of Frauds are not applicable to other written contracts. In dealing with the latter we have to do only with the parol evidence rule itself, while in dealing with the former we have not only that rule to consider, but other principles as well.

### § 632. Scope of the rule.

Wigmore in his keen analysis of the subject conceives of the so-called parol evidence rule as in reality a group of rules defining the constitution of legal acts, and he divides every legal act into four possible elements:

"(A), The Enaction, or Creation, of the act; (B), its Integration, or embodiment in a single memorial, when desired; (C), its Solemnization, or fulfilment of the prescribed forms, if any; and (D), the Interpretation, or application of the act to the external objects affected by it."<sup>67</sup> The enaction or creation of the act is concerned with the question whether an act has been created and, if so, whether it is voidable. For instance, whether a formal contract has been delivered or whether a contract is voidable for fraud. The integration of the act consists in embodying it in a single memorial as a writing. The solemnization concerns the forms which the law requires, as signature of a memorandum under the Statute of Frauds—seals on bonds or deeds, certain requisites in negotiable paper.

<sup>65</sup> See *supra*, §§ 592 *et seq.*

<sup>66</sup> *Meres v. Ansell*, 3 Wils. 275. See comment of Thayer, in *Preliminary Treatise on Evidence*, p. 402.

<sup>67</sup> Wigmore on *Evidence*, § 2401. It

should be observed that (A), (B) and (C) may all take place simultaneously. There may be no legal act until (B) and (C) have occurred.

The interpretation defines the effect of the act in its application to external objects. These various problems are doubtless closely connected with the parol evidence rule, and in particular cases there is often confusion in distinguishing one principle from another. Nevertheless what is known as the parol evidence rule is but a single rule. As applied to contracts, it assumes that there has been a legal act consisting of a promise or set of promises; it also assumes the integration of that act in a written memorial. It assumes the proper interpretation of a written memorial according to some standard which the law adopts; and these assumptions being made, excludes from consideration all other elements of the act though they might have been material had there been no integration in a written memorial. In other words, the written memorial, as interpreted by the law, is, for legal purposes, the sole act of the parties in regard to the matter up to the time of the integration. In speaking of the rule, Wigmore says:—<sup>68</sup>

“(1) The parol-evidence rule is not a rule of evidence;<sup>68a</sup> (2) nor is it only a rule for things parol; (3) nor is it a single rule; (4) nor is it all of the rules that concern either parol or writing; (5) nor does it involve the assumption that a writing can possess, independently of the surrounding circumstances, any inherent status or efficacy.”

All of these statements seem true except the third, that the rule is not a single rule. (All courts agree that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject-matter are excluded from consideration whether they were oral or written. All courts agree also that subsequent agreements may be shown, and are not rendered ineffective by the prior writing.<sup>69</sup> All courts agree that the written memorial must be interpreted according to legal rules, and that when so interpreted meanings may sometimes be given to it which would not have been apparent without parol evidence. The difference of decision concerns this question:—When is an extrinsic

<sup>68</sup> Wigmore on Evidence, § 2401.

<sup>68a</sup> Upon this, see Thayer, Preliminary Treatise on Evidence, 390 *et seq.*

<sup>69</sup> If the prior writing was under seal,

the subsequent act may be ineffectual. See *infra*, § 1849, but this depends on the rules governing sealed instruments, not on the parol evidence rule.

agreement or term of an agreement which existed prior to the integration, or was made simultaneously with it, so far a separate and distinct matter as to be capable of existence as an independent legal act? and how far, on the other hand, must it be disregarded as a futile attempt to change the effect of the legal act integrated in the written memorial?) The parol evidence rule does not forbid the contradiction of an instrument which purports merely to recite facts—like a receipt.<sup>70</sup> How far recitals of fact in a deed may be contradicted has been previously considered.<sup>71</sup>

### § 633. Integration depends upon intent.

The parol evidence rule does not apply to every contract of which there is written evidence, but "only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement."<sup>72</sup> It is not essential to integration that the writings in question should be of a formal character. Letters and telegrams are sufficient.<sup>73</sup> Acceptance of a written contract as such is sufficient though it is not signed by the party accepting it.<sup>74</sup> On the other hand,

<sup>70</sup> "A receipt in full of all claims and demands, given as evidence of such settlement, does not conclude the parties as to a claim which affirmatively appears not to have been included in the settlement negotiations." Held *v. Keller*, 135 Minn. 192, 160 N. W. 487, 490, citing: 1 Dunnell's Dig. 44; *Matheney v. Eldorado*, 82 Kans. 720, 109 Pac. 166, 28 L. R. A. (N. S.) 980; *Harrison v. Henderson*, 67 Kans. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386. See also *Hudson v. Merchants Reserve L. Ins. Co.*, 204 Ill. App. 306; *American Home L. Ins. Co. v. Citizens' State Bank (Okl.)*, 168 Pac. 437; *Jones v. Campbell*, (Vt. 1917), 102 Atl. 102; *Jones-Rosquist-Killen Co. v. Nelson*, 98 Wash. 539, 167 Pac. 1130.

<sup>71</sup> *Supra*, § 115a.

<sup>72</sup> *Pollock, C. B., Harris v. Rickett*, 4 H. & N. 1. See also *Eustis Mining*

*Co. v. Beer*, 239 Fed. 976, 982; *Chamberlain v. Lealey*, 39 Fla. 452, 22 So. 736; *Hills v. Hopp*, 201 Ill. App. 554; *Bice v. Siver*, 170 Ia. 255, 152 N. W. 498; *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. 819; *Herring-Hall-Marvin Safe Co. v. Balliet*, 38 Nev. 164, 145 Pac. 941; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Routledge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111; *H. Leonard Simmons Co. v. Goldfarb*, 150 N. Y. S. 547; *Faust v. Rohr*, 167 N. C. 360, 83 S. E. 622; *City Messenger Co. v. Postal Telegraph Co.*, 74 Oreg. 433, 145 Pac. 657.

<sup>73</sup> *Calcutta, etc., Co. v. DeMattos*, 32 L. J. (N. S.) Q. B. 322; *Brown v. Davidson*, 42 Okl. 598, 142 Pac. 387.

<sup>74</sup> *Manufacturers', etc., Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847. See also *supra*, § 90.

where it is contemplated that there shall be a later writing integrating the agreement of the parties, the contents of an earlier writing may be contradicted by parol.<sup>75</sup> Since it is only the intention of the parties to adopt a writing as a memorial which makes that writing an integration of the contract, and makes the parol evidence rule applicable, any expression of their intention in the writing in regard to the matter will be given effect. If they provide in terms that the writing shall be a complete integration of their agreement or that it shall be but a partial integration, or no integration at all, the expressed intention will be effectuated.<sup>76</sup> The parties, however, rarely express their intention upon this point in the writing, and if the court may seek this intention from extrinsic circumstances, the very fact that parties made a contemporaneous oral agreement will of itself prove that they did not intend the writing to be a complete memorial. The only question open would be whether such a contemporaneous oral agreement was in fact made. Even if the oral agreement is repugnant to the writing, what was orally agreed would be of equal importance with what was written, since its existence would prove that there was no complete integration of the contract in regard to the matter to which it related. The parol evidence rule would then be of importance only as establishing a presumption that prior and contemporaneous oral agreements and negotiations were merged in the writing, but the practical value of the rule would be much impaired if either party to a writing were allowed to rebut the presumption by proof of any contemporaneous oral agreement. Certainly the law does not permit this. The question arises chiefly where it is asserted not that there is no integration at all, but only a partial integration. It is generally held that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms.<sup>77</sup> Frequently, it is not a necessary inference

<sup>75</sup> *Brautigam v. Dean*, 86 N. J. 676, 89 Atl. 760.

<sup>76</sup> *Samuel H. Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048.

<sup>77</sup> *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 35 L. Ed. 837, 12 S. Ct. 46; *Dennis v. Slyfield*, 117 Fed.

474, 54 C. C. A. 520; *Telluride Power Co. v. Crane Co.*, 208 Ill. 218, 226, 70 N. E. 319; *Pierce v. Woodward*, 6 Pick. 206; *Ogooshevitz v. Arnold*, 197 Mich. 203, 212, 163 N. W. 846, 165 N. W. 633; *Naumberg v. Young*, 44 N. J. L. 331, 341; *Thomas v. Scutt*, 127

from the writing itself either that it is a statement of the whole agreement, or that it is not. In such a case it has been held that parol evidence is admissible to show which is the fact.<sup>78</sup> The difficulty with such a principle lies in its application. No written contract which does not in terms state that it contains the whole agreement (and few do so provide though it would be generally a wise provision) precludes the possible supposition of additional parol clauses, not inconsistent with the writing. The matter has been well summed up by Finch, J.:<sup>79</sup> "If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation<sup>80</sup> it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract."

**§ 634. It may be shown that the writing has never become effective.**

The parol evidence rule does not become applicable unless the parties have assented to a certain writing or writings as the statement of a contract between them. Accordingly it not only may be shown by parol evidence that a writing was

N. Y. 133, 27 N. E. 961; *Dixon v. Blondin*, 58 Vt. 689, 5 Atl. 514; *Van Doren & Co. v. Guardian Casualty & Co.*, 99 Wash. 68, 168 Pac. 1124; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620.

<sup>78</sup> *Malpas v. London & S. W. Ry. Co.*, L. R. 1 C. P. 336; *Peabody v. Bement*, 79 Mich. 47, 44 N. W. 416; *Samuel H. Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048. See also

*Brennecke v. Heald*, 107 Ia. 376, 77 N. W. 1063.

<sup>79</sup> *Eighmie v. Taylor*, 98 N. Y. 288, 294.

<sup>80</sup> The ordinary principles of interpretation should be applied and therefore evidence of surrounding circumstances admitted. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

never executed or delivered as a contract,<sup>81</sup> or that assent thereto was impaired by fraud,<sup>82</sup> illegality,<sup>83</sup> duress,<sup>84</sup> mistake,<sup>85</sup> or failure of consideration,<sup>86</sup> rendering the contract void or voidable; but also (if the writing is unsealed) that parties agreed by parol that the writing in question should not become effective until some future day or the happening of some contingency, if this is not inconsistent with the express terms of the writing.<sup>87</sup> Even where the writing itself states one con-

<sup>81</sup> *Versan v. McGregor*, 23 Cal. 339; *Uhl v. Moorhous*, 137 Ind. 445, 37 N. E. 366; *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361.

<sup>82</sup> *Suravits v. Pristass*, 201 Fed. 335, 119 C. C. A. 573; *First Nat. Bank v. Fox*, 40 Dist. Col. App. 430; *Chicago, etc., Co. v. Butler*, 139 Ga. 816, 78 S. E. 244; *Bank of Bushnell v. Buck*, 161 Ia. 362, 142 N. W. 1004; *Smith & Nixon Co. v. Morgan*, 152 Ky. 430, 153 S. W. 749; *Fletcher v. Willard*, 14 Pick. 464; *J. B. Millet Co. v. Andrews*, 175 Mich. 350, 141 N. W. 578; *Tiffany v. Times Square Auto Co.*, 168 Mo. App. 729, 154 S. W. 865; *J. I. Case, etc., Co. v. McKay*, 161 N. C. 584, 77 S. E. 848; *American Trust Co. v. Chitty*, 36 Okl. 479, 129 Pac. 51; *Kinnear & Gagar Mfg. Co. v. Miner*, 88 Vt. 324, 92 Atl. 459.

<sup>83</sup> *Collins v. Blantern*, 2 Wils. 341; *Roe v. Kiser*, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288; *Waters v. Pearson*, 39 Dist. Col. App. 10; *Smith v. David B. Crockett Co.*, 85 Conn. 282, 82 Atl. 569, 39 L. R. A. (N. S.) 1148; *Friend v. Miller*, 52 Kans. 139, 34 Pac. 397, 39 Am. St. Rep. 340; *Sherman v. Wilder*, 106 Mass. 537; *Taylor v. Perkins*, 171 Mo. App. 246, 157 S. W. 122; *Hinton v. Mutual Reserve Fund Life Assoc.*, 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161, 102 Am. St. Rep. 545; *Manufacturers', etc., Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847.

<sup>84</sup> See cases of duress, *passim*, *infra*, §§ 1601 *et seq.*

<sup>85</sup> *Baker v. Paine*, 1 Ves. 456; *Jersey Farm Co. v. Atlantic Realty Co.*, 164 Cal. 412, 129 Pac. 593; *Gray v. Merchants' Insurance Co.*, 113 Ill. App. 537; *Maffet v. Schaar*, 89 Kan. 403, 131 Pac. 589; *Somerville v. Coppage*, 101 Md. 519, 61 Atl. 318; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228; *Palmer v. Lowder*, 167 N. C. 331, 83 S. E. 464.

<sup>86</sup> *Farrington v. McNeill*, 174 N. C. 420, 93 S. E. 957. See cases of rescission for breach of contract, *passim*, *infra*, §§ 1455 *et seq.*

<sup>87</sup> *Davis v. Jones*, 17 C. B. 625; *Wallis v. Littell*, 11 C. B. (N. S.) 369; *Lindley v. Lacey*, 17 C. B. (N. S.) 578; *Tug River Coal Co. v. Brigel*, 86 Fed. 818, 30 C. C. A. 415; *American Sales Book Co. v. Whitaker*, 100 Ark. 360, 140 S. W. 132, 37 L. R. A. (N. S.) 91; *Cochran v. Shull*, 115 Ark. 226, 170 S. W. 997; *Versan v. McGregor*, 23 Cal. 339; *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Robinson v. Nessel*, 86 Ill. App. 212; *Converse v. Independent Breweries Co.*, 199 Ill. App. 137; *Uhl v. Moorhous*, 137 Ind. 445, 37 N. E. 366; *Stroupe v. Hewitt*, 90 Kan. 200, 133 Pac. 562; *Southern St. Ry. Advertising Co. v. Metropole Shoe Mfg. Co.*, 91 Md. 61, 46 Atl. 513; *Elastic Tip Co. v. Graham*, 185 Mass. 597, 71 N. E. 117; *Church v. Case*, 110 Mich. 621, 68 N. W. 424; *Ada Dairy Assoc. v. Mears*, 123 Mich. 470, 82 N. W. 258; *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Samuel Chute Co. v. Latta*,

dition precedent to its effectiveness, evidence has been admitted to show that another condition was orally agreed upon.<sup>88</sup> Where, however, a sealed instrument is delivered to the grantee or obligee no parol condition deferring its effect can be shown in most jurisdictions,<sup>89</sup> and this principle has occasionally been extended to unsealed written contracts.<sup>90</sup> Even though an instrument is under seal, lack of the intent necessary to constitute delivery may be shown.<sup>91</sup> Whether a written contract is sealed or unsealed, it cannot be shown that under a parol contemporaneous agreement a written contract, once effective, was to be terminated by a condition subsequent or at a time not stated in the writing;<sup>92</sup> and on the other hand where the contract states that it is not to be effective until a certain contingency, a contemporaneous oral agreement that it should take effect immediately is inadmissible.<sup>93</sup> "Parol evidence is competent to show that a written contract, not under seal, apparently made between the parties named

123 Minn. 69, 142 N. W. 1048; *Bowser v. Fountain*, 128 Minn. 198, 150 N. W. 795, L. R. A. 1916 B. 1036; *Dodd v. Kemnitz*, 74 Neb. 634, 104 N. W. 1069; *Musser v. Musser*, 92 Neb. 387, 138 N. W. 599; *Oak Ridge Co. v. Toole*, 82 N. J. Eq. 541, 88 Atl. 827; *Blackstad Mercantile Co. v. Parker*, 163 N. C. 275, 79 S. E. 606; *First Nat. Bank v. Kelly*, 30 N. Dak. 84, 152 N. W. 125, Ann. Cas. 1917 D. 1044; *Gamble v. Riley*, 39 Okl. 363, 135 Pac. 390; *Mitchell v. Allen*, 69 Tex. 70, 6 S. W. 745; *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262; *Seattle v. L. H. Griffith Co.*, 28 Wash. 605, 68 Pac. 1036; *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885; *Golden v. Meier*, 129 Wis. 14, 107 N. W. 27, 116 Am. St. Rep. 935. *Cf.* *Housekeeper Pub. Co. v. Swift*, 97 Fed. 290, 38 C. C. A. 187; *Findley v. Means*, 71 Ark. 289, 73 S. W. 101; *Newman v. Baker*, 10 Dis. Col. App. 187; *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213; *Stewart v. Gardner*, 152 Ky. 120, 153 S. W. 3; *Miller v. Smith*, 140 Mich.

524, 103 N. W. 872; *Kinnear & Gager Mfg. Co. v. Miner*, 88 Vt. 324, 92 Atl. 459.

<sup>88</sup> *Golden v. Meier*, 129 Wis. 14, 107 N. W. 27, 116 Am. St. Rep. 935. But see *United Engineering Co. v. Broadnax*, 136 Fed. 351, 69 C. C. A. 172.

<sup>89</sup> See *supra*, § 212.

<sup>90</sup> *Findley v. Means*, 71 Ark. 289, 73 S. W. 101; *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213.

<sup>91</sup> *Diebold Safe & Lock Co. v. Morse*, 226 Mass. 342, 115 N. E. 431.

<sup>92</sup> *Begley v. Combs*, 27 Ky. L. Rep. 1115, 87 S. W. 1081; *Louis Eckels, etc., Co. v. Cornell Economizer Co.*, 119 Md. 107, 86 Atl. 38; *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433; *Smith v. Mathis*, 174 Mich. 262, 140 N. W. 548; *Samuel H. Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048; *Tower v. Richardson*, 6 Allen, 351; *Jamestown Assoc. v. Allen*, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740.

<sup>93</sup> *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851.

in it, was in fact made between one of them and a person not named." <sup>94</sup>

**§ 635. Absolute written transfer may be proved by parol to be a mortgage.**

It is a doctrine, which was early established that a court of equity will give effect to the real intention of the parties to make a mortgage even though the parties have made an absolute written and sealed transfer of the property,<sup>95</sup> and this doctrine is uniformly upheld at the present day.<sup>96</sup> It should be observed, however, that such a transfer by an insolvent debtor is in many jurisdictions regarded as a fraud on his creditors which will enable them to avoid the transaction even as security;<sup>97</sup> and if the grantor has a positive fraudulent

<sup>94</sup> *MacDonald v. Crissey*, 215 N. Y. 609, 616, 109 N. E. 609; *Gordon Malt-ing Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 537, 10 N. E. 457, 461, and cases cited. See also *supra*, §§ 283 *et seq.*

<sup>95</sup> *Dixon v. Parker*, 2 Ves. Sr. 219.

<sup>96</sup> *Langton v. Horton*, 5 Beav. 9; *Re Duke of Marlborough*, [1894] 2 Ch. 133; *Brick v. Brick*, 98 U. S. 514, 25 L. Ed. 256; *Anthony v. Anthony*, 23 Ark. 479; *Holt v. Moore*, 37 Ark. 145; *Edwards v. Bond*, 105 Ark. 314, 151 S. W. 243; *Raynor v. Lyons*, 37 Cal. 452; *Todd v. Todd*, 164 Cal. 255, 128 Pac. 413; *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70; *Walls v. Endel*, 20 Fla. 86, 99; *Keithley v. Wood*, 151 Ill. 566, 574, 38 N. E. 149, 42 Am. St. Rep. 265; *Mott v. Fiske*, 155 Ind. 597, 58 N. E. 1053; *Ensminger v. Ensminger*, 75 Ia. 89, 39 N. W. 208, 9 Am. St. 462; *McRobert v. Bridget*, 168 Ia. 28, 149 N. W. 906; *Crutcher v. Muir*, 90 Ky. 142, 11 Ky. L. 989, 13 S. W. 435, 29 Am. St. 356; *Castillo v. McBeath*, 162 Ky. 382, 172 S. W. 669; *Pickett v. Wadlow*, 94 Md. 564, 51 Atl. 423; *Alexander v. Grover*, 190 Mass. 462, 465, 77 N. E. 487; *Moore v. Reed*, 172

*Mich.* 642, 138 N. W. 223; *Klein v. McNamara*, 54 Miss. 90; *O'Neill v. Capelle*, 62 Mo. 202; *Names v. Names*, 48 Neb. 701, 706, 67 N. W. 751; *Rollins v. Brock* (N. H.), 101 Atl. 636; *Pace v. Bartles*, 47 N. J. Eq. 170, 20 Atl. 352; *Mooney v. Byrne*, 163 N. Y. 86, 57 N. E. 163; *Burr v. Kase*, 168 Pa. 81, 31 Atl. 954; *Brownlee v. Martin*, 21 S. Car. 392, 400; *Bryan v. Boyd*, 100 S. Car. 397, 84 S. E. 992; *Lewis v. Bayliss*, 90 Tenn. 280, 16 S. W. 376; *Eckford v. Berry*, 87 Tex. 415, 28 S. W. 937; *Perkins v. West*, 55 Vt. 265; *Snively v. Pickle*, 29 Gratt. 27; *Johnson v. National Bank*, 65 Wash. 261, 118 Pac. 21, L. R. A. 1916 B. 4; *Gilchrist v. Beswick*, 33 W. Va. 168, 10 S. E. 371; *Beebe v. Wisconsin Mtge. Loan Co.*, 117 Wis. 328, 93 N. W. 1103. See also *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696, and the note in L. R. A. 1916 B. 18.

<sup>97</sup> *Stratton v. Putney*, 63 N. H. 577, 4 Atl. 876; *Rosenbluth v. DeForest, etc., Co.*, 85 Conn. 40, 81 Atl. 955; *Graham v. Townsend*, 62 Neb. 364, 87 N. W. 169; *Dudley v. Buckley*, 68 W. Va. 630, 70 S. E. 376, 14 Am. Encyc. of Law (2d Ed.), 247. But see *Hutchison v. Page*, 246 Ill. 71, 92 N. E. 571.



intent in giving the transaction the appearance of an absolute transfer, he will be denied relief.<sup>88</sup>

The purpose of an absolute transfer of chattels by bill of sale may likewise be shown to have been merely for security;<sup>89</sup> and the rule is the same where negotiable paper is transferred.<sup>1</sup> Two reasons may be given for this apparent exception to the parol evidence rule, the first of which is that doubtless equity regards the enforcement of the transfer according to its terms as so oppressive as to require the same redress as if the grantee had been fraudulent. From this point of view the cases properly fall within the general class which includes written transactions voidable for fraud, illegality and the like. A second reason is that the mortgagee's agreement to release the security on payment of his debt is in its nature collateral to the transfer of the security, and therefore need not form part of the written transfer.<sup>2</sup> It may be thought that these decisions which allow an absolute written transfer to be shown by parol to have been a mortgage, are inconsistent with decisions which deny the promisor on negotiable paper, or under a non-negotiable written contract the right to prove a condition subsequent to his liability;<sup>3</sup> but the line of distinction is between a transfer of property and the giving of a promise.<sup>4</sup> Aside from historical and technical reasons of equitable jurisdiction, which embraced conveyances of land, but was not concerned with the enforcement of negotiable paper, the theoretical propriety of such a distinction must rest on the assumption that A may very likely give an actual conveyance of Blackacre in absolute form when it is agreed that the transfer shall operate merely as a security,

<sup>88</sup> *Baldwin v. Cawthorne*, 19 Ves. Jr. 166. See also generally on the inability of a grantor to set aside a conveyance made on a secret parol trust with intent to defeat creditors, *Kirby v. Raynes*, 138 Ala. 194, 35 So. 118, 100 Am. St. Rep. 39; *Castellow v. Brown*, 119 Ga. 461, 46 S. E. 632; *Jayne v. Jayne*, 148 Ky. 613, 147 S. W. 41; *Redmond v. Hayes*, 116 Minn. 403, 133 N. W. 1016; *Parker v. Parker*, 4 Neb. Unof. 692, 96 N. W. 208; *Conner v. Carpenter*, 28 Vt. 237.

<sup>89</sup> *Seavey v. Walker*, 108 Ind. 78, 9 N. E. 347; *Parks v. Hall*, 2 Pick. 206; *Booth v. Robinson*, 55 Md. 419; *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931.

<sup>1</sup> *Vickers v. Battershall*, 84 Hun, 496, 32 N. Y. S. 314.

<sup>2</sup> See *infra*, § 637.

<sup>3</sup> See *supra*, § 634.

<sup>4</sup> See *Marsh v. McNair*, 99 N. Y. 174, 1 N. E. 660. The distinction seems to have been lost sight of in *Davidson v. Young*, 167 Pa. 265, 31 Atl. 557.

but that he is not so likely to make a written contract promising to transfer Blackacre in absolute form when the understanding of the parties is, as before, that the transaction shall be defeasible upon a certain contingency. No satisfactory distinction seems possible on the score of forfeiture. It is true that there may be a greater element of forfeiture in enforcing an absolute conveyance as such when it was intended as a mortgage than in enforcing an absolute promise in spite of an oral condition subsequent; but this is not necessarily the case. Moreover, though the facts giving rise to an implied or resulting trust may be shown by parol to establish that property conveyed in absolute terms is held upon a trust for another,<sup>5</sup> it is said that an express agreement to hold in trust cannot be so established.<sup>6</sup> And yet the forfeiture here may be quite as great as in the mortgage case.

### § 636. An incomplete writing may be added to by parol.

The parol evidence rule assumes agreement upon the writing in question as a complete statement of the bargain. If the parties never adopted the writing as a statement of the whole agreement, the rule does not exclude parol evidence of additional promises.<sup>7</sup>

<sup>5</sup> Perry on Trusts, § 137.

<sup>6</sup> *Ibid.*, § 76. The cases cited by the author for the proposition seem to have related to real estate and to have been based on the section of the Statute of Frauds relating to trusts and not on the parol evidence rule.

<sup>7</sup> *Harris v. Rickett*, 4 H. & N. 1; *Lafitte v. Shawcross*, 12 Fed. 519; *In re Baird*, 245 Fed. 504; *Brosty v. Thompson*, 79 Conn. 133, 64 Atl. 1; *Chamberlain v. Lesley*, 39 Fla. 452, 22 So. 736; *Wood v. Williams*, 142 Ill. 269, 31 N. E. 681; *Mason v. Griffin*, 281 Ill. 246, 118 N. E. 18; *Louisville N. A., etc., R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711; *Carfield Lumber Co. v. Kint Lumber Co.*, 148 Ia. 207, 127 N. W. 70; *Royer v. Western Silo Co.*, 92 Kan. 333, 140 Pac. 872; *Grant v. Frost*, 80 Me. 202, 13 Atl. 881; *Davis*

*v. Cress*, 214 Mass. 379, 101 N. E. 1081; *Lyman B. Brooks Co. v. Wilson*, 218 Mass. 205, 105 N. E. 607; *Stahelin v. Sowle*, 87 Mich. 124, 49 N. W. 529; *Locke v. Wilson*, 135 Mich. 593, 98 N. W. 400; *Davis v. Scovern*, 130 Mo. 303, 32 S. W. 986; *Strickland v. Johnson*, 21 N. Mex. 599, 157 Pac. 142; *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Rochester Folding Box Co. v. Browne*, 55 N. Y. App. Div. 444, 66 N. Y. S. 867, *affd.* 166 N. Y. 635, 60 N. E. 1120; *Leifer v. Scheinman*, 179 N. Y. App. D. 665, 167 N. Y. S. 105; *Wilson v. Scarboro*, 163 N. C. 380, 79 S. E. 811; *Putnam v. Prouty*, 24 N. Dak. 517, 140 N. W. 93; *O. K. Transfer &c. Co. v. Neill*, (Okla. 1916), 159 Pac. 272, L. R. A. 1917 A. 58; *Selig v. Rehfuß*, 195 Pa. St. 200, 45 Atl. 919; *Virginia-Carolina Chemical Co. v.*

It should be observed, however, that a writing though incomplete may, nevertheless, be adopted as the expression by the parties of that portion of their agreement to which it relates. Accordingly, if a contract is even partially reduced to writing, the written portion is no more subject to contradiction by parol than the entire contract would be had it been wholly reduced to writing.<sup>8</sup> It has been suggested<sup>9</sup> that this mode of expression is inexact, and that always where what is called partial integration exists there is in fact an entire integration of the matter to which the writing relates; and that the outside oral agreement is a different subject-matter. Plausible as this sounds, it seems of doubtful accuracy as a universal proposition. To say that the agreement of an accommodation indorser that he shall be held harmless by the accommodated party is a separate subject from the contract which he enters into by his accommodation signature seems artificial; and certainly if that mode of expression is adopted, the question of what is a distinct subject is so difficult, that the inquiry suggested affords no help towards the solution of the ultimate problem

Moore, 61 S. C. 166, 39 S. E. 346; Palmer v. Lawrence, 72 Vt. 14, 47 Atl. 159; Knowles v. Rogers, 27 Wash. 211, 67 Pac. 572; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924.

This principle was well expressed by Fuller, C. J., in *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510, 12 S. C. 46, 30 L. Ed. 837. "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction

as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing. *Greenl. Ev.*, § 275." Cf. *Vogt v. Shienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989.

<sup>8</sup> *Jeffery v. Walton*, 1 Stark. 267; *Whatley v. Reese*, 128 Ala. 500, 29 So. 606; *Blair v. Buttolph*, 72 La. 31, 33 N. W. 349; *Davis v. Cress*, 214 Mass. 379, 101 N. E. 1081; *Hutchison Mfg. Co. v. Pinch*, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340; *Horn v. Hansen*, 56 Minn. 43, 46, 57 N. W. 315, 22 L. R. A. 617; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Wilson v. Scarboro*, 163 N. C. 380, 79 S. E. 811.

<sup>9</sup> *Wigmore on Evidence*, §2430.

of whether a particular oral agreement is admissible. How it may be decided whether a given writing is a complete integration, or only a partial integration has already been considered.<sup>10</sup>

**§ 637. There may be entirely distinct contemporaneous oral and written agreements.**

The mere fact that an oral agreement is contemporaneous with a written one does not necessarily involve the conclusion that they are part of the same contract. Two entirely distinct contracts each for a separate consideration may be made at the same time and will be entirely distinct legally. Where, however, one agreement is entered into wholly or partly in consideration of the simultaneous agreement to enter into another, the transactions are necessarily bound together. In the following discussion, it is assumed that there is at least this bond; and then if one of the agreements is oral and the other is written, the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement. It is now also assumed that the writing is an integration of a contract between the parties, and the inquiry is how far does the integration extend.

**§ 638. Test for determining whether an oral agreement is so far separate and collateral as to be admissible.**

A distinction doubtless exists between collateral agreements and agreements which are logically part of the main body of an agreement. This collateral character supposedly may be matter of form or matter of substance. Where an agreement contains several promises on each side, it is ordinarily easy to put any one of them in the form of a collateral agreement. This, however, cannot be the sort of thing intended when it is said that a collateral parol agreement may be proved; for, necessarily in such a case the parol promise which it is sought to add to the writing is collateral in form; and if this were enough any parol agreement might be proved. A distinction must therefore be attempted between promises which are intended to be or are inherently and substantially collateral to the main purpose of the contract as distinguished

<sup>10</sup> *Supra*, § 633.

from those which directly relate to the main object. It need not be denied that such a distinction is logically conceivable or that cases can be put of promises of one sort or the other. But unquestionably to differentiate the promises in contracts as they arise, as either collateral or the reverse, is very difficult and sometimes nearly if not quite impossible. It is probable that however the matter may be phrased, the reason guiding the courts in admitting or excluding proof of additional oral terms to an apparently complete written contract, is rather practical than theoretical.

Two suggestions may be made to serve as a guide to the many decisions apparently often contradicting one another, before considering the subject in detail. First that the test of admissibility is much affected by the inherent probability of parties who contract under the circumstances in question, simultaneously making the agreement in writing which is before the court, and also the alleged parol agreement. The point is not merely whether the court is convinced that the parties before it did in fact do this, but whether parties so situated generally would or might do so. If that is true, the parol agreement is so far collateral and separate from the writing as to make it admissible. The second suggestion is that the tendency of the courts is toward increasing liberality in the admission of parol agreements.

**§ 639. Collateral parol agreements contradicting a written contract are inadmissible.**

The general rule is clear that a parol agreement which is in terms contradictory of the express words of a contemporaneous or subsequent written contract, properly construed, necessarily is ineffectual and evidence of it inadmissible, whether the parol agreement be called collateral or not.<sup>11</sup> If

<sup>11</sup> *St. Louis, etc., Fireproofing Co. v. Standard Fireproofing Co.*, 195 U. S. 627, 49 L. Ed. 351, 25 S. Ct. 792; *Forbes v. Taylor*, 139 Ala. 286, 35 So. 855; *Hodson v. Varney*, 122 Cal. 619, 55 Pac. 413; *Chattanooga, etc., R. Co. v. Warthen*, 98 Ga. 599, 25 S. E. 988; *Unity Co. v. Equitable Trust Co.*, 204

Ill. 595, 68 N. E. 654; *Western Electric Co. v. Bærthel*, 127 Ia. 467, 103 N. W. 475; *Bounanni v. White Bronze Monument Co.*, 131 Ia. 304, 108 N. W. 524; *Merritt v. Peninsular Const. Co.*, 91 Md. 453, 46 Atl. 1013; *Pike v. McIntosh*, 167 Mass. 309, 45 N. E. 749; *Dean v. Washburn & Moen Mfg. Co.*,

there are exceptions to the rule they are made where a formal instrument is issued in its usual form, but its terms limited by a parol agreement.<sup>12</sup> Even where the parol agreement is not in terms contradictory of the writing, the implication in fact of the writing may be clear that it fully expresses the whole bargain in regard to the matter in question. To contradict such an implication of fact by parol is no more permissible than to contradict the direct words of the writing, but it is often a question of extreme difficulty to determine whether the writing does, if fairly construed, imply that its statements contain the whole agreement of the parties either in regard to the whole subject-matter of the contract, or in regard to some particular provision. The test usually suggested in the cases, whether the collateral agreement "varies or contradicts" the terms of the writing, has been criticised<sup>13</sup> and the suggestion made that the "most satisfactory index for a judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing." Though the ordinary statement is open to misapprehension, it is not, when properly understood, open to the criticism which has been made that it involves either a contradiction in terms or reasoning in a circle. It is true that a collateral agreement if admissible, will always vary the legal effect of a writing, or there would be no occasion to prove it, and if under "variation" is included any addition to the general subject of the contract, that word certainly is inaccurate, since it would exclude all oral collateral agreements. It does not follow, however, that an oral agreement which is of value will contradict the terms of the writing. As has been seen it may contradict only the implications of fact or law which would be drawn from the writing if the collateral agreement was not admitted to proof. The index suggested by Wigmore is, very likely, more satisfactory and less open to misapprehension; but it should be observed that this is no final test which can be applied with

177 Mass. 137, 58 N. E. 162; *Calmen-son v. Equitable Mut. F. I. Co.*, 92 Minn. 390, 100 N. W. 88; *Hebbard v. American Sheet Metal Lath Co.*, 150 N. Y. S. 72; *Hatfield v. Thomas Iron Co.*, 208 Pa. 478, 57 Atl. 950; *Minnesota*

*Sandstone Co. v. Clark*, 35 Wash. 466, 77 Pac. 803; *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664; *Patterson v. Cappon*, 125 Wis. 198, 102 N. W. 1083.

<sup>12</sup> See *infra*, §§ 644, 645.

<sup>13</sup> Wigmore on Evidence, § 2430.

unvarying regularity. When an accommodation indorser signs a note, the matter of his liability is dealt with in the writing; nevertheless the collateral agreement may be shown. When goods are sold under a written contract, the subject of the seller's liability for defects may not be dealt with at all, yet many courts exclude evidence of a parol warranty.<sup>14</sup> Moreover, what is to be regarded as the "particular element of the extrinsic negotiation" is always open to question. In the case of the warranty, is the particular element the general liability of the seller in regard to the goods, or is it his liability for defects of quality? Is a warranty of title part of the same element as a warranty of quality? Is a warranty of one quality part of the same element as a warranty of another quality? There is here the same inescapable difficulty that exists when an attempt is made to determine whether the oral agreement contradicts the writing. A written promise to pay \$50 is not in terms contradicted by an oral promise to pay \$25 more, but the natural implication from the written promise is irresistible that \$50 is the whole cash payment which the promisor is to make. This implication arises because as a matter of actual practice, one who was intending to promise \$75 would put his promise in the form of a single promise to pay that sum, rather than in that of a written promise to pay \$50 and a separate agreement to pay \$25 in addition.<sup>15</sup> So if the other test is applied, it may be said that the "particular element" of the alleged extrinsic negotiation is the price, and the oral agreement is inadmissible. Suppose the oral agreement instead of providing for an additional payment of \$25 provided for the giving a book, is the "particular element" of this agreement payment of consideration and therefore dealt with in the writing, or payment of non-pecuniary consideration and therefore not dealt with therein? Whether under the rule as ordinarily expressed a collateral agreement tends to contradict the implications of the writing or under the suggested improvement thereon relates to a "particular element" dealt with in the

<sup>14</sup> See *infra*, § 643.

<sup>15</sup> See *O'Malley v. Grady*, 222 Mass. 202, 109 N. E. 829; *McGarrigle v. McCosker*, 83 N. Y. App. Div. 184, 82

N. Y. S. 494, *affd.* 178 N. Y. 637, 71 N. E. 1133. *Cf.* *Malpas v. London & S. W. R. Co.*, L. R. 1 C. P. 336.

writing will depend in large measure on the question whether a reasonable person making such an agreement as is set up both in the writing and in the proffered parol evidence might naturally have separated the matters into two parts.

**§ 640. Collateral agreements contradicting an implication of law.**

It has been questioned whether a parol agreement is admissible which definitely expresses the intent of the parties in regard to a matter covered neither expressly nor by implication of fact in the written contract between them, but concerning which the law makes an implication in the absence of express agreement. Thus where no time or place for performance is fixed, the law fixes the time or place in accordance with certain rules, which in many cases at least are based on what is reasonable rather than what is actually intended. Are these rules part of the contract and therefore does parol agreement with reference to their subject-matter contradict the writing? It is so generally held. Especially it has been held that evidence of a parol agreement that performance should be made at a particular time is inadmissible where the writing specifies no time for performance.<sup>16</sup> But the criticism which has been made previously<sup>17</sup> of the theory that the law governing a contract is necessarily adopted into the contract as part of its terms, seems applicable here. The parties to a negotiable note which does not specify the time of payment probably understand and recognize that the writing is equivalent to a promise to pay on demand, and therefore a parol agreement to pay at a fixed time would be inconsistent with the writing.<sup>18</sup> The legal implication from a blank indorsement also is perfectly understood by the parties, and the implication may well be given the same effect as if the indorsement were filled out,<sup>19</sup> but the contradiction is

<sup>16</sup> *Greaves v. Ashlin*, 3 Camp. 426; *Ford v. Yates*, 2 M. & G. 549; *Simpson v. Henderson*, Moo. & M. 300; *Roughton v. Brookings Lumber &c. Co.*, 26 Cal. App. 752, 148 Pac. 539; *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; *Warren v. Wheeler*, 8 Met. 97; *Coon v. Spaulding*, 47 Mich. 162, 10 N. W. 183; *American Bridge Co. v. American &c.*

*Steam Co.*, 107 Minn. 140, 119 N. W. 783; *Blake Mfg. Co. v. Jæger*, 81 Mo. App. 239; *Thompson v. Ketcham*, 8 Johns. 189 (note); *Oliver v. Heil*, 95 Wis. 364, 70 N. W. 346.

<sup>17</sup> *Supra*, § 615.

<sup>18</sup> *Bloom v. Horwitz*, 100 N. Y. Misc. 687, 166 N. Y. S. 786.

<sup>19</sup> See *supra*, § 644.



one fictitiously invented by the law when an ordinary contract does not state the time for performance, and the parties orally agree on a particular time. Undoubtedly it is not always easy to determine whether an implication is one of fact, and therefore the agreement of the parties, or is one of law imposed upon the parties because of their failure to express an agreement upon the matter in question, but the distinction is none the less real. Some decisions, recognizing this, have allowed proof of parol agreement fixing the time,<sup>20</sup> or place<sup>21</sup> of performance. A contract for the shipment of goods from one place to another without specification of the route,<sup>22</sup> and contracts containing other legal implications have given rise to the same difference of opinion.<sup>23</sup>

#### § 641. Other inadmissible collateral agreements.

Following the analogy of cases holding that though parol conditions precedent to the effectiveness of a written agreement may be shown, conditions subsequent may not be,<sup>24</sup> it has been held that parol evidence of an agreement that goods

<sup>20</sup> *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571; *Wolters v. King*, 119 Cal. 172, 51 Pac. 35; *Bankers' Acc. Ins. Co. v. Rogers*, 73 Minn. 12, '75 N. W. 747 (time for which insurance was written not being stated in policy or application may be shown by parol); *Stephens-Adamson Mfg. Co. v. Bigelow*, 84 N. J. L. 585, 87 Atl. 74, 86 N. J. L. 707, 92 Atl. 398. (The offer which was accepted read, "Time of delivery to be about . . . from receipt by us of your acceptance." Parol evidence was admitted of the fixed time orally agreed upon.) *Eichenaure v. Rents Candy Co.*, 43 N. Y. Misc. 151, 88 N. Y. S. 260 (term of service shown to be for one year). See also *Paul v. Owings*, 32 Md. 402 (a written contract to sell land for \$5,000 was held not to preclude parol evidence of the manner or terms of payment, as by application on a judgment).

<sup>21</sup> *Ebert v. Arends*, 190 Ill. 221, 60 N. E. 211. But see *LaFarge v. Rickert*,

5 Wend. 187, 21 Amer. Dec. 209; *State v. Kenosha Home Tel. Co.*, 158 Wis. 371, 148 N. W. 877, Ann. Cas. 1916 E. 365. In *Delaware v. Oregon Iron Co.*, 14 Wall. 579, 20 L. Ed. 779, a bill of lading not stating the place of storage was held contradicted in legal effect by a parol agreement that the goods should be stowed on deck and evidence of the agreement was held inadmissible.

<sup>22</sup> A parol agreement fixing the route was not admitted in *Webster v. Paul*, 10 Ohio St. 531, but the contrary was held in *Louisville, etc., R. Co. v. Duncan*, 137 Ala. 446, 34 So. 988.

<sup>23</sup> In *Sowers v. Earnhart*, 64 N. C. 96, a bond for \$1,000 was given in 1862, payable one day after date. The court said "By presumption of law this note was solvable in Confederate money," but gave effect to a parol agreement that the bond should be paid in money good after the war.

<sup>24</sup> See *supra*, § 634.

might be returned is not admissible to qualify an absolute written contract of sale;<sup>25</sup> nor where there is a writing showing a sale can it be proved by parol that the transaction was a bailment.<sup>26</sup> Other cases where parol collateral agreements were held inadmissible are collected in the accompanying note.<sup>27</sup>

### § 642. Admissible collateral agreements.

Where the writing in question is a unilateral conveyance,

<sup>25</sup> *Dr. Shoop Family Medicine Co. v. Davenport*, 163 N. C. 294, 79 S. E. 602. See also *Grabfelder v. Vosburgh*, 90 N. Y. App. Div. 307, 85 N. Y. S. 633. *Cf. Gilman v. Williams*, 74 Vt. 327, 52 Atl. 428.

<sup>26</sup> *Price v. Marthen*, 122 Mich. 655, 81 N. W. 551; *Horn v. Hansen*, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617. *Cf. mortgage cases, supra*, § 635.

<sup>27</sup> *Sun Printing, etc., Assoc. v. Edwards*, 113 Fed. 445, 51 C. C. A. 279; *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110, 61 C. C. A. 657 (parol agreement that work under written contract should be done to defendant's satisfaction or need not be paid for); *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723 (parol agreement that written contract might be terminated at will); *Hills v. Farmington*, 70 Conn. 450, 39 Atl. 795 (parol agreement that part of price named in writing was for an alleged oral warranty); *Connor v. Lasseter*, 98 Ga. 708, 25 S. E. 830 (parol agreement to obtain other paid employment and credit pay received therefor on amount due under written contract); *McElveen v. Southern R. Co.*, 109 Ga. 249, 34 S. E. 281, 77 Am. St. 371; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28 (parol agreement that goods contracted for under written contract should be of the seller's own production); *Bounanni v. White Bronze Monument Co.*, 131 Ia. 304, 108 N. W. 524 (parol agreement that a statue should in a certain respect differ from

a photograph though writing demanded a copy thereof); *Walker v. Price*, 62 Kans. 327, 62 Pac. 1001, 84 Am. St. 392 (parol agreement that a railroad ticket in terms limited should be unlimited); *Castleman v. Southern Mut. L. I. Co.*, 14 Bush, 197 (parol agreement for additional compensation); *Sutton v. Kentucky Lumber Co.*, 19 Ky. L. Rep. 1604, 44 S. W. 86 (parol agreement to furnish right of way for teams to carry lumber to be cut and hauled under written contract); *Goldenberg v. Taglino*, 218 Mass. 357, 105 N. E. 883 [parol agreement as to the nature of services under a written contract for general employment. *Cf. Price v. Mouat*, 11 C. B. (N. S.) 508]; *Smith v. Smull*, 69 N. Y. App. Div. 452, 74 N. Y. S. 1012; *Eden v. Silberberg*, 89 N. Y. App. Div. 259, 85 N. Y. S. 781; *Cornwall R. Co. v. Cornwall &c. R. Co.*, 125 Pa. 232, 17 Atl. 427, 11 Am. St. 889; *Farrell v. Coatesville*, 214 Pa. 296, 63 Atl. 742 (parol agreement that rock excavation should be specially paid for at a higher rate than that named for excavation generally in written contract); *Wallace v. Langston*, 52 S. Car. 133, 29 S. E. 552 (parol agreement with the signer of a bond that he should not be liable); *Missouri, etc., Ry. Co. v. Harrison*, 97 Tex. 611, 80 S. W. 1139; *Nelson v. Godfrey*, 74 Vt. 470, 52 Atl. 1037 (parol agreement that letters on a tablet for which a written contract provided, should be raised). See also *Empire Inv. Co. v. Mort*, 169 Cal. 732, 147 Pac. 960.

release or promise, it may be shown that the consideration given by the grantee or promisee therefor was wholly or partly a parol promise,<sup>28</sup> if the parol promise is in no way inconsistent with or contradictory of the written promise;<sup>29</sup> and this is generally so held even where the writing recites as consideration the receipt of a specific executed consideration.<sup>30</sup> Again though a contract to sell a business, or to hire an employee, is in writing, a parol contemporaneous agreement not to carry on a competing business,<sup>31</sup> or not to assign,<sup>32</sup> has been held admissible. Other illustrations of collateral agreements held admissible may be found in the note.<sup>33</sup>

<sup>28</sup> *Ewaldt v. Farlow*, 62 Ia. 212, 17 N. W. 487; *Weeks v. Medler*, 20 Kans. 57; *American, etc., Assoc. v. Dahl*, 54 Minn. 355, 56 N. W. 47; *Kane v. Cortesy*, 100 N. Y. 132, 2 N. E. 874; *Wenz v. Meyersohn*, 59 N. Y. App. Div. 130, 68 N. Y. S. 1091; *Playa De Oro Min. Co. v. Gage*, 60 N. Y. App. Div. 1, 69 N. Y. S. 702, *affd.*, 172 N. Y. 630, 65 N. E. 1121; *Becker v. Knudson*, 86 Wis. 14, 56 N. W. 192.

<sup>29</sup> In *Lozier v. Hill*, 68 N. J. Eq. 300, 59 Atl. 234, the court refused to allow proof that the grantee under an absolute deed had promised as consideration therefor, to devise the land to the grantor.

<sup>30</sup> See also *supra*, § 115a.

<sup>31</sup> *Durham v. Lathrop*, 95 Ill. App. 429; *Wels v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747; *Locke v. Murdoch*, 20 N. Mex. 522, 151 Pac. 298, L. R. A. 1917 B. 267; *Turner v. Abbott*, 116 Tenn. 718, 94 S. W. 64, 6 L. R. A. (N. S.) 892. See also *Webber v. Smith*, 24 Cal. App. 51, 140 Pac. 37. But see *contra*, *Brennard Mfg. Co. v. Citronelle Mercantile Co.*, 148 Ala. 666, 41 So. 671; *Main v. Radney* (Ala.), 39 So. 981; *Durkin v. Cobleigh*, 156 Mass. 108, 110, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; *Walther v. Stampfli*, 91 Mo. App. 398; *Wessel v. Havens*, 91 Neb. 426, 136 N. W. 70, Ann. Cas. 1913 C. 1377; *Smith v.*

*Gibbs*, 44 N. H. 335; *Love v. Hamel*, 59 N. Y. App. D. 360, 69 N. Y. S. 251; *Gordon v. Parke & Lacy Mach. Co.*, 10 Wash. 18, 38 Pac. 755; *Scholz v. Dankert*, 69 Wis. 416, 34 N. W. 394.

<sup>32</sup> *Myerstown Bank v. Roessler*, 186 Pa. 431, 40 Atl. 963.

<sup>33</sup> *Malpas v. London & S. W. Ry. Co.*, L. R. 1 C. P. 336 (a parol arrangement to carry cattle to K was made with a carrier. Later a writing was signed by the shipper, by which it was ordered that the cattle should be carried to N, an intermediate station. It was held that the parol agreement might be shown since it only supplemented, not contradicted the writing); *Ditmar v. Frederick Starr Contracting Co.*, 249 Fed. 437, 162 C. C. A. 3 (though there was a written charter of a scow for service in and about New York Harbor proof was allowed of a parol agreement that, in case she was taken out of the harbor, the charterer should insure her for the benefit of the owner); *Meador v. Allen*, 110 Ia. 588, 81 N. W. 799 (size of casing orally agreed upon shown where a written building contract did not specify the size); *Mt. Vernon Stone Co. v. Sheely*, 114 Ia. 313, 86 N. W. 301; *Rivers v. Oak Lawn Sugar Co.*, 52 La. Ann. 762, 27 So. 118 (that stock was sold "dividend off" shown by parol); *Gould v. Boston Excelsior Co.*, 91 Me. 214, 39 Atl. 554,

### § 643. Parol evidence of a warranty.

There is no more frequent application of the parol evidence rule than in cases where it is sought to attach a parol warranty to a written sale or contract to sell goods. If the writing states in terms that there is no warranty or none except what is contained in the writing, it is clear that the parol warranty is ineffectual because contradictory and not merely additional to the writing.<sup>34</sup> Where the writing contains an express warranty, proof of an additional parol warranty is also not allowable. This is most obviously a necessary conclusion where the parol warranty concerns the same quality or attribute of the goods as the written warranty;<sup>35</sup> but it is also commonly held that the parol warranty is inadmissible if any express

64 Am. St. Rep. 221 (parol agreement as to the scaling of lumber contracted for in writing, admitted when the writing made no provision as to scale or scales); *Cook v. Littlefield*, 98 Me. 299, 56 Atl. 899; *Ryder v. Faxon*, 171 Mass. 206, 50 N. E. 631, 68 Am. St. Rep. 417; *Hawley Down-Draft Furnace Co. v. Hooper*, 90 Md. 390, 45 Atl. 456; *Brown v. Bowen*, 90 Mo. 184, 2 S. W. 398; *Huffman v. Ellis*, 64 Neb. 623, 90 N. W. 552; *Creedon v. Patrick*, 3 Neb. unoff. 459, 91 N. W. 872 (oral agreement where building materials should be obtained, admitted); *Polakoff v. Halphen*, 83 N. J. Eq. 126, 89 Atl. 996 (a written license to erect a building was supplemented by an oral agreement as to the character of the building); *Daly v. Piza*, 105 N. Y. App. Div. 496, 94 N. Y. S. 154; *Holmboe v. Morgan*, 69 Ore. 395, 138 Pac. 1084 (a written contract for sale of automobile was supplemented by a parol agreement to give instruction); *Potlatch Lumber Co. v. North Coast Produce Co.*, 78 Wash. 533, 139 Pac. 496. Pennsylvania seems to have gone further than most States in allowing such evidence. In *Alexander v. Righter*, 240 Pa. 22, 26, 87 Atl. 427, the court said: "We have ruled more than once

that even where there is a written unconditional promise to pay, in a suit thereon between the original parties, one may show a contemporaneous agreement that the promisee would look to a special fund for the payment, where such agreement constituted a part of the consideration of the written contract or operated as an inducement for entering it." Cf. *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, 7 So. 444; *Murchi v. Peck*, 160 Ill. 175, 43 N. E. 356; *Harrison v. Morrison*, 39 Minn. 319, 40 N. W. 66; *Wilson v. Wilson*, 26 Ore. 251, 38 Pac. 185; *Fuller v. Law*, 207 Pa. 101, 56 Atl. 333.

<sup>34</sup> *Allen v. Young*, 62 Ga. 617; *Martin v. Moore*, 63 Ga. 531; *Stewart v. Blalock*, 20 Ga. App. 488, 93 S. E. 116; *Otto v. Braman*, 142 Mich. 185, 105 N. W. 601; *Plano Mfg. Co. v. Root*, 3 N. Dak. 165, 54 N. W. 924.

<sup>35</sup> *Middletown Mach. Co. v. Chaffin*, 108 Ark. 254, 157 S. W. 398; *United Iron Works v. Outer Harbor Co.*, 168 Cal. 81, 141 Pac. 917; *Barrett v. Wheeler*, 71 Ia. 662, 33 N. W. 230; *Rice v. Codman*, 1 Allen, 377; *Colt v. Demarest*, 159 N. Y. App. Div. 394, 144 N. Y. S. 557; *Buchanan v. Laber*, 39 Wash. 410, 81 Pac. 911.

warranty is in writing;<sup>36</sup> and even where there is no express warranty contained in the writing to which the terms of a sale are reduced, extrinsic evidence of a warranty generally is excluded.<sup>37</sup> Especially in recent years some qualification of this doctrine is to be observed in the cases. The principles applicable to contracts only partially reduced to writing find frequent application, and where the writing on its face does not appear to be a complete statement of the contract or the purchase, or is a mere memorandum or order as distinguished from a written

\* *Chandler v. Thompson*, 30 Fed. 38; *Wilson v. New United States Cattle Ranch Co.*, 73 Fed. 994, 20 C. C. A. 244, 36 U. S. App. 634; *Buckstaff v. Russell*, 79 Fed. 611, 25 C. C. A. 129, 49 U. S. App. 253; *Johnson v. Hughes*, 83 Ark. 105, 103 S. W. 184; *Arden Lumber Co. v. Henderson Iron Works*, 83 Ark. 240, 103 S. W. 185; *Nichols v. Wyman*, 71 Ia. 160, 32 N. W. 258; *Electric Storage Battery Co. v. Waterloo, etc., R. Co.*, 138 Ia. 369, 116 N. W. 144, 19 L. R. A. (N. S.) 1183; *Sullivan Machinery Co. v. Breeden*, 40 Ind. App. 631, 637, 82 N. E. 107; *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490; *Carpenter v. Sugden*, 231 Mass. 1, 119 N. E. 959; *Nichols Shepard & Co. v. Crandall*, 77 Mich. 401, 43 N. W. 875, 6 L. R. A. 412; *Zimmerman Mfg. Co. v. Dolph*, 104 Mich. 281, 61 N. W. 339.

\* *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510, 12 S. C. 46, 30 L. Ed. 837; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 L. R. A. 973, 69 C. C. A. 662; *Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646, 141 C. C. A. 402; *Whitehead v. Lane & Bodley Co.*, 72 Ala. 39; *Fitch v. Woodruff & Beach Iron Works*, 29 Conn. 82; *Robinson v. McNeill*, 51 Ill. 225; *Telluride Power Co. v. Crane*, 208 Ill. 218, 70 N. E. 319; *Nichols v. Wyman*, 71 Iowa, 160, 32 N. W. 258; *Diebold Safe Co. v. Huston*, 55 Kans. 104, 39 Pac. 1035, 28 L. R. A. 53;

*Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371; *Frost v. Blanchard*, 97 Mass. 155; *Schramm v. Boston Sugar Refining Co.*, 146 Mass. 211, 15 N. E. 571; *Durkin v. Cobleigh*, 156 Mass. 108, 110, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; *Detroit Shipbuilding Co. v. Comstock*, 144 Mich. 516, 108 N. W. 286; *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599; *Day Leather Co. v. Michigan Leather Co.*, 141 Mich. 533, 104 N. W. 797; *McCormick Harvesting Machine Co. v. Thompson*, 46 Minn. 15, 48 N. W. 415; *Eighmie v. Taylor*, 98 N. Y. 288; *Stanford v. National Drill & Mfg. Co.*, 28 Okl. 441, 114 Pac. 734; *Scott v. Vulcan Iron Works Co.*, 31 Okl. 334, 122 Pac. 186, 192; *Bond v. Clark*, 35 Vt. 577; *Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013. So a parol guarantee that an assigned claim could be effectively used as a set-off was held ineffectual. *Maxfield v. Jones*, 106 Ark. 346, 153 S. W. 584. In *King v. Edward Thompson Co.* (Ind. App.), 104 N. E. 106, a printed order contained a statement that no guaranty had been made by the salesman. This clause was erased, and evidence was offered that a guaranty had been made by the salesman, and for that reason the clause was struck out. Nevertheless the parol guaranty was held ineffectual.

contract, the reason for applying the parol evidence rule is lacking and extrinsic evidence of a warranty is admitted.<sup>38</sup> It must be admitted that the principle thus stated is one very difficult of application, and the decisions cited in the two notes last referred to are not all easy to reconcile on their facts. Another principle which has not yet been very clearly brought out by the cases should be plain wherever it is recognized that an affirmation or representation may form the basis of liability in warranty even though there is no intent to warrant, and the representations cannot fairly be construed as an offer to contract. The basis of the parol evidence rule is that it must be assumed that when parties contracted in regard to a certain matter and reduced their agreement to writing, the writing expressed their whole agreement in regard to that matter. This reason is obviously inapplicable to a situation where an obligation is imposed by law irrespective of any intention to contract. Such is frequently the case with warranties.<sup>39</sup> Therefore, if a buyer is induced by positive statements of fact to enter into a written contract for the purchase of goods, there seems no reason why these statements should not be admitted in evidence. False and fraudulent statements inducing the formation of a written contract may, of course, be proved and if a false but honest statement, inducing the buyer to enter into the bargain, renders the seller liable as a warrantor though he does not intend to contract, there seems every reason for admitting evidence of such statements in spite of the fact that the bargain was

<sup>38</sup> *Allen v. Pink*, 4 M. & W. 140; *Harris v. Marsh*, 217 Fed. 555, 133 C. C. A. 407; *Florence Wagon Works v. Trinidad Mfg. Co.*, 145 Ala. 677, 40 So. 49; *Ruff v. Jarrett*, 94 Ill. 475; *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361; *Jackson v. Mott*, 76 Iowa, 263, 41 N. W. 12; *Chicago Telephone Supply Co. v. Morne & Co. Tel. Co.*, 134 Ia. 252, 111 N. W. 935; *Neal v. Flint*, 88 Me. 72, 33 Atl. 669; *White Automobile Co. v. Dorsey*, 119 Md. 25, 86 Atl. 617; *Atwater v. Clancy*, 107 Mass. 369; *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682; *Phelps v. Whitaker*, 37

Mich. 72; *Palmer v. Roath*, 86 Mich. 602, 49 N. W. 590; *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Perrine v. Cooley*, 39 N. J. L. 449; *Charter Gas Engine Co. v. Kellam*, 79 N. Y. App. Div. 231; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Mayer v. Dean*, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; *Routledge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111; *Hadley v. Bordo*, 62 Vt. 285, 19 Atl. 476; *Red Wing Mfg. Co. v. Moe*, 62 Wis. 240, 22 N. W. 414; *McMullen v. Williams*, 5 Ont. App. 518.

<sup>39</sup> See Williston on Sales, § 197.

reduced to writing.<sup>40</sup> The same question in regard to parol evidence that arises in regard to warranties generally, arises in the case of sales by sample. If a written contract is made which makes no mention of a sample, is parol evidence admissible to show that the contract was made with reference to a sample? The same principles which have been laid down in regard to warranties generally govern here also. If the writing purports to state the whole contract between the parties, the parol evidence rule would seem to forbid the buyer to show that it was in fact part of the contract that the goods should correspond with a sample.<sup>41</sup> But if a written contract for goods is procured by representing that the goods described in the writing are like a sample which is exhibited, it seems that parol evidence should be admitted to prove these representations and that the seller should be liable as warranting the truth of them. They are not part of the contract, but the law should impose a quasi-contractual obligation upon one who makes such statements.<sup>42</sup>

#### § 644. Agreements collateral to negotiable paper.

There is a practical reason why parties who make negotiable paper with additional oral agreements should adopt that course rather than put the whole agreement into one writing. If a

<sup>40</sup> This argument is fully supported by the case of *De Lessalle v. Guildford*, [1901] 2 K. B. 215. In that case though the parties had entered into a formal lease, a contract of considerable solemnity, the plaintiff was allowed to prove that he took the lease only on receiving an oral assurance that the drains were in order, and the defendant was held liable upon this as upon a warranty collateral to the lease. See also the numerous similar decisions, *infra*, § 645, on agreements collateral to deeds. So in the case of *Waterbury v. Russell*, 8 Baxt. 159, it was held that misrepresentation as to the character of goods, made to influence the bargain, were warranties, though not inserted in the written contract of sale. But see *Whitehead v. Lane & Bodley Co.*, 72 Ala. 39; *Telluride Power Co. v. Crane*,

103 Ill. App. 647, which held that such representations could not be shown unless fraudulent. See also *Seitz v. Brewer Refrigerator Co.*, 141 U. S. 510, 12 S. Ct. 46, 30 L. Ed. 837; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973, and cases cited *supra*, n. 38; *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682.

<sup>41</sup> *Meyer v. Everth*, 4 Campb. 22; *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291; *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433.

<sup>42</sup> In *Pike v. Fay*, 101 Mass. 134, there was a written order for willow cuttings. Parol evidence was held admissible to show that the sale was induced by the exhibition of samples.

collateral agreement is written on the instrument it ceases to be negotiable, and the parties frequently desire that the features of a negotiable instrument shall be retained. Probably for this reason the courts, though professing to apply the same doctrine with reference to parol evidence where negotiable instruments are concerned as where other written contracts are in question, have, nevertheless, frequently been more ready, where the controversy involved no holder in due course, to admit parol evidence of collateral agreements. Not only in such a case may it be shown that a negotiable instrument or an obligation thereon is given in escrow and has never become binding,<sup>43</sup> but it may also be shown that the signature of a party to a negotiable instrument is for accommodation or without consideration,<sup>44</sup> or is an indorsement for collec-

<sup>43</sup> *Jefferies v. Austin*, 1 Strange, 674; *Bell v. Ingestre*, 12 Q. B. 317; *Burke v. Dulaney*, 153 U. S. 228, 38 L. Ed. 698, 14 S. Ct. 816; *Beach v. Nevins*, 162 Fed. 129, 89 C. C. A. 129, 18 L. R. A. (N. S.) 288; *Parker v. Bond*, 121 Ala. 529, 25 So. 898; *Graham v. Rimmel*, 76 Ark. 140, 88 S. W. 899; *Ager v. Duncan*, 50 Cal. 325, 327; *Denver Brewing Co. v. Barets*, 9 Colo. App. 341, 48 Pac. 834; *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546; *Scott Adm'x v. Scott*, 33 Ga. 102; *Bragg v. Stanford*, 82 Ind. 234; *Gray v. Anderson*, 99 Ia. 342, 68 N. W. 790, 61 Am. St. Rep. 243; *Oakland Cemetery Assoc. v. Lakins*, 126 Ia. 121, 101 N. W. 778; *Caudle v. Ford*, 24 Ky. L. Rep. 1764, 72 S. W. 270; *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726; *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831, 80 N. E. 605; *Hamburger v. Miller*, 48 Md. 317 (indorsement); *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433; *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057; *Hardin v. Wright*, 32 Mo. 452; *Juilliard v. Chaffee*, 92 N. Y. 529, 535; *Williams v. First Nat. Bank*, 45 N. Y. App. Div. 239, 60 N. Y. S. 1105, aff'd. 167 N. Y. 594, 60 N. E. 1122; *Morris v. Faurot*,

21 Ohio St. 155, 8 Am. Rep. 45; *La Grande Nat. Bank v. Blum*, 26 Ore. 49, 37 Pac. 48; *Merkel's Appeal*, 89 Pa. 340; *Camp v. Page*, 42 Vt. 739. But some decisions hold, following the analogy of sealed instruments, that negotiable paper cannot be delivered to the payee as an escrow. *Garner v. Fite*, 93 Ala. 405, 9 So. 367; *Clanin v. Easterly Harvesting Mach. Co.*, 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; *Murray v. W. W. Kimball Co.*, 10 Ind. App. 141, 37 N. E. 736; and see *Shaw v. Shaw*, 50 Me. 94, 79 Am. Dec. 605; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823.

<sup>44</sup> *Thompson v. Clubley*, 1 M. & W. 212; *Castrique v. Buttigieg*, 10 Moore P. C. 94; *Cohen v. Goux*, 48 Cal. 97; *Case v. Spaulding*, 24 Conn. 578; *Larned v. Ogilby*, 20 Ia. 410; *State Bank v. Pangerl*, 139 Minn. 19, 165 N. W. 479; *Trego v. Lowrey*, 8 Neb. 238; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Haddock v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136; *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *M. Rumely Co. v. Anderson*, 35 S. Dak. 114, 150 N. W. 939. Cf. *Abrey v. Crux*, L. R. 5 C. P. 37.



tion;<sup>45</sup> or that the signer signed a draft or indorsement merely to transfer money to his principal by giving the latter the obligation of one with whom the agent has dealt on behalf of the principal.<sup>46</sup> It may also be shown that parties appearing to be indorser and indorsee, are co-sureties; and agreed as between one another to share their liability equally,<sup>47</sup> or that one accommodation indorser agreed to indemnify another.<sup>48</sup> And it may be shown that the date is erroneous, even though altering the date alters the effect of the promise in the note by changing the time of maturity.<sup>49</sup> On the other hand, except so far as the admissibility of proof of a suretyship relation qualifies the statement, it cannot be shown that the obligation of the maker,<sup>50</sup>

<sup>45</sup> *Denton v. Peters*, L. R. 5 Q. B. 475; *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 20; *Johnston v. Schnabaum*, 86 Ark. 82, 109 S. W. 1163, 17 L. R. A. (N. S.) 838; *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353; *Galceran v. Noble*, 66 Ga. 367; *Woodward v. Foster*, 18 Gratt. 200. But see *contra*, *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Johnson v. Ramsey*, 43 N. J. L. 279, 39 Am. Rep. 580.

<sup>46</sup> *Castrique v. Buttigieg*, 10 Moore P. C. 94; *First Nat. Bank v. Reinman*, 93 Ark. 376, 125 S. W. 443, 28 L. R. A. (N. S.) 530; *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441; *Farmers' Sav. Bank v. Hausmann*, 114 Ia. 49, 86 N. W. 31; *Wolfe v. Jewett*, 10 La. 383; *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229; *McAllister v. Budd*, 33 Mo. 417; *Hicks v. Hinde*, 9 Barb. 528; *Dickinson v. Burke*, 8 N. Dak. 118, 77 N. W. 279; *Roberts v. Austin*, 5 Whart. 313; *Abraham v. Mitchell*, 112 Pa. 230, 3 Atl. 830, 56 Am. Rep. 312. But see *contra*—*Day v. Thompson*, 65 Ala. 269; *Hancock v. Fairfield*, 30 Me. 299; *Tucker Co. v. Fairbanks*, 98 Mass. 101.

<sup>47</sup> *Phillips v. Preston*, 5 How. 278, 12 L. Ed. 396; *Rhodes v. Sherrod*, 9 Ala. 63; *Edelen v. White*, 6 Bush, 408; *Smith v. Morrill*, 54 Me. 48; *Clapp v. Rice*, 13 Gray, 403, 406, 74 Am. Dec. 639; *Farwell v. Ensign*, 66 Mich. 600,

33 N. W. 734; *Dunn v. Wade*, 23 Mo. 207; *Paul v. Ryder*, 58 N. H. 119; *Easterly v. Barber*, 66 N. Y. 433; *Egbert v. Hanson*, 34 N. Y. Misc. 596, 70 N. Y. S. 383; *Kelley v. Few*, 18 Ohio, 441; *Montgomery v. Page*, 29 Ore. 320, 44 Pac. 689; *Ross v. Espy*, 66 Pa. 481, 5 Am. Rep. 394; *In re Marquardt's Est.*, 251 Pa. 73, 95 Atl. 917; *Sloan v. Gibbs*, 56 S. Car. 480, 35 S. E. 408, 76 Am. St. Rep. 559. See also *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915.

<sup>48</sup> *Wilson v. Hendee*, 74 N. J. L. 640, 66 Atl. 413; *Feile v. Rudiger* (N. J. Eq.), 104 Atl. 142; *Handssaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230. See also *Lynch v. Loftin*, 153 N. C. 270, 69 S. E. 143; *Davis v. First Nat. Bank*, 86 Ore. 474, 168 Pac. 929; and the express provision of the Uniform Negotiable Instruments Law, *infra*, § 1163. As to the relation of accommodation indorsers to one another see *infra*, § 1282.

<sup>49</sup> *Biggs v. Piper*, 86 Tenn. 589, 8 S. W. 851.

<sup>50</sup> *Moseley v. Hanford*, 10 B. & C. 729; *Selden v. Myers*, 20 How. 506, 15 L. Ed. 976; *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508; *Earle v. Enos*, 130 Fed. 467; *Bomar v. Rosser*, 131 Ala. 215, 31 So. 430; *Tisdale v. Mallett*, 73 Ark. 431, 84 S. W. 481; *Guy v. Bibend*,

acceptor,<sup>51</sup> drawer,<sup>52</sup> or guarantor<sup>53</sup> is other than the obligation imposed by the custom of merchants upon persons who sign apparently in such capacity. A note in form joint,<sup>54</sup> or joint and several,<sup>55, 56</sup> cannot be shown by parol to impose obligations other than those appropriate to that form. Similarly an indorsement cannot be shown to be merely a transfer without recourse or a guaranty of identity, or anything other than an indorsement within the custom of merchants.<sup>57</sup> Whether this principle is applicable to an irregular or anomalous indorsement was matter of much dispute prior to the enactment of the Uniform Negotiable Instruments Law.<sup>58</sup> This statute,

41 Cal. 322; *Haley v. Evans*, 60 Ga. 157; *Walker v. Crawford*, 56 Ill. 444, 8 Am. Rep. 701; *Potter v. Earnest*, 45 Ind. 416; *Clement v. Houck*, 113 Ia. 504, 85 N. W. 765; *Shaw v. Shaw*, 50 Me. 94, 79 Am. Dec. 605; *Currier v. Hale*, 8 Allen, 47; *True v. Shepard*, 51 N. H. 501; *Colbert v. First Nat. Bank*, 38 Okl. 391, 133 Pac. 206; *Heist v. Hart*, 73 Pa. 286; *Morse v. Low*, 44 Vt. 561; *Hemrich v. Wist*, 19 Wash. 516, 53 Pac. 710; *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28. Cf. *Ramsey v. Capshaw*, 71 Ark. 408, 75 S. W. 479; *Murdy v. Skyles*, 101 Ia. 549, 70 N. W. 714, 63 Am. St. Rep. 411; *Hansen v. Yturria* (Tex. Civ. App.), 48 S. W. 795.

<sup>51</sup> *Young v. Austen*, L. R. 4 C. P. 553; *Cowles v. Townsend*, 31 Ala. 133; *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235; *Crane v. Williamson*, 111 Ky. 271, 63 S. W. 610; *Sylvester v. Staples*, 44 Me. 496; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Mason v. Graff*, 35 Pa. 448; *Foster v. Hall*, 44 Wis. 568.

<sup>52</sup> *Abrey v. Crux*, L. R. 5 C. P. 37; *Citizens' Bank v. Millet*, 103 Ky. 1, 44 S. W. 366, 44 L. R. A. 664, 82 Am. St. Rep. 546.

<sup>53</sup> *Noble v. Beeman, Spaulding Co.*, 65 Oreg. 93, 131 Pac. 1006, 46 L. R. A. (N. S.) 162. See also *Hibernia*

*Bank v. Dresser*, 132 La. 532, 61 So. 561.

<sup>54</sup> *Rumsey v. Fox*, 158 Mich. 248, 122 N. W. 526. See also *supra*, § 322.

<sup>55, 56</sup> *Parker v. Mayes*, 85 S. Car. 419, 67 S. E. 559.

<sup>57</sup> *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95; *Citizens' Bank v. Jones*, 121 Cal. 30, 53 Pac. 354; *Hopkins v. Commercial Bank*, 64 Fla. 310, 60 So. 183; *Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113; *Cochran v. Atchison*, 27 Kans. 728; *First Nat. Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790; *Prescott Bank v. Caverly*, 7 Gray, 217, 66 Am. Dec. 473; *Aronson v. Nurenberg*, 218 Mass. 376, 105 N. E. 1056; *Burwell v. Gaylord*, 119 Minn. 426, 138 N. W. 685; *Lake Harriet State Bank v. Miller*, 138 Minn. 481, 164 N. W. 989; *Foley v. Emerald, etc., Co.*, 61 N. J. L. 428, 39 Atl. 650; *Bird v. Kay*, 40 N. Y. App. Div. 533, 58 N. Y. S. 170; *Washington Sav. Bank v. Ferguson*, 43 N. Y. App. Div. 74, 59 N. Y. S. 295; *Hodgens v. Jennings*, 148 N. Y. App. D. 879, 133 N. Y. S. 584; *Smith v. Caro*, 9 Oreg. 278; *Holt Mfg. Co. v. Brotherton*, 91 Wash. 354, 157 Pac. 849; *Eaton v. McMahon*, 42 Wis. 484. See also *Barnstable Bank v. Ballou*, 119 Mass. 487.

<sup>58</sup> The decisions are collected and classified in 1 Ames' Cas. Bills and Notes, 269.

now in force in nearly all of the United States, provides,<sup>59</sup> that "where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser." In spite of this language, however, it has been held in several States<sup>60</sup> that parol evidence is still admissible to show as between the parties the liability which was actually intended. It has been well said that such decisions nullify the plain language of the statute;<sup>61</sup> and in Florida and Maryland contrary decisions have been made.<sup>62</sup> Where an indorsement is in blank, it has been said that there is no complete contract, but merely authority to write a contract above the signature. But by the custom of merchants the terms of the only contract which is authorized to be written over a blank indorsement are fixed, and there seems no more propriety in admitting evidence to vary the contract to be implied from the form of the instrument than if the terms were fully written out.<sup>63</sup> This argument is strengthened by the provisions of the Negotiable Instrument Law that "The signature of the indorser without additional words is a sufficient indorsement,"<sup>64</sup> and that an instrument indorsed in blank is payable to bearer,<sup>65</sup> for under these provisions it can hardly be said that a blank indorsement is incomplete. A parol agreement that an instrument need not be paid, or need not be paid in a certain contingency, or may be paid wholly or partly in merchandise or shall not be sued on when due, or shall be renewed, is also in violation of the parol

<sup>59</sup> Sec. 64, *infra*, § 1161.

<sup>60</sup> *Haddock Blanchard & Co., Inc., v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136; *Kohn v. Consolidated Butter & E. Co.*, 30 N. Y. Misc. 725, 63 N. Y. S. 265; *Mercantile Bank v. Busby*, 120 Tenn. 652, 113 S. W. 390. To the same effect is *Long v. Gwin*, 188 Ala. 196, 66 So. 88, 7 L. R. A. 599. The court does not cite the Negotiable Instruments Law though it was in force in the State. See also *Jenkins v. Coomber*, [1898] 2 Q. B. 168.

<sup>61</sup> *Brannan, Negotiable Instruments Law* (2d ed.), 78.

<sup>62</sup> *Baumeister v. Kunts*, 53 Fla. 340,

42 So. 886; *Lightner v. Roach*, 126 Md. 474, 95 Atl. 62. See also *Tucker v. Mueller*, 287 Ill. 551, 122 N. E. 847.

<sup>63</sup> *Torbert v. Montague*, 38 Col. 325, 87 Pac. 1145; *Seabury v. Hungerford*, 2 Hill, 80, 82; *Charles v. Denis*, 42 Wis. 56, 24 Am. Rep. 383. Such an indorsement cannot be shown to have been made without recourse. *Randle v. Davis Coal Co.*, 15 App. Dist. Col. 357; *Matthews v. Richards*, 13 Ga. App. 412, 79 S. E. 227. See also *Woodward v. Foster*, 18 Gratt. 200.

<sup>64</sup> N. I. L., Sec. 31, *infra*, § 1149.

<sup>65</sup> *Id.* Sec. 9 (5), 34; *infra*, §§ 1139, 1151.

evidence rule.<sup>66</sup> Where parol agreements have been allowed to modify the apparent effect of contracts on negotiable paper, various explanations have been given. As for instance, that the effect of the parol evidence was to show lack of consideration, or that for other reasons no contract whatever had been entered into. While this may explain some cases, it will not explain all. It has also been suggested,<sup>67</sup> that the avoidance of circuitry of action is the real reason for admitting evidence of the parol agreement where it has been held admissible. The parol evidence offered, it is argued, shows a collateral agreement which would justify a cross action if recovery were allowed on the negotiable instrument. But the parol evidence rule as ordinarily applied does not merely exclude proof of prior or contemporaneous oral agreements when suit is brought upon the written contract, but denies validity to the oral agreement

<sup>66</sup> *Hoare v. Graham*, 3 Camp. 57; *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 316; *Payne v. Mutual Life Ins. Co.*, 141 Fed. 339, 72 C. C. A. 487; *Rice v. Gilbreath*, 119 Ala. 424, 24 So. 421; *Harmon v. Harmon*, 131 Ark. 501, 199 S. W. 553; *Dorsey v. Armor*, 10 Colo. App. 255, 50 Pac. 726; *Johnson v. Cobb*, 100 Ga. 139, 28 S. E. 72; *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496; *Jensen v. McConnell*, 31 Idaho, 87, 169 Pac. 292; *Clayes v. White*, 65 Ill. 357; *Moore v. Prussing*, 165 Ill. 319, 46 N. E. 184; *Clinton v. Royal*, 203 Ill. App. 248; *Graff v. Fox*, 204 Ill. App. 598; *Dominion Nat. Bank v. Manning*, 60 Kans. 729, 57 Pac. 949; *Slusher v. Conant*, 18 Ky. L. Rep. 660, 37 S. W. 579; *Ockington v. Law*, 66 Me. 551; *Henry Woods' Sons Co. v. Schaefer*, 173 Mass. 443, 53 N. E. 881, 73 Am. St. Rep. 305; *Central Sav. Bank v. O'Connor*, 139 Mich. 82, 102 N. W. 280; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; *Lake Harriet State Bank v. Miller*, 138 Minn. 481, 164 N. W. 989; *Van Etten v. Howell*, 40 Neb. 850, 59 N. W. 389; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep.

256; *Stiles v. Vandewater*, 48 N. J. L. 67, 4 Atl. 658; *Block v. Stevens*, 72 N. Y. App. Div. 246, 76 N. Y. S. 213; *Bijur Motor &c. Co. v. Eclipse Mach. Co.*, 243 Fed. 600, 156 C. C. A. 298 (N. Y. D. C.); *Western Carolina Bank v. Moore*, 138 N. C. 529, 51 S. E. 79; *Cherokee County v. Meroney*, 173 N. C. 653, 92 S. E. 616; *First State Bank v. Kelly*, 30 N. Dak. 84, 152 N. W. 125; *Colvin v. Goff*, 82 Oreg. 314, 161 Pac. 568, L. R. A. 1917 C. 300; *Homewood People's Bank v. Heckert*, 207 Pa. 231, 56 Atl. 431; *Lewis v. Wilson*, 108 S. Car. 47, 93 S. E. 242; *Black Hills Trust & Sav. Bank v. Plunkett* (S. Dak.), 166 N. W. 527; *Hancock v. Edwards*, 7 Humph. 349; *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882. But see *Rosentock v. Montague*, 28 N. Y. Misc. 483, 59 N. Y. S. 500; *Quin v. Sexton*, 125 N. C. 447, 34 S. E. 542; *Farrington v. McNeill*, 174 N. C. 420, 93 S. E. 957; *Clinch Valley Co. v. Willing*, 180 Pa. 165, 36 Atl. 737, 57 Am. St. Rep. 626; *Gandy v. Weckerly*, 220 Pa. 285, 69 Atl. 858, 18 L. R. A. (N. S.) 434.

<sup>67</sup> 2 Ames Cas. Bills & Notes, 804.

altogether.<sup>68</sup> If, therefore, parol evidence is more freely allowed in case of negotiable instruments than in that of other written contracts it must be for the reason suggested at the beginning of the section.

### § 645. Agreements collateral to deeds.

In a number of decisions parol agreements made by the grantor in a deed of conveyance or lease as part of the transaction, have been enforced.<sup>69</sup> The same is true in many jurisdictions where an insurance policy has been involved.<sup>69</sup>

These decisions seem probably based on the fact that the written transaction between the parties was a formal deed of conveyance in which it was inappropriate to insert any minor collateral matter. But a parol agreement which contradicts the express or implied terms of a sealed instrument is of course inadmissible,<sup>70</sup> as where proof of a parol reservation of part of the property conveyed, is offered.<sup>71</sup>

<sup>68</sup> *Supra*, § 631.

<sup>69</sup> *Morgan v. Griffith*, L. R. 6 Exch. 70 (agreement by lessor to keep down rabbits); *Erksine v. Adeane*, L. R. 8 Ch. 756 (agreement by lessor to kill the game and not let the shooting); *Angell v. Duke*, L. R. 10 Q. B. 174 (agreement by lessor to repair and send furniture to leased premises); *Henshaw v. Smith*, 102 Kans. 599, 171 Pac. 616 (agreement to pay for improvements and expense of moving); *Page v. Monks*, 5 Gray, 492 (agreement to pay for filling land); *Carr v. Dooley*, 119 Mass. 294 (agreement to build a sewer); *McCormick v. Cheevers*, 124 Mass. 262 (agreement to pay for filling); *Durkin v. Cobleigh*, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436 (agreement to grade and build a street and cause city water to be put in); *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427 (agreement not to sell other land below a certain price); *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666; *Scott v. Asbury* (Mo. App.), 198 S. W. 1131 (agreement

by vendor of house to transfer medical practice with it); *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127; *Webber v. Loranger* (N. H.), 103 Atl. 1050 (agreement of lessor to repair premises); *Mayer v. Rothstein*, 167 N. Y. S. 503 (agreement as to repairs of leased premises); *Shughart v. Moore*, 78 Pa. 469; *Wolfe v. Arrott*, 109 Pa. 473, 1 Atl. 333 (*cf.* *Wood v. Carson*, 257 Pa. 522, 101 Atl. 811). See also *Kernodle v. Kernodle*, 174 N. C. 441, 93 S. E. 956 (bond for money).

<sup>70</sup> See *infra*, § 749.

<sup>71</sup> *Edison, etc., Co. v. Gibby Foundry Co.*, 194 Mass. 258, 80 N. E. 479; *Lozier v. Hill*, 68 N. J. Eq. 300, 59 Atl. 234; *Wallace v. Langston*, 52 S. Car. 133, 29 S. E. 552. But see *Mereness v. De Lemos*, 91 Conn. 651, 101 Atl. 8, where it was held contrary to *Edison, etc., Co. v. Gibby Foundry Co.*, *supra*, that an oral agreement by a grantor to pay taxes on the granted premises, was effectual though the deed contained a covenant against encumbrances.

<sup>72</sup> *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430; *Hisey v. Troutman*, 84 Ind.

**§ 646. The parol evidence rule does not exclude merely oral agreements.**

As the basis of the parol evidence rule is that a certain writing or writings have been agreed upon by the parties or assumed by them as an integration or memorial of their agreement upon a certain matter, it necessarily follows that any transaction between them, outside of this memorial, cannot affect their obligations in regard to that matter. It will be of no consequence whether such outside matter is oral or written.<sup>72</sup> Nevertheless where there are several writings relating to the same matter, and one of them does not appear on its face to be a revision or substitute for another, it will generally be easier to find as a fact that the last writing was intended merely to supplement not to supersede the earlier writing or writings than a corresponding finding would be if the earlier agreements were oral.

**§ 647. Applications of the parol evidence rule to third persons.**

It is commonly said that the parol evidence rule is only applicable to the parties to a contract and does not apply to third persons, or only applies to them when they are trying to enforce rights under the contract.<sup>73</sup> This statement is likely

115; *Bricker v. Whisler*, (Ind. App.), 117 N. E. 550; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Cauble v. Worsham*, 96 Tex. 86, 70 S. W. 737, 97 Am. St. Rep. 871. In *Caveny v. Curtis*, 257 Pa. 575, 101 Atl. 853, 654, the court said:—"The general rule is that preliminary agreements and understandings relating to the sale of land become merged in the deed. This rule, however, does not apply to independent covenants or provisions in an agreement of sale not intended by the parties to be incorporated in the deed. In such case the delivery of the conveyance is merely a part performance of the contract, which remains binding as to its further provisions. *Seldon v. Williams*, 9 Watts, 9; *Walker v. France*, 112 Pa. 203, 5 Atl. 208; *Close v. Zell*, 141 Pa. 390, 21 Atl. 770, 23 Am. St. Rep. 296."

<sup>72</sup> *Wigmore on Evidence*, § 2400.

<sup>73</sup> *Sigua Iron Co. v. Greene*, 88 Fed. 207, 31 C. C. A. 477; *O'Shea v. New York, C. & St. L., etc., R. Co.*, 105 Fed. 559, 44 C. C. A. 601; *Central Coal, etc., Co. v. Good*, 120 Fed. 793, 57 C. C. A. 161; *Coleman v. Pike Co.*, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865; *Northern Assur. Co. v. Chicago, etc., Assn.*, 198 Ill. 474, 64 N. E. 979; *Hubbard v. Harrison*, 38 Ind. 323; *Burns v. Thompson*, 91 Ind. 146; *Livingston v. Stevens*, 122 Iowa, 62, 94 N. W. 925; *Kellogg v. Tompson*, 142 Mass. 76, 6 N. E. 860; *Johnson v. Von Scholley*, 218 Mass. 454, 106 N. E. 17; *National Car, etc., Builder v. Cyclone, etc., Co.*, 49 Minn. 125, 51 N. W. 657; *McKim v. Metropolitan St. Ry. Co.*, 196 Mo. App. 544, 196

to cause misapprehension. Confusion seems to have arisen from the broad application of the term of parol evidence rule to several related but distinct topics, especially to the doctrine of estoppel by deed.<sup>74</sup> It was a doctrine of the common law that facts recited in a deed could not be contradicted by the parties to the instrument; though even in jurisdictions where seals still retain much of their early significance, this rule has been considerably broken in upon.<sup>75</sup> But no such broad rule was ever applied to written unsealed contracts.<sup>76</sup> It was part of the doctrine of estoppel by deed that, though the facts recited in the deed could not be contradicted by the parties, they might be contradicted by third persons, "Who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others."<sup>77</sup> At the present day, as recited facts in unsealed writings may generally be shown to be inaccurately stated even between the parties to the writing, there can be no question of the right of third persons to prove the inaccuracy. It is also true in regard to any writing sealed or unsealed that if a transaction is in fraud of the rights of third persons, it may be shown by parol that the written contract is a scheme, or part of a scheme, to defraud them,<sup>78</sup> though in

S. W. 433; *Libby v. Mount Monadnock, etc., Co.*, 67 N. H. 587, 32 Atl. 772; *First Nat. Bank of Plainfield v. Dunn*, 55 N. J. L. 404, 27 Atl. 908; *Lee v. Adsit*, 37 N. Y. 78; *Lowell Mfg. Co. v. Safeguard Ins. Co.*, 88 N. Y. 591; *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292; *Alexander v. Righter*, 240 Pa. 22, 26, 87 Atl. 427; *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053; *Ransom v. Wickstrom*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916 A. 588.

<sup>74</sup> As to this doctrine see *Bigelow on Estoppel* (6th ed.), pp. 364 *et seq.*

<sup>75</sup> See for example *supra*, § 115a.

<sup>76</sup> As to the limits of estoppel by contract, see *Bigelow on Estoppel* (6th ed.), 695 *et seq.*

<sup>77</sup> 1 Greenleaf, Evidence, § 279. See also *King v. Cheadle*, 3 B. & Adol. 833; *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865; *Hubbard v. Harrison*, 38 Ind. 323; *Overseers of New Berlin v. Overseers of Norwich*, 10 Johns. 229; *Bruce v. Roper Lumber Co.*, 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657.

<sup>78</sup> *Burns v. Thompson*, 91 Ind. 146; *Livingston v. Stevens*, 122 Ia. 62, 94 N. W. 925; *Highstone v. Burdette*, 61 Mich. 54, 27 N. W. 852; *National Car, etc., Builder v. Cyclone, etc., Co.*, 49 Minn. 125, 51 N. W. 657. Indeed much of the law of fraudulent conveyances is based on this principle. A conveyance absolute in terms and indefeasible between the parties, whether made orally, by unsealed writing or

an action between the parties the writing might be taken at its face value. Furthermore, it does not follow from the parol evidence rule "that a written contract between A and B, which is conclusive as to them, must be of necessity so, as to the proof of any rights or claims of A against C merely because they grow out of the same business."<sup>79</sup> The effect of the parol evidence rule must also be distinguished from the effect of the requirements of the Statute of Frauds. As has been seen,<sup>80</sup> a memorandum under the statute is not necessarily a written contract, and it may be the oral agreement, not the written memorandum making the contract enforceable, which constitutes the contract. So far as concerns third persons, there is a contract between the parties when the oral agreement is made.<sup>81</sup>

But where the issue in dispute, even between third parties, is what are the obligations of A and B to one another, and those obligations are stated in a written contract, the parol evidence rule is applicable. The written contract represents the truth and the whole truth of the contractual obligations of A and B in whatever way and between whatever parties an inquiry as to such obligations may become important. To admit parol evidence to the contrary which would not be admitted as between the parties, except for the purpose of showing either fraud against the third person, or some invalidating facts which would be available to the parties themselves, is to permit facts to be shown which have no relevancy to the issue of what is the contract between A and B.<sup>82</sup> There can be no doubt that if a third person claims in the right of a party to a written contract,

by deed, may be attacked by creditors if in fraud of their rights.

<sup>79</sup> *Evans v. Wells*, 22 Wend. 324, 345; *Johnson v. Portword*, 89 Tex. 235, 34 S. W. 596, 787.

<sup>80</sup> *Supra*, § 567.

<sup>81</sup> See *supra*, § 530.

<sup>82</sup> In *Walker v. State*, 117 Ala. 42, 23 So. 149, criminal proceedings were brought against the defendant, an agent of the Singer Mfg. Co., for embezzling money of the Company. The defendant set up that money which he had retained was due him for com-

missions and otherwise. The court said, at page 52: "It is obvious, however, that it was not proper for the State to prove by its witness—an agent of the Singer Co.—how much commissions the defendant was entitled to receive on collections. The written contracts regulated that, and were before the court, and there was no question of motive or intent, touching the issues involved in the prosecution, which that witness's views of what the allowable commissions were, would shed any light upon."



he is subject to the parol evidence rule.<sup>83</sup> But the application of the rule to third persons is not confined to such cases. Though most of the decisions on the subject, however broad the language used, are correctly decided since they merely involved either the contradiction of a recited fact, or the proof of fraud against the rights of a third person, a few decisions cannot thus be explained. In some recent cases<sup>84</sup> against joint tortfeasors, the defence has been set up that a release had been given to the other tortfeasor. Though perhaps the cases might have been well decided on the ground that the so-called releases when construed as a whole were merely covenants not to sue, the courts did not rest their conclusion on such a construction of the writing taken by itself, but admitted parol evidence of the negotiations between the parties to the release (though conceding that the evidence would not have been admissible between the parties themselves) on the ground that as against a third party the parol evidence rule had no application. The error of such decisions is plain if we assume that the defendant instead of being a joint tortfeasor was a surety jointly bound on a contract, the principal debtor of which was released or given time—a change which would make no difference in the application of the argument of the court.

In the case supposed, if judgment were given against the surety because a construction was given to the release of the principal, which the writing itself would not bear, the surety would thereafter seek to enforce by subrogation a claim against the principal debtor. He would, however, fail because the right to which he sought subrogation did not exist. As between the creditor and the principal debtor, the release would unquestionably be binding according to the terms of the writing; and as the creditor would have no right against the principal debtor, the surety could be subrogated to nothing.

<sup>83</sup> In *Libby v. Mount Monadnock, etc., Co.*, 67 N. H. 587, 32 Atl. 772, the plaintiff was a garnishee creditor, and was held subject to the terms of a written contract between the defendant and the garnisheered party as fully as if the litigation had been between the parties of the contract. *Union Mach-*

*inery &c. Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

<sup>84</sup> *O'Shea v. New York, etc., R. Co.*, 105 Fed. 559, 44 C. C. A. 601; *Johnson v. Von Scholley*, 218 Mass. 454, 106 N. E. 17; *McKim v. Metropolitan St. Ry. Co.* (Mo. App.), 196 S. W. 433; *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053.

## CHAPTER XXII

### USAGE AND CUSTOM

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#### § 648. Effect of custom and usage.

Usage or custom may be important in three different aspects:

- (1) To aid in the interpretation of the meaning of the express language of a contract;
- (2) To annex terms to the contract, and thereby to contradict or vary implications which, otherwise, would be drawn from the written or oral expression of the parties; and
- (3) To create new rules of law.

In the first aspect usage becomes important as a means of interpretation. In the second aspect two questions may be involved, first, does the usage show that the parties have agreed on a collateral term of their contract and, second, if so, does the parol evidence rule prevent their agreement from taking effect? In the third aspect, the usage has ripened into customary law. So far as the first use of evidence of usage is concerned, it may be said broadly, that any usage with knowledge of which both parties are chargeable is always admissible to show the meaning

of the language employed. Usage is an ordinary means of proving the local or technical meaning of language, and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstances of the case, a meaning different from its normal sense.<sup>1</sup>

#### § 649. Distinction between custom and usage.

The terms, custom and usage, are commonly used interchangeably, though there is a recognized distinction in the meaning of the two words. Custom is such a usage as has by long and uniform practice become the law of the matter to which it relates.<sup>2</sup> Usage derives its efficacy from the assent thereto of parties to the transaction; custom derives its efficacy from its adoption into the law, and when once established is binding irrespective of any manifestation of assent by parties concerned. Usage is, therefore, of importance only in consensual agreements since it is the assent of the parties which gives it its force. Custom, on the other hand, may be of importance in any department of the law. The custom of gavelkind or of borough English, under which land of a deceased person did not pass to his eldest son as at common law, did not depend for its validity on the assent of the eldest son to be wholly or partly disinherited. The importance of usage except for the purpose of establishing the meaning of words, is comparatively modern. The early law did not give effect to unexpressed implications of fact. The earliest decision of importance recognizing the validity of usage in this respect was decided in the latter half of the eighteenth century by Lord Mansfield.<sup>3</sup> Custom, on the other hand, has from early times been recognized as a source of law, and the customs of different communities in England have been given effect by the courts. In the United States there is less law based on special custom than in England, and this method of developing and changing the law is of decreasing importance. Statutes take its place.

..<sup>1</sup> See *supra*, § 609, and *infra*, § 650.

<sup>2</sup> "Strictly speaking custom is that length of usage which has become law." *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Eames v. H. B. Claffin Co.*, 239 Fed. Rep. 631, 152 C. C. A. 465;

*American Lead Pencil Co. v. Nashville, etc., R. Co.*, 124 Tenn. 57, 134 S. W. 613, 32 L. R. A. (N. S.) 323.

<sup>3</sup> *Wigglesworth v. Dallison*, 1 Doug. 201.

Some confusion of thought has arisen from applying to usages the requirements necessary to establish customary law.

### § 650. Proof of usage for purposes of definition.

Though Professor Thayer has said, that "In contracts, it was always recognized that familiar words may have different meanings in different places, so that 'every bargain as to such a thing shall have relation to the custom of the country where it is made,'" <sup>4</sup> it may be doubted how far it was allowable under early law to show that a word in a written contract (or perhaps in an oral agreement) having a clear and fixed ordinary meaning bore a meaning contrary to its usual significance, if nothing in the context showed that a particular meaning was intended.<sup>5</sup> But there are now numerous decisions (not all of them of recent date) where words with a clear normal meaning have been shown by usage to bear a meaning which nothing in the context would suggest. This is not only true of technical terms,<sup>6</sup> but of language, which at least on its face

<sup>4</sup> Prelim. Treatise on Evidence, p. 403; citing, Keilwey, 87, 3, in the Ex. Ch. in 1505, and continuing: "In *Baker v. Paine*, 1 Ves. p. 456, 459 (1750), Lord Hardwicke, in a mercantile case of sale, remarked: 'all contracts of this kind depend on the usage of trade. . . . On mercantile contracts relating to insurance, etc., courts of law examine and hear witnesses of what is the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction.' The development of the mercantile law by the use of special juries involved a recognition of these same ideas."

<sup>5</sup> As late as the end of the eighteenth century in *Yates v. Pym*, 6 Taunt. 446, the words "prime unsinged bacon" were held to have so definite a meaning that parol evidence could not be admitted to show that bacon

with no more than a certain degree of taint came within their meaning. Not only *Starkie on Evidence* (p. 706) states that "plain and ordinary terms and expressions to which an unequivocal meaning belongs . . . ought not to be altered by evidence of a mercantile understanding and usage" but *Stephen, Digest of Evidence*, Art. 91 (2) expresses the same idea. "Usage may be admissible to explain what is doubtful: it is never admissible to contradict what is plain." *Blackett v. Royal Exchange Ass. Co.*, 2 Cr. & J. 244, per Lord Lyndhurst, C. B. See also *supra*, § 609.

<sup>6</sup> The general rule is stated in *Soper v. Tyler*, 77 Conn. 104, 106, 58 Atl. 699, "When the defendant made his contract with a Boston grain dealer, the meaning of any technical terms used in expressing it, so far as they were terms of common use in the grain trade at Boston, was to be determined by such usage."

has no peculiar or technical significance;<sup>7</sup> though even to-day it is still occasionally said by courts that usage cannot control words having "a definite legal meaning;"<sup>8</sup> or cannot be used to interpret a contract unless there is an uncertainty on the face of the instrument.<sup>9</sup> So it is often said also that usage is admissible to explain what is doubtful but never to contradict what is plain.<sup>9</sup> If this statement means that usage is not admitted to contradict a meaning apparently plain if proof of the usage were excluded (and this is what the statement seems naturally to mean), it is inconsistent with many decisions and wrong on principle.<sup>10</sup> The words "sail in the month of October" in a policy of insurance have been proved to mean not to sail until the 25th of the month.<sup>11</sup> The words in a bill of lading "to be discharged in 14 days" have been shown to mean fourteen working days.<sup>12</sup> The words "twelve shillings per day" have been shown to mean twelve shillings for ten hours; so that for working twelve hours and a half in a single day, the agreed compensation would be sixteen shillings.<sup>13</sup> The word "products" in pork packing has been shown to exclude part of what an unenlightened person would call products.<sup>14</sup> "White oak" may include varieties of wood not scientifically so designated.<sup>15</sup> "An order" in a contract with an agent providing for a certain commission for "an order" has been shown to mean only an order on which a certain amount had been paid by the purchaser.<sup>16</sup> A transfer to a dealer "on approval to show my customers" has been shown to confer no

<sup>7</sup> *Paepcke-Leicht Lumber Co. v. Talley*, 106 Ark. 400, 153 S. W. 833; and see cases in this section *passim*.

<sup>8</sup> *Hall v. Philadelphia Co.*, 72 W. Va. 573, 78 S. E. 755.

<sup>9</sup> *Jones v. Cochran*, 33 Okl. 431.

<sup>10</sup> *Blackett v. Royal Exchange Assur. Co.*, 2 C. & J. 244, and this statement is frequently repeated, *e. g.*, *Menage v. Rosenthal*, 175 Mass. 358, 361, 56 N. E. 579. See also *The Rebecca R. Douglass*, 248 Fed. 366; *Guild v. Sampson*, 232 Mass. 509, 122 N. E. 712.

<sup>11</sup> See *supra*, § 649, and *infra*, §§ 651, 652.

<sup>12</sup> *Chaurand v. Angerstein, Peake*, 43.

<sup>13</sup> *Cochran v. Retberg*, 3 Esp. 121. A contract to give one's "entire time" will or will not require work on Sunday according to the usage of the business in question. *Collins Ice Cream Co. v. Stephens*, 189 Ill. 200, 59 N. E. 524.

<sup>14</sup> *Hinton v. Locke*, 5 Hill, 437.

<sup>15</sup> *Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211. See also *Stewart v. Smith*, 28 Ill. 397.

<sup>16</sup> *Taylor v. Union Sawmill Co.*, 105 Ark. 518, 152 S. W. 150.

<sup>17</sup> *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859.

power to sell.<sup>17</sup> The words "to be shipped prompt" have been shown to mean, among grain dealers, within ten days.<sup>18</sup> Words of measurement may be shown to bear an unusual meaning;<sup>19</sup> "rags" may include whatever is used for paper stock;<sup>20</sup> and "old metals," glass and rubbers;<sup>21</sup> "a crop" may by usage be shown to include what the seller had acquired by purchase as well as what he raised;<sup>22</sup> "Close of navigation for the season" may be shown to mean Nov. 30th, although navigation was in fact possible after that date;<sup>23</sup> "Dry goods" may be shown to exclude notions, clothing, hats and caps;<sup>24</sup> the word "noon" may be shown to mean twelve o'clock standard time rather than actual time.<sup>25</sup> "Winter season" has been shown to mean the period between the time a saw mill closed in the autumn and the arrival of logs in the spring;<sup>26</sup> "Working Days" has been shown to exclude freezing weather;<sup>27</sup> "San Domingo mahogany" has been shown to be a trade name covering a good figured mahogany equal in density to the San Domingan variety;<sup>28</sup> "Sawlogs" may by usage mean only pine logs.<sup>29</sup>

<sup>17</sup> *Smith v. Clewes*, 114 N. Y. 190, 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. Rep. 627.

<sup>18</sup> *Soper v. Tyler*, 77 Conn. 104, 58 Atl. 699.

<sup>19</sup> The meaning of "bushel of a particular commodity may be shown to be 32 pounds. *Richardson v. Cornforth*, 118 Fed. 325, 55 C. C. A. 341, or 14 pounds, *Brent v. Chas. H. Lilly Co.*, 202 Fed. 335." "Thousand" as applied to rabbits, may mean twelve hundred. *Smith v. Wilson*, 3 B. & Ad. 728. "Thousand" may also be shown by custom to mean a quantity estimated by measure to amount to a thousand, but in fact not exactly that number. *Lowe v. Lehman*, 15 Ohio St. 179; *Pittsburgh v. O'Neill*, 1 Pa. St. 342. So two packs of shingles may by custom be referred to in a contract as a thousand, though not containing that exact number. *Soutier v. Kellerman*, 18 Mo. 509. See also *Walker v. Syme*, 118 Mich. 183, 76 N. W. 320. But in *Rogers v. Hayden*, 91 Me. 24, 39 Atl. 283, a custom of determining the

number of cubic yards of stone, sold at a price per cubic yard, after it had been laid in a wall, was held unreasonable when it would result in doubling the quantity actually sold.

<sup>20</sup> *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Goodrich v. Stevens*, 5 Lans. 230.

<sup>23</sup> *Eddy v. Northern Steamship Co.*, 79 Fed. 361.

<sup>24</sup> *Wood v. Allen*, 111 Ia. 97, 82 N. W. 451.

<sup>25</sup> *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.*, 120 Ky. 752, 87 S. W. 1115, 89 S. W. 3.

<sup>26</sup> *Barker v. Citizens' Mutual Fire Ins. Co.*, 136 Mich. 626, 99 N. W. 866.

<sup>27</sup> *General Bonding &c. Co. v. McQuerry* (Tex. Civ. App.), 1915 W. 858.

<sup>28</sup> *Snoqualmi Realty Co. v. Moynihan*, 179 Mo. 629, 78 S. W. 1014.

<sup>29</sup> *W. T. Smith Lumber Co. v. Jernigan*, 185 Ala. 125, 64 So. 300, Ann. Cas. 1916 C. 654.

In a contract for the sale of lumber by measure, a particular method of measurement may be shown to be customary.<sup>30</sup> A contract calling for shipment from Turkey to New York has been held satisfied by a cargo shipped from Turkey to Liverpool and transshipped there to New York, that being the customary mode of shipment.<sup>31</sup> "Cash basis, note at sixty days, interest added" may be shown to mean that the buyer has the option of paying either in cash or by note.<sup>32</sup>

**§ 651. Usage may be adopted as a term of a contract.**

The belief of individuals or of a community that a rule of law is something different from what it actually is, will not change the rule of law.<sup>33</sup> Nor will it make any difference if the members of the community habitually settle disputes in accordance with their erroneous belief. At least, a habit must be general and continue for a long time before the common law will adopt the custom as part of itself. But if two individuals of such a community make a contract with one another with reference to a matter to which a well-known habit or usage applies, and if the common law does not forbid the application of the customary rule if parties agree thereto, a different problem is presented. The only question now is whether the parties to the contract have agreed impliedly to be bound by the usage. They cannot change the rule of law but they can change its application to themselves if they agree to do so. The belief of a community that an implied warranty of quality accompanies every sale of goods will not make that the law. But it is the law that if the parties to a sale agree that there shall be a warranty of quality the law enforces their agreement. If then each party to a sale knows that the other believes that there is a warranty impliedly given and assents to its existence, there seems no reason why the implication of fact involved in the existence of the usage should not be given the same effect as any implication of fact in the law of contracts.<sup>34</sup>

<sup>30</sup> *McKinney v. Matthews*, 166 N. C. 576, 82 S. E. 1036; *Brown v. Brooks*, 25 Pa. 210.

<sup>31</sup> *Isaigi v. Rosenstein*, 158 N. Y. 678, 52 N. E. 1124. *Cf. Sutro v. Halbut*, [1917] 2 K. B. 348.

<sup>32</sup> *Morris v. Supplee*, 208 Pa. 253, 57 Atl. 566.

<sup>33</sup> *Haskins v. Warren*, 115 Mass. 514.

<sup>34</sup> See *Eames v. H. B. Clafin Co.*, 239 Fed. 631, 152 C. C. A. 465.

Broad statements, therefore, which are sometimes made, that usage or custom cannot change a rule of law,<sup>35</sup> must be accepted with some reservation. The rule of law cannot be changed, but its application to the case may be prevented. The facts as they appear to be apart from the usage are altered by the additional agreement which is implied because the parties contracted with reference to the usage. The additional facts make a rule of law applicable which would not have been applicable in the absence of the usage. Otherwise it would have been idle to introduce evidence of it. Indeed the very existence or non-existence of a contract may depend upon usage. Thus usage in a particular trade that one party should confirm in writing telephone agreements, and the other should promptly give notice if the written confirmation proved inaccurate has been rightly held admissible.<sup>36</sup> It is evident that under this usage a contract made by telephone may by lack of confirmation be invalidated, and a disagreement by telephone may by failure to object to the written confirmation ripen into a contract.

**§ 652. Collateral agreements may be added to written contracts by usage.**

In accordance with the principles heretofore considered, in connection with collateral parol agreements, it may be shown that a matter concerning which the written contract is silent, is affected by a usage with which both parties are chargeable.

"It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to

<sup>35</sup> *Fleming v. King*, 100 Ga. 449, 28 S. E. 239; *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457, 64 N. E. 496; *Entwhistle v. Henke*, 211 Ill. 273, 71 N. E. 990, 103 Am. St. Rep. 196; *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, 25 N. E. 901; *High Wheel Auto Parts Co. v. Journal Co.*, 50 Ind. App. 396, 98 N. E. 442; *Clark v. Allaman*, 71 Kans. 206, 80 Pac. 571, 70 L. R. A. 971; *Grant v. Robb*, 71 Kans. 846, 80 Pac. 585;

*Pickering v. Weld*, 159 Mass. 522, 34 N. E. 1081; *Healey v. Mannheimer*, 74 Minn. 240, 76 N. W. 1126; *Hart v. Cort*, 165 App. Div. 583, 151 N. Y. S. 4; *Syer v. Lester*, 116 Va. 541, 82 S. E. 122. Thus a custom that freight prepaid is not to be returned in case the vessel is lost, has been held ineffective. *De Sola v. Pomares*, 119 Fed. 373.

<sup>36</sup> *Strong v. Ringle*, 96 Kans. 573, 152 Pac. 631.



which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."<sup>37</sup> This necessarily involves the proposition that evidence of usage may be introduced to contradict implications of fact or law which in the absence of usage would have been drawn from the writing, since otherwise there would be no point in proving the usage.<sup>38</sup> The matter has been confused by statements, often inconsistent, made by courts of high authority. Thus Clifford, J., of the Supreme Court of the United States, speaking for the court has said: "Usage is admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties,"<sup>39</sup> and the statement is typical of the endeavor of many courts to give in practice to usage a greater effect than they admit in theory. In fact, the statement is self-contradictory. The distinction between "annexing incidents" and "adding a new element" is impossible to draw. Usage when not admitted merely for the purposes of defining the meaning of language is necessarily introduced for the purpose of adding a new element or term or incident, whichever one is pleased to call it, to the contract.<sup>40</sup>

<sup>37</sup> *Hutton v. Warren*, 1 M. & W. 466, 475, per Parke, B. So "Evidence of a custom can be given in two cases: (1) to interpret a business term or expression in a contract, and (2) to annex an incident to the contract." *Sutro v. Heilbut*, [1917] 2 K. B. 348, 365. "Usage enters into every contract, and may be shown for the purpose not only of elucidating the contract, but also of completing it." *Bitulithic Co. v. Algiers Ry. & Lighting Co.*, 130 La. 830, 58 So. 588. See also *Produce Brokers' Co. v. Olympia Oil and Cake Co.*, [1916] A. C. 314, 331.

<sup>38</sup> The implication contradicted may be merely negative, i. e., that the parties had made no agreement in regard to the matter to which the custom related.

<sup>39</sup> *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779. Equally futile is the distinction suggested in *Scott's Exec. v. Chesterton*, 117 Va. 584, 596, 85 S. E. 502, that "a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character."

<sup>40</sup> The matter has been well expressed in *Humfrey v. Dale*, 7 E. & B. 266, E.

Sometimes almost every element of a contract is left to be determined by usage. When an employee is engaged, or an agent or corporate officer is appointed, the nature of his duties and sometimes his compensation and term of service are not stated but are fixed by what is customary and reasonable.

**§ 653. Illustrations of collateral agreements annexed to written contracts by usage.**

Usage has been given effect in the following cases, though the rule of law would, in many of the cases, have been otherwise, apart from usage; that a tenant should have the crop growing at the expiration of a fixed term;<sup>41</sup> that a contract of employment by the year may be terminated by a month's notice;<sup>42</sup> that the travelling expenses of a salesman who receives a five per cent commission are to be deducted from the commission;<sup>43</sup> that the obligation to pay freight is to be based on the measurement at the place of shipment;<sup>44</sup> that on the rejection of a shipment by the consignee the carrier should notify the consignor within forty-eight hours;<sup>45</sup> that on a sale of shares providing for payment of the price in instalments

B. & E. 1004. "In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations and be different contracts. The truth is, that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but *those only which were necessary to be determined in the particular case* by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them."

<sup>41</sup> *Wigglesworth v. Dallison*, 1 Doug. 201. This decision by Lord Mansfield is the leading case on the admissibility of usage to annex incidents to a contract. *Moore v. Coughlin*, 36 Okl. 252, 128 Pac. 257. See *contra Harris v. Carson*, 7 Leigh, 632, 30 Am. Dec. 510.

<sup>42</sup> *Parker v. Ibbetson*, 4 C. B. (N. S.) 346. See also *George v. Davies*, [1911] 2 K. B. 445; *Arkadelphia Lumber Co. v. Asman*, 85 Ark. 568, 107 S. W. 1171; *De Carlton v. Glaser*, 172 N. Y. App. 132, 168 N. Y. S. 271. Cf. *Bowen v. Chensa-Hignite Coal Co.*, 168 Ky. 588, 182 S. W. 635.

<sup>43</sup> *Himmel v. Levinstein*, 132 Md. 317, 103 Atl. 848.

<sup>44</sup> *Buckle v. Knoop*, L. R. 2 Exch. 125. See as to other maritime customs, *Noble v. Kennoway*, 2 Doug. 510; *Allan v. Sundius*, 1 H. & C. 123.

<sup>45</sup> *South Deerfield Onion Storage Co. v. New York, etc., R. Co.*, 222 Mass. 535, 111 N. E. 367.

in two and four months, the seller need not deliver the shares without receiving payment concurrently with delivery;<sup>46</sup> that a contract to sell in terms performable at a fixed day is not to be regarded as broken until after the lapse of twenty-four hours' notice;<sup>47</sup> that insurance premiums will be accepted by the insurer after the day of payment fixed in the policy, and that the insurance in the meantime is not invalidated;<sup>48</sup> that a contract to perform for three years in a theatre at a weekly salary does not require payment of salary during the theatrical vacation;<sup>49</sup> that a period of credit may be attached to a contract of sale which apart from usage would require payment on delivery;<sup>50</sup> that in a sale on credit the delivery is to be concurrent with payment;<sup>51</sup> and that the buyer of goods shall be allowed a deduction of a certain percentage for wastage.<sup>52</sup> The manner or place of delivery,<sup>53</sup> or the mode of payment may be shown in the same way.<sup>54</sup> The time within which an offer must be accepted similarly may be shown to be twenty-four hours;<sup>55</sup> and a time for the delivery of goods to be manufactured may by usage be shown to be reasonable, though apart from usage unreasonable.<sup>56</sup> By usage it may be shown that on sales of lumber defects must be reported within ten days after delivery and that an inspector was then to be sent by the seller to adjust differences, and that the party found in fault

<sup>46</sup> *Field v. Lelan*, 6 H. & N. 617.

<sup>47</sup> *McDonald v. Union Hay Co.* (Minn.), 172 N. W. 891.

<sup>48</sup> *Baxter v. Massasoit Ins. Co.*, 13 Allen, 320; *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 86 Pa. 236; *National Mutual Ins. Co. v. Home Benefit Soc.*, 181 Pa. 443, 37 Atl. 519, 59 Am. St. Rep. 666. But see *contra*, *Busby v. North American Life Ins. Co.*, 40 Md. 572, 17 Am. Rep. 634.

<sup>49</sup> *Grant v. Maddox*, 15 M. & W. 737.

<sup>50</sup> *Barrie v. Quinby*, 206 Mass. 259, 264, 92 N. E. 451.

<sup>51</sup> *Field v. Lelan*, 6 H. & N. 617; *Barrie v. Quinby*, 206 Mass. 259, 265, 92 N. E. 451.

<sup>52</sup> *Vanderbilt v. Ocean S. S. Co.*, 215 Fed. 886, 132 C. C. A. 226; *Hayes v.*

*Union Mercantile Co.*, 27 Mont. 264, 70 Pac. 975.

<sup>53</sup> *Pittsburgh, etc., R. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295; *Smith v. Bloom*, 159 Ia. 592, 141 N. W. 32; *Gehl v. Milwaukee Produce Co.*, 116 Wis. 263, 93 N. W. 26.

<sup>54</sup> *New England Box Co. v. Flint*, 77 N. H. 277, 90 Atl. 789; *Blalock v. Clark*, 137 N. C. 140, 49 S. E. 88. See also *Stone v. Perry*, 60 Me. 48.

<sup>55</sup> *Robeson v. Pels*, 202 Pa. 399, 51 Atl. 1028.

<sup>56</sup> *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451. *Cf.* *Cameron Coal & Co. v. Universal Metal Co.*, 26 Okla. 615, 110 Pac. 720, 31 L. R. A. (N. S.) 618, where evidence of a parol agreement instead of usage was held inadmissible.

must pay the expenses of inspection.<sup>57</sup> The English Sale of Goods Act provides<sup>58</sup> that where any right, duty, or liability, would arise under a contract of sale by implication of law, it may be negatived or varied by usage; and the American Uniform Sales Act has copied this provision.<sup>59</sup> Under this statutory provision it has been held that a warranty may be attached by usage to a contract containing no express provision in regard to warranty, though in the absence of usage no warranty would be implied,<sup>60</sup> and that a contract not expressly excluding a warranty may be shown to have been made without a warranty, though in the absence of usage a warranty would have been implied.<sup>61</sup> How far usage might thus add a warranty, or deprive the buyer of one, which would otherwise have been implied is a matter of dispute in jurisdictions where the statutes referred to are not in force. In England the usage would doubtless have been admitted before the enactment of the statute.<sup>62</sup> In the United States the weight of authority is otherwise.<sup>63</sup> The English rule seems better. One who contracted with knowledge of such a usage would naturally say nothing about the matter unless desirous of excluding the operation of the usage, and if he was desirous of excluding its operation, he naturally would so state in express terms.

<sup>57</sup> *Folley v. Smith*, 103 S. Car. 445, 88 S. E. 24. See also *First Nat. Bank v. Hogg-Harris Lumber Co.*, 181 Ill. App. 220.

<sup>58</sup> Sec. 55.

<sup>59</sup> Sec. 71.

<sup>60</sup> *Procter v. Atlantic Fish Co.*, 208 Mass. 351, 94 N. E. 281 (overruling *Dickinson v. Gay*, 7 Allen, 29, 83 Amer. Dec. 656, which was decided before the enactment of the Uniform Sales Act); *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471.

<sup>61</sup> *Cointat v. Myham*, 110 L. T. 749, reversing [1913] 2 K. B. 220.

<sup>62</sup> *Jones v. Bowden*, 4 Taunt. 847; *Syers v. Jonas*, 2 Exch. 111; *Harnor v. Groves*, 24 L. J. C. P. 53, 56.

<sup>63</sup> In the following cases usage was not permitted to add a warranty. *Barnard v. Kellogg*, 10 Wall. 383, 19

L. Ed. 987; *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656; *Thompson v. Ashton*, 14 Johns. 316; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Wetherill v. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741 (overruling *Snowden v. Warder*, 3 Rawle, 101); *McKinney v. Fort*, 10 Tex. 220. See also *Thomas v. Guarantee Title & Trust Co.*, 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. (N. S.) 1210. But see *contra Sumner v. Tyson*, 20 N. H. 384; *Florence Wagon Works v. Trinidad Mfg. Co.*, 145 Ala. 677, 40 So. 49, 50.

Usage was similarly not allowed to deprive a buyer of a warranty which otherwise would have been implied in *Chicago Provision Co. v. Tilton*, 87 Ill. 547, but the evidence was admitted in *Sea tile Seed Co. v. Fujimori*, 79 Wash. 123, 139 Pac. 866.

A right of the buyer to inspect goods before paying for them though bought under a contract which apart from the usage would be held to exclude such a right may also be established by usage.<sup>64</sup>

One who employs an agent to deal for him in a certain market, thereby consents to having the business transacted according to the usages of that market even though not aware of the nature of such usages.<sup>65</sup> Other illustrations of the addition of collateral agreements annexed by usage to contracts may easily be found.<sup>66</sup>

**§ 654. Implications of fact or law in a writing may be contradicted more extensively by usage than by parol agreements.**

Though the principle under which incidents are annexed to written contracts by usage is the same as that which controls the admission of collateral parol agreements, usage may be more effective than an express agreement. The test is probably, as has been suggested, the practical one whether a reasonable contracting party might fairly be supposed to have entered into the written contract in question and have intended to be bound both by its express terms, and also by the terms of the usage or collateral parol agreement in question. Concrete cases seem to indicate that reasonable persons may with far greater probability rely on a recognized usage to affect the otherwise natural implications of their written contracts than on collateral parol agreements. By usage a tenant has been held entitled to hold over part of leased premises after expiration of the notice to quit for which the lease provided.<sup>67</sup> A signature "as agent to merchants" which the court admitted

<sup>64</sup> *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470.

<sup>65</sup> *Sutton v. Tatham*, 10 A. & E. 27; *Smith v. Reynolds*, 66 L. T. 808; *Forget v. Baxter*, [1900] A. C. 467, 479; *Partridge v. Cutler*, 168 Ill. 504, 48 N. E. 125.

<sup>66</sup> See, e. g., *Arkansas, etc., R. Co. v. Premier Cotton Mills*, 109 Ark. 218, 158 S. W. 148; *Barrie v. Quinby*, 206

Mass. 259, 92 N. E. 451; *E. L. Welch Co. v. Lahart Elevator Co.*, 122 Minn. 432, 142 N. W. 828; and see cases in the following sections. Cf. *Finch v. Zenith Furnace Co.*, 146 Ill. App. 257, *affd.*, 245 Ill. 586, 92 N. E. 521; *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579.

<sup>67</sup> *Re Paul*, 24 Q. B. D. 247.

would not have bound the agent personally, has been held to bind him under a usage which made an agent liable who failed to disclose his principal.<sup>68</sup>

Where a bill of lading made goods deliverable on payment of freight of "5/8 of a penny per pound, with 5% primage, and average accustomed," a usage by which three months' discount was deducted from bill of lading freight of goods coming from the port of shipment was held ineffectual,<sup>69</sup> but a usage of the stock exchange relieving a jobber who has contracted to buy shares, from liability, if he gives the seller the name of another who will assume the contract and no objection to the nominee is made by the seller within ten days has been upheld.<sup>70</sup> Where an agreement was made for the payment of \$12 an acre for clearing twenty miles of a right of way, a usage was given effect to pay for clearing so much of the right of way as extended through open fields, only that proportion of the price which such work bore to the work necessary to clear an equal space in the forest.<sup>71</sup>

Usage may make a buyer bound to pay divisibly for instalments of the seller's performance, though apart from the usage no payment would be due until the seller had completely performed;<sup>72</sup> and may give the buyer a right to inspect the goods before paying a draft for the price, though apart from custom he would have no such right.<sup>73</sup> A usage of pawnbrokers to sell unredeemed pledges after the expiration of six months has been enforced against a pledgor though the rule of the common law gives no such right.<sup>74</sup>

A contract to pay money has been shown by usage to be satisfied by payment by check.<sup>75</sup>

It may be questioned whether the effect produced by usage in these cases could have been produced by a collateral parol

<sup>68</sup> *Hutchinson v. Tatham*, L. R. 8 C. P. 482.

<sup>69</sup> *Brown v. Byrne*, 3 E. & B. 703.

<sup>70</sup> *Grissell v. Bristowe*, L. R. 4 C. P. 36. See also *Marted v. Paine*, L. R. 6 Exch. 132. Cf. *Nickalls v. Merry*, L. R. 7 H. L. 530.

<sup>71</sup> *McCarthy v. McArthur*, 69 Ark. 313, 63 S. W. 56.

<sup>72</sup> *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Stern v. Simons*, 77 Conn. 150, 58 Atl. 696.

<sup>75</sup> *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586.

agreement. Had there been no usage the natural implications of the writing would have been too strong.<sup>76</sup>

**§ 655. How far law may be changed by custom.**

Though usage may work such changes in the rule of law applicable to a situation, as the parties themselves might have brought about had they in terms so agreed, it is a general rule that "where the incident [which it is sought to annex by proof of usage] is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage."<sup>77</sup> This means that if an express agreement would be either in violation of public policy or forbidden effect by law, an equivalent usage will not help the matter. Parties cannot effectively agree that a parol promise shall be binding without consideration, and the fact that a community or group of persons is accustomed to act as if such promises were binding will make no difference. So where a Factor's Act gives power to a mercantile agent to pledge the goods of his principal, a usage denying such power and invalidating such a pledge is ineffective.<sup>78</sup> And where the law does not permit one party to a contract within the Statute of Frauds to sign a memorandum as agent for the other, even if authorized to do so,<sup>79</sup> a usage permitting such agency is ineffective.<sup>80</sup> But even this principle may have its exceptions. The rules of law governing negotiable instruments are based on the custom of merchants and are often not only different from, but contradictory to the rules governing other contracts. Choses in action cannot be made negotiable by express stipulation. Yet custom has made some choses in action negotiable, and may apparently have the same power still to make others negotiable.<sup>81</sup> The

<sup>76</sup> See also cases in the preceding section, of many of which the same might be said.

<sup>77</sup> *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374, 386; *Northwestern Nat. Ins. Co. v. Southern States Phosphate &c. Co.*, 20 Ga. App. 506, 93 S. E. 157; *Myers v. Exchange Nat. Bank*, 96 Wash. 244, 164 Pac. 951.

<sup>78</sup> *Oppenheimer v. Attenborough*, [1908] 1 K. B. 221.

<sup>79</sup> See *supra*, § 587.

<sup>80</sup> *Happ Bros. Co. v. Hunter Mfg. &c. Co.*, 145 Ga. 836, 90 S. E. 61.

<sup>81</sup> Though this is denied in *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374, 386, that case is overruled by later decisions, holding that bonds by

effect of the transfer of order bills of lading,<sup>82</sup> and more recently of warehouse receipts giving the transferee not only title, but in effect possession of the property,<sup>83</sup> is another illustration of a change in the law owing to mercantile custom, though express stipulation that something which the law does not regard as possession shall be so regarded, would ordinarily be ineffective. A converse case arises in England, where it is held that because of the usage of selling goods to hotel-keepers on conditional sale with retention of title, the goods are not in the order and disposition of the hotel-keeper within the bankrupt law.<sup>84</sup> So the custom of market overt in England is contradictory to the general rule of the common law applicable to sale of goods. In truth usage is one of the agencies by which the law has been gradually formed and still is not only added to, but otherwise amended. The change, however, when other than a merely additional rule as distinguished from one contradicting a previously settled principle is gradual, especially in recent times, and not always frankly admitted when first made. That usage may harden by repeated decisions into such new rules of law as do not contradict any previously existing rule is, however, clearly stated.<sup>85</sup>

**§ 656. A usage which the parties have indicated an intention not to adopt is ineffective.**

Though a usage may show that the effect of a written contract is different from an apparently clear meaning which the writing would otherwise bear, it is obvious that if the parties

modern custom may be made negotiable. *Goodwin v. Robarts*, L. R. 10 Ex. 337, 356; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; *Bechuanaland Co. v. London Trading Bank Co.*, [1898] 2 Q. B. 658; *Edelstein v. Schuler*, [1902] 2 K. B. 144.

<sup>82</sup> *Lickbarrow v. Mason*, 2 T. R. 63, 1 H. Bl. 357, 2 *id.* 211, 6 East, 20 n. 5 T. R. 683. See Buller's general remarks, 2 Y. R. 63, 73.

<sup>83</sup> See *Merchants' Banking Co. v. Phoenix, etc., Steel Co.*, 5 Ch. D. 205;

*Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.

<sup>84</sup> *In re Blanshard*, 8 Ch. D. 601; *Ex parte Brooks*, 23 Ch. D. 261.

<sup>85</sup> "There is no doubt that a mercantile custom may be so frequently proved in courts of common law, that the courts will take judicial notice of it, and it becomes part of the law merchant," per Mellish, L. J., in *Ex parte Powell*, 1 Ch. D. 501, 506. See also *Universo Insurance Co. v. Merchants' Marine Ins. Co.*, [1897] 1 Q. B. 205, 2 *id.* 93.



choose to exclude the application of usage by contracting upon different terms from those customary in the locality, they may do so; and it cannot be necessary in order to produce this result that they should state in terms that the usage is not adopted as part of the contract, if they otherwise make their intention manifest. Therefore, if the terms of their agreement read in the light of surrounding circumstances warrant the conclusion that they did not contract with reference to the usage, it will not be applicable. The question is whether "upon the construction of the whole contract, enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning, [*i. e.*, that indicated by the usage] to prevail. The consequence is that every individual case must be decided on its own grounds, and upon the terms of the particular contract in dispute, regarded as a whole."<sup>86</sup> On the one hand, the fact that a collateral stipulation contradicts the express words of the writing, if those words are taken literally, will not necessarily, though it will generally, prove that the parties did not contract with reference to the usage.<sup>87</sup> Indeed, even though a usage contradicts merely

<sup>86</sup> *Myers v. Sarl*, 3 E. & E. 306, 320, per Blackburn, J. See also *Sutro v. Heilbut*, [1917] 2 K. B. 348.

<sup>87</sup> In the following cases usages which contradicted the express terms of a contract were held ineffective. *Suse v. Pompe*, 8 C. B. (N. S.) 538; *Hall v. Janson*, 4 E. & B. 500; *Dickenson v. Jardine*, L. R. 3 C. P. 639; *Hayton v. Irwin*, 5 C. P. D. 130; *The Alhambra*, 6 Prob. Div. 68; *The Nifa*, [1892] Prob. 411; *Sutro v. Heilbut*, [1917] 2 K. B. 348; *Leopold Walford, Ltd., v. Les Affréteurs Réunis*, [1918] 2 K. B. 498; *Moore v. United States*, 196 U. S. 157, 25 S. Ct. 202, 49 L. Ed. 428; *The Rebecca R. Douglass*, 248 Fed. 366; *Smith v. National Bank*, 191 Fed. 226; *Jenkins S. S. Co. v. Preston*, 186 Fed. 609, 108 C. C. A. 473; *Municipal Investment Co. v. Industrial Trust Co.*, 89 Fed. 254; *Shelby Iron Co. v. Dupree*, 147 Ala. 602, 41 So. 182; *People's Bank & Trust Co. v. Walthall*,

(Ala. 1918), 75 So. 570; *Withers v. Moore*, 140 Cal. 591, 74 Pac. 159; *Wiggin v. Federal Stock & Grain Co.*, 77 Conn. 507, 59 Atl. 607; *Vardeman v. Penn Mutual Life Ins. Co.*, 125 Ga. 117, 54 S. E. 66; *Braun v. Hess*, 187 Ill. 283, 58 N. E. 371, 79 Am. St. Rep. 221; *Van Camp v. Hartman*, 126 Ind. 177, 25 N. E. 901; *Independent School Dist. v. Swearngin*, 119 Ia. 702, 94 N. W. 206; *Eckhardt v. Taylor*, 90 Kans. 698, 135 Pac. 579; *Columbia Malting Co. v. Glenmore Distilleries Co.*, 150 Ky. 229, 150 S. W. 53; *Gooding v. Northwestern Mut. L. I. Co.*, 110 Me. 69, 85 Atl. 391; *Denton v. Gill*, 102 Md. 386, 62 Atl. 627; *Auto, etc., Co. v. Merchants' Nat. Bank*, 116 Md. 179, 81 Atl. 294; *Parks v. Griffith & Boyd Co.*, 123 Md. 232, 91 Atl. 581; *Agri Mfg. Co. v. Atlantic Fertilizer Co.*, 129 Md. 42, 98 Atl. 365; *Boruszowski v. Middlesex Mut. Assur. Co.*, 186 Mass. 589, 72 N. E. 250; *Johnson*

an implication from the writing, that fact may show that the parties did not contract with reference to the usage. As a general rule in such cases, however, the usage will substitute a different implication for the implication which otherwise would be drawn; but no rule can be stated which will avoid the necessity of considering the particular contract in question in the light of surrounding circumstances including the usage and determining whether an intention has been manifested to exclude the application of the usage. It will be applicable provided the parties are chargeable with knowledge of it, unless such an intention is manifested.<sup>88</sup>

### § 657. Characteristics of usage essential for its validity.

It is said that a custom in order that it may be considered as entering into a contract and forming part of it, must be "reasonably uniform and well settled, not in opposition to fixed rules of law, and not in contradiction of the terms of the contract."<sup>89</sup> There is some confusion between usage and custom, when the same statement is made in regard to usage, as it often is. How far any such statement is warranted must be considered.

*v. Norcross Bros. Co.*, 209 Mass. 445, 95 N. E. 833; *Hayward v. Wemple*, 152 N. Y. App. Div. 195, 136 N. Y. S. 625, *affd.*, 206 N. Y. 692, 99 N. E. 1108; *Goulds Mfg. Co. v. Munckenbeck*, 20 N. Y. App. Div. 612, 47 N. Y. S. 325; *Richard v. Haebler*, 36 N. Y. App. Div. 94, 55 N. Y. S. 583; *Manerud v. Eugene*, 62 Oreg. 196, 124 Pac. 662; *Syer v. Lester*, 116 Va. 541, 82 S. E. 122; *Mowatt v. Wilkinson*, 110 Wis. 176, 85 N. W. 661; *Dunning v. Lederer*, 164 Wis. 399, 160 N. W. 159.

<sup>88</sup> See cases *supra*, §§ 653, 654.

<sup>89</sup> *Hopper v. Sage*, 112 N. Y. 530, 535, 20 N. E. 350, 8 Am. St. Rep. 771; *P. J. Kennedy & Sons v. Perkins & Squier Co.*, 154 N. Y. S. 101. To similar effect see—*Continental Coal Co. v. Birdsall*, 108 Fed. 882, 47 C. C. A. 124; *Loyal v. Wolf*, 179 Ala. 505, 60

So. 298; *Wheelright v. Dyal*, 99 Ga. 247, 25 S. E. 170; *Cleveland, etc., R. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, 46 Am. St. Rep. 296; *Wallace v. Morgan*, 23 Ind. 399; *Shaw v. Ingram-Day Lumber Co.*, 152 Ky. 329, 153 S. W. 431, L. R. A. 1915 D. 145; *Rochester, etc., Ins. Co. v. Peaselee-Gaulbert Co.*, 27 Ky. L. Rep. 1155, 87 S. W. 1115; *Hartley v. Richardson*, 91 Me. 424, 40 Atl. 336; *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96, 7 L. R. A. (N. S.) 965, 114 Am. St. Rep. 631; *Pennell v. Delta Transp. Co.*, 94 Mich. 247, 53 N. W. 1049; *White v. Tripp*, 125 N. C. 523, 34 S. E. 686; *Robeson v. Pels*, 202 Pa. 399, 51 Atl. 1028; *Oriental Lumber Co. v. Blades Lumber Co.*, 103 Va. 730, 50 S. E. 270; *Sterling Organ Co. v. House*, 25 W. Va. 64.

**§ 658. Reasonableness of usage.**

One quality which it is universally stated that usage must possess in order to be effectual is reasonableness. This rule was originally laid down in regard to custom—that is customary law, which is applicable to a neighborhood irrespective of its being adopted as part of a contract.<sup>90</sup> It is obvious that such a requirement is there appropriate. The common law cannot adopt as one of its rules a custom which is not reasonable in its nature. With regard to usage, however, the question is different. Parties may make an unreasonable contract if it is not so unreasonable as to be illegal or in violation of public policy. If they may make an unreasonable contract in express terms, there seems no reason why they should not make one equally unreasonable by implication of fact. It is true that the more unreasonable the terms of the alleged implication are, the clearer proof will the court require that parties assented to the unreasonable terms, and the less ready will the court be to assume knowledge or a duty to know, in the absence of clear evidence of actual knowledge and adoption of the usage. "There can be very few cases, where a custom has been sufficiently proved, in which a court could hold that it was unreasonable, for that it must be convenient is shewn by the fact that it has been established and followed."<sup>91</sup>

**§ 659. Reasonableness of usage—continued.**

Though, as just shown, there seems force in the argument that where a usage is adopted as part of a contract by apparent assent thereto, the law should impose no more stringent requirement of reasonableness than it does where express terms of a contract are in question, there seems no doubt that a more rigorous test is in fact imposed. The reason is probably because the assent to a usage which is given by parties to a contract is generally constructive. An outward manifestation of assent to the express terms of a contract almost invariably connotes mental assent. Contracting under circumstances which make a usage applicable less certainly connotes an actual purpose to adopt the usage as a term of the contract.

<sup>90</sup> 1 Bl. Comm. 77, referring to Co. Litt. § 212; 1 Inst. 62.

<sup>91</sup> Moulton v. Halliday, [1898] 1 Q. B. 125, 130.

The test of reasonableness is necessarily somewhat indefinite. Even an express contract must not be opposed to public policy, and *a fortiori*, a usage must not be. Where a usage is actually known to the contracting parties, and the court can feel confident that they intended to adopt it, it is probable that the requirement of reasonableness means little more than that the usage must not be so opposed to public policy that if the parties had expressly stated it as part of their contract, the law would not have enforced it. Reasonableness, therefore, may in some degree depend upon the actual knowledge of the parties. A usage that an outgoing tenant under a lease shall be paid for straw left on the farm, has been upheld,<sup>92</sup> but a usage which makes the incoming tenant liable to the outgoing tenant, while the landlord is under no liability to him, has been denied enforcement because it is unreasonable.<sup>93</sup> A usage that a broker employed to buy 50 tons of tallow, might buy on behalf of this and other customers a larger amount, and subsequently appropriate 50 tons to the customer, was also held bad;<sup>94</sup> as were a usage permitting a buyer to reject at his option a portion of a shipment of goods ordered by him;<sup>95</sup> a usage of brokers to charge commissions to both parties;<sup>96</sup> and one requiring a consignor to allow whatever shortage in a shipment was stated to exist by the consignee.<sup>97</sup>

It is impossible to lay down a general rule covering all cases. The decisions of particular courts as to what customs are unreasonable will necessarily depend upon all the circumstances of the situation including perhaps the views of the court on economic questions.<sup>98</sup>

<sup>92</sup> *Muncey v. Dennis*, 1 H. & N. 216.

<sup>93</sup> *Bradburn v. Foley*, 3 C. P. D. 129.

<sup>94</sup> *Robinson v. Mollett*, L. R. 7 H. L. 802. Cf. *Scott v. Godfrey*, [1901] 2 K. B. 726, where a somewhat similar usage of stock brokers was upheld.

<sup>95</sup> *Kalamazoo Corset Co. v. Simon*, 129 Fed. 144, 1005, 64 C. C. A. 166; *Syer v. Lester*, 116 Va. 541, 82 S. E. 122.

<sup>96</sup> *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756.

<sup>97</sup> *Byrd v. Beall*, 150 Ala. 122, 43 So. 749.

<sup>98</sup> See *Phillips v. Briand*, 1 H. & N. 21; *Stewart v. West India Co.*, L. R. 8 Q. B. 88, 362; *Barrow v. Dyster*, 13 Q. B. D. 635; *Macoun v. Erskine*, [1901] 2 K. B. 493; *Liverpool & G. W. Steam Co. v. Suitter*, 17 Fed. 695; *Young v. One Hundred and Forty Thousand Hard Brick*, 78 Fed. 149; *Municipal Inv. Co. v. Industrial Trust Co.*, 89 Fed. 254; *Chilberg v. Lyng*, 128 Fed. 899, 63 C. C. A. 451; *Anderson v. Whittaker*, 97 Ala. 690, 11 So. 919; *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571; *Becker v. Hall*, 116 Ia.

### § 660. Generality of usage.

It is sometimes asserted that usage must be general in order to be effectual; but even custom, as distinguished from usage, might be local, and still binding;<sup>99</sup> and it seems clear that usage likewise may be. The real question where usage is concerned is whether the parties contracted with reference thereto. This will depend not merely on actually expressed assent to the adoption of the usage but on the justifiable belief of each party that the other was adopting it. A habit of business confined to the two parties to a contract may by implication be adopted as an unexpressed part of it. The habit indeed of one party, known and apparently acquiesced in by the other, may prove the adoption of an implied term of the contract between them.<sup>1</sup>

Consequently the generality of habit or usage is important only with reference to the inference properly to be drawn of the parties' knowledge or ignorance of its existence. The more general and notorious a usage is, the more clearly will either party to a contract be justified in assuming that the other is contracting with reference to the usage.

### § 661. What is necessary to make a party to a contract chargeable with usage.

A party cannot be bound by usage unless he either knew or ought to have known of its existence and nature. Accordingly one who seeks either to define language or to annex a term to a contract by means of usage must either show that the other

589, 88 N. W. 324, 56 L. R. A. 573; *Castleman v. Southern Mut. Life Ins. Co.*, 14 Bush, 197; *McDonnell v. Ford*, 87 Mich. 198, 49 N. W. 545; *The Keystone v. Moies*, 28 Mo. 243, 75 Am. Dec. 123; *Schipper v. Milton*, 51 N. Y. App. Div. 522, 64 N. Y. S. 935; *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850; *Dempsey v. Dobson*, 184 Pa. 588, 39 Atl. 493, 40 L. R. A. 550, 63 Am. St. Rep. 809; *Nelson v. Southern Pac. Co.*, 15 Utah, 325, 49 Pac. 644; *Saunders v. Southern Pac. Co.*, 15 Utah, 334, 49 Pac. 646; *Russell's Ex'r v. Ferguson*, 77 Vt. 433, 60 Atl. 802.

<sup>99</sup> 1 Bl. Comm. 76.

<sup>1</sup> In *Birely & Sons v. Dodson*, 107 Md. 229, 235, 68 Atl. 488, the court said: "Where such usage is receivable at all, it may be either of a general usage in that trade or business or in the uniform course of dealing of the party against whom the usage is invoked in his transactions with the other party; the acts and admissions of the parties in the one case, and the general custom of the business in the other being held to enter into the particular contract. *Citizens Fire Ins. Co. v. Doll*, 35 Md. 89, 107; *Mitchell v. Wedderburn*, 68 Md. 139, 145."

party was actually aware of the usage,<sup>2</sup> or must show that there was a well-defined usage generally adopted by those engaged in the business to which the contract relates, at the place where the contract was made or was to be performed. It must, if not known, be so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it.<sup>3</sup> If so notorious actual knowledge of it is immaterial, for "A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general usage or custom relating to such business."<sup>4</sup> And this is so whether he knew of the custom or not."<sup>5</sup>

<sup>2</sup> *Gabay v. Lloyd*, 3 B. & C. 793; *Bartlett v. Penland*, 10 B. & C. 760; *Sweeting v. Pearce*, 7 C. B. (N. S.) 449, 482, 9 *id.* 534; *Robinson v. Mollett*, L. R. 7 H. L. 802, 836, 838; *Chicago, etc., Ry. Co. v. Lindeman*, 143 Fed. 946, 75 C. C. A. 18; *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612; *Universal Oil. & Fertiliser Co. v. Burney*, 174 N. C. 382, 93 S. E. 912.

<sup>3</sup> *Sutton v. Tatham*, 10 A. & E. 27; *Bayliffe v. Butterworth*, 1 Exch. 425; *Kirchner v. Venus*, 12 Moo. P. C. 361; *Forget v. Baxter*, [1900] A. C. 467, 479; *Continental Coal Co. v. Birdsall*, 108 Fed. 882, 48 C. C. A. 124; *Chicago, etc., Ry. Co. v. Lindeman*, 143 Fed. 946, 75 C. C. A. 18; *Smith v. National Bank*, 191 Fed. 226; *Eames v. H. B. Claffin Co.*, 239 Fed. 631, 152 C. C. A. 465; *Mullins Lumber Co. v. Williamson & Brown Land &c. Co.*, 246 Fed. 232, 158 C. C. A. 392; *Central Commercial Co. v. Jones-Dusenbury Co.*, 251 Fed. 13, 163 C. C. A. 263; *Exchange Nat. Bank v. Little*, 111 Ark. 263, 164 S. W. 731; *Beach v. Travelers' Ins. Co.*, 73 Conn. 118, 46 Atl. 867; *Mobile Fruit Co. v. Judy*, 91 Ill. App. 82; *Newcomb Rubber Works v. Home Rattan Co.*, 100 Ill. App. 421; *Currie v. Syndicate*, 104 Ill. App. 165; *American Ins. Co. v. France*, 111 Ill. App. 310; *Strange v. Carrington*, 116 Ill. App. 410; *Wallace v. Morgan*, 23 Ind. 399; *Rafert v. Scroggins*, 40 Ind. 195; *Hartley v.*

*Richardson*, 91 Me. 424, 40 Atl. 336; *Baltimore Baseball Club v. Pickett*, 78 Md. 375, 386, 28 Atl. 279, 280, 22 L. R. A. 690, 44 Am. St. 304; *Himmel v. Levinstein*, 132 Md. 317, 103 Atl. 848; *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451; *Puffer Mfg. Co. v. Yeager*, 230 Mass. 557, 120 N. E. 97; *Ledyard v. Hibbard*, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; *Black v. Ashley*, 80 Mich. 90, 44 N. W. 1120; *Schurr v. Savigny*, 85 Mich. 144, 48 N. W. 547; *Bowser v. Fountain*, 128 Minn. 198, 150 N. W. 795, L. R. A. 1916 B. 1036; *Syer v. Lester*, 116 Va. 541, 82 S. E. 122.

<sup>4</sup> *Steidtmann v. Joseph Lay Co.*, 234 Ill. 84, 84 N. E. 640, citing—*Collins Ice Cream Co. v. Stephens*, 189 Ill. 200, 59 N. E. 524; *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N. E. 796; *Leavitt v. Kennicott*, 157 Ill. 235, 41 N. E. 735.

<sup>5</sup> *Ibid.*, citing—*Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499; *Taylor v. Bailey*, 169 Ill. 181, 48 N. E. 200; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *Doane v. Dunham*, 79 Ill. 131; *Bailey v. Bensley*, 87 Ill. 556. See also *Field v. Lelean*, 6 H. & N. 617; *Colman v. Clements*, 23 Cal. 245; *Lowe v. Lehman*, 15 Ohio St. 179; *Cormier v. H. H. Martin Lumber Co.*, 98 Wash. 463, 167 Pac. 1105; *Hewitt v. John Week Lumber Co.*, 77 Wis. 548, 46 N. W. 822, and cases in preceding notes.

It is generally said that the usage must have existed for a considerable length of time. This supposed requirement relates rather to custom, and what is necessary to give custom the force of law,<sup>6</sup> than to usage which derives its efficacy, from the assent of the parties to the contract. The essential matter there is that the usage shall have been at the time of the contract so notorious as to justify belief that the parties contracted with reference to it. And if it can be proved that the parties in fact knew of the usage it is immaterial for how brief a time it existed.<sup>7</sup> The degree of proof that is necessary to satisfy a court that a particular usage existed, and that the contract must be interpreted with reference to it, may indeed vary according to the generality of the usage and the length of time which it has been in existence. "When once it is admitted that there is a custom, it becomes clear that the custom must have grown up, and it follows that the custom may change, and a new custom may become notorious, so as to be incorporated into every contract, unless it is expressly excluded. Then there comes a further stage, where the custom need no longer be proved, but the Courts will take judicial notice of it."<sup>8</sup> Where usage is general it is ordinarily a fair assumption that parties who contract under circumstances to which the usage is applicable either have or ought to have knowledge of it; but where a usage is local, no such implication necessarily arises. It must appear either that the usage was actually known or be inferable as a fact from residence or business transactions in the locality where it prevails that the party to the contract setting up the usage was justified in assuming knowledge of it by the other party.<sup>9</sup> So even though a usage is general in a particular business, one who is not in that business will not

<sup>6</sup> 1 Bl. Comm. 76.

<sup>7</sup> *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612.

<sup>8</sup> *Moult v. Halliday*, [1898] 1 Q. B. 125, 130.

<sup>9</sup> *Gould v. Cates Chair Co.*, 147 Ala. 629, 41 So. 675; *McCall v. Herrin*, 118 Ga. 522, 45 S. E. 442; *Bacon Fruit Co. v. Blessing*, 122 Ga. 369, 50 S. E. 139; *Rake v. Townsend* (Ia.), 102 N. W. 499; *Kenyon v. Charlevoix Im-*

*provement Co.*, 135 Mich. 103, 97 N. W. 407; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211, 72 Am. St. Rep. 631; *Leach v. Hughes*, 74 N. Y. Misc. 69, 131 N. Y. S. 570; *Gilmer v. Young*, 122 N. C. 806, 29 S. E. 830; *Robbins v. Maher*, 14 N. Dak. 228, 103 N. W. 755. Cf. *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443.

be bound by it, in the absence of knowledge or neglect of a duty, to inform himself.<sup>10</sup> It is, however, also said that "A party dealing in a particular market is presumed to know all customs of that market bearing upon the transaction in question."<sup>11</sup> Here as always the guide must be, not what one party actually knew or intended, but what he ought to have supposed the other party would understand him to intend. A Texan who comes into the Chicago grain market and transacts business there, is surely bound by the usages of the market if dealing with one who has no reason to know of his co-contractor's ignorance.<sup>12</sup>

### § 662. The province of the court and of the jury.

Whether a usage exists is a question of fact,<sup>13</sup> though the evidence of it may be insufficient to warrant submission to the jury.<sup>14</sup> Whether the facts are such that the parties must be assumed to have adopted the usage because of actual knowledge or duty to know, is also a question of fact.<sup>15</sup> On the other hand, the validity of the usage and its effect, if any, upon the contract of the parties is a question of law.<sup>16</sup>

<sup>10</sup> *Great Western Elevator Co. v. White*, 118 Fed. 406, 56 C. C. A. 338; *Laver v. Hotaling*, 115 Cal. 613, 47 Pac. 593; *Citizens' State Bank v. Chambers*, 129 Ia. 414, 105 N. W. 692; *Bixby v. Bruce*, 69 Neb. 78, 95 N. W. 34.

<sup>11</sup> *Smith v. Bloom*, 159 Ia. 592, 141 N. W. 32, 35, citing: *Cothran v. Ellis*, 107 Ill. 413; *Bailey v. Bensley*, 87 Ill. 556; *Long v. Armsby Co.*, 43 Mo. App. 253. See also *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Soper v. Tyler*, 77 Conn. 104, 106, 58 Atl. 699.

<sup>12</sup> See *supra*, §§ 94, 95.

<sup>13</sup> *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98; *Sullivan v. Jernigan*, 21 Fla. 264; *Chicago, etc., Co. v. Tilton*, 87 Ill. 547; *Currie v. Syndicate*, 104 Ill. App. 165; *Hichhorn*

*v. Bradley*, 117 Ia. 130, 90 N. W. 592; *Fish v. Crawford Mfg. Co.*, 120 Mich. 500, 79 N. W. 793; *Powell v. Luders*, 84 Minn. 372, 87 N. W. 940; *Traders Ins. Co. v. Dobbins*, 114 Tenn. 227, 86 S. W. 383; *Oriental Lumber Co. v. Blades Lumber Co.*, 103 Va. 730, 50 S. E. 270; *Denny v. Williams*, 5 Allen, 1.

<sup>14</sup> *Chicago, etc., R. Co. v. Lindeman*, 143 Fed. 946, 75 C. C. A. 18.

<sup>15</sup> *Scott v. Brown*, 29 N. Y. Misc. 320, 60 N. Y. S. 511.

<sup>16</sup> *Lauchheimer v. Jacobs*, 126 Ga. 261, 55 S. E. 55; *Hess v. Shurtleff*, 74 N. H. 114, 65 Atl. 377; *Runyan v. Central Railroad*, 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744; *Silver Valley Min. Co. v. North Carolina Smelting Co.*, 122 N. C. 542, 29 S. E. 940.



## CHAPTER XXIII

### EXPRESS CONDITIONS

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#### § 663. Nature of conditions.

A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens, or to the case where it does not happen. It is ordinarily said that a condition must be something future and uncertain, and it is undoubtedly true that at least from the standpoint of the parties, both futurity and uncertainty are necessary elements. If to their knowledge the event has either already happened or cannot possibly happen, the promise is either absolute or nugatory from the outset. It may be said that this is true whether the parties are aware of the facts or not, and such a statement is strictly accurate. A promise to pay for a horse if he is sound, could only be regarded by an omniscient person as either no promise or as an absolute promise, according as the horse was at the time of the bargain in fact sound or unsound. But the parties to such a transaction undoubtedly look at it as involving a promise subject to a condition, because their knowledge of the horse's condition will not be complete until the future, and the common law accepts that point of view.

The situation suggested of a promise qualified by the

happening of an event which is neither future nor uncertain, may seem unlikely, but in fact it is of frequent occurrence in insurance law. If the matter in question though it has happened is unknown to both parties, there can be no doubt that the matter may be made a condition of a promise which will be treated in law in the same way as if it were future and uncertain. Thus a ship already lost may be insured.<sup>1</sup> The insurer's promise though in reality absolute if the vessel has already been lost, is treated as conditional; whereas, if the vessel has not been lost and has perhaps already, unknown to the parties completed her voyage, the insurer is in reality promising nothing, but as the bargain was made on the basis of the knowledge which the parties had at the time they made their agreement, there is no failure of consideration. If the insurer's promise were in law a nullity, because in view of the condition on which it was dependent no possible liability could arise upon it, fraud of the insured would be unnecessary to establish a defence to an action for the insurance money, or to establish a right to recover it back if already paid. Lack or failure of consideration would be sufficient without fraud. In truth, however, the promise is not legally a nullity, and the transaction can be avoided by the insured only on the ground of mutual mistake or of fraud. If the parties contemplate the possibility of the situation which has arisen, their agreement is a valid contract. Even though one party knows of the fact which is stated as a condition of the promise, the contract may still be valid and treated by the law as a conditional contract. Where the insured is aware that he has already violated a condition of an insurer's promise, as where he makes a knowingly false and material representation, and the truth of the representation is a condition of the policy, there is no failure of consideration, and the premium can be retained though the breach of condition excuses the insurer from liability.<sup>2</sup> If, however, the parties mistakenly assumed the existence of a fact upon which the promise of the insurer was in terms con-

<sup>1</sup> *Sutherland v. Pratt*, 11 M. & W. 312; *Insurance Co. v. Folsom*, 18 Wall. 237, 21 L. Ed. 827; *Arnould, Marine Ins.*, § 13.

<sup>2</sup> *Parsons v. Lane*, 97 Minn. 93, 106 N. W. 485; and see *infra*, §§ 754 *et seq.*

ditioned, or if though the insured was aware of the facts yet his conduct was not intentionally fraudulent, there is failure of consideration; the premium has not been earned and if paid may be recovered.<sup>3</sup> In exact pleading also whether the defendant should deny the existence of a contract, or admit the contract and deny the breach of it, will depend on whether the law accepts the point of view of the parties and treats a matter unknown to the parties though it has already happened as capable of being a condition.<sup>4</sup>

#### § 664. Purpose of conditions.

It is more advantageous for a promisee to have an absolute promise than a conditional one. The terms of the promise apart from any conditions qualifying it are for the promisee's benefit. The conditions are inserted for the promisor's protection. If the promisor desires to receive some performance from the promisee in return for his own, he may attempt to secure his object either by requiring a counter promise of such performance, or by qualifying his own promise by making it conditional on the desired performance being previously or concurrently given by the promisee. The fullest protection for the promisor will be obtained if he unites these two methods, requiring a counter promise and also making his own promise conditional on the performance of that counter promise.

#### § 665. Distinction between promises and conditions.

The distinction between a promise or covenant on the one hand, and a condition on the other, both in their legal effect and in their wording, is obvious and familiar. Breach of promise subjects the promisor to liability in damages, but does not necessarily excuse performance on the other side. Breach of condition prevents the party failing to perform from acquiring a right, or deprives him of one, but subjects him to no

<sup>3</sup> *Parsons v. Lane*, 97 Minn. 98, 106 N. W. 485; and see *infra*, §§ 754 *et seq.*

<sup>4</sup> In *Harran v. Klaus*, 79 Wis. 383, 48 N. W. 479, the defendant promised to buy certain notes from the plaintiff if the plaintiff had paid \$75 for them

as he asserted. The court called the transaction a "conditional" agreement and discusses the matter in a way equally applicable to a promise dependent on a fortuitous and uncertain event. See *supra*, § 119.

liability. Words appropriate to promise and to condition make this distinction, which is clear in the legal effect produced, also clear as a matter of English construction. The minds of parties who enter into contracts, however, is more often addressed to what one party or the other is to do than to the consequences of the failure of doing it. When a contract reads "It is agreed," or "it is provided," or "it is stipulated," or "it is understood" that A shall do a certain act, or simply that the act shall be done it is not perfectly clear whether A promises to do the act in question, or whether he will acquire a right against the other party only by doing that act. Argument is possible that the words mean both these things. As matter of construction, it seems better to favor bilateral contracts than unilateral, and in bilateral contracts better, where the meaning of the agreement is doubtful, to construe words as involving a promise by the party who is expected to do the act in question than as words of condition. Such a construction protects both parties to the transaction, and also does not involve the consequences that a slight failure to perform wholly destroys all rights under the contract. The law recognizes the propriety of this rule of construction.<sup>5</sup>

The illustrations given above are enough to indicate that it is not always easy to distinguish whether a promise or a condition is intended, and the desire of courts to give substantial justice in the particular cases before them has sometimes introduced difficulty where as matter of language none would exist. Especially words appropriate for condition have not been given their natural meaning where the consequence would lead to injustice, and a violation of the probable intent of the parties.<sup>6</sup> The difference between conditions and promises is so radical in its consequences that there is no excuse for a nomenclature which fails to recognize the distinction. In the

<sup>5</sup> *Lucy v. Davis*, 163 Cal. 611, 126 Pac. 490; *San Diego Const. Co. v. Mannix*, 175 Cal. 548, 166 Pac. 325; *Graves v. Deterling*, 120 N. Y. 447, 455, 24 N. E. 655. See also *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S. E. 12, L. R. A. 1917 A. 171.

<sup>6</sup> See for example: *Boone v. Eyre*, 1

H. Bl. 273 n.; *Terry v. Duntze*, 2 H. Bl. 389; *Stavers v. Curling*, 3 Bing. (N. C.) 355; *Dawson v. Dyer*, 5 B. & Ad. 584; *Newson v. Smythie*, 3 H. & N. 840; *Edge v. Boileau*, 16 Q. B. D. 117; *Green County v. Quinlan*, 211 U. S. 582, 29 S. Ct. 162, 53 L. Ed. 335; *De Lancey v. Ganong*, 9 N. Y. 9.

English books there has sprung up an astonishing usage of the word "condition" in the law of sales as meaning a certain kind of promise and this usage has to some extent been followed in the United States. It cannot be too strongly deprecated.<sup>7</sup>

**§ 666. What it is which conditions qualify.**

In the law of property a condition relates generally to the vesting or divesting of title, but may relate to the vesting or divesting of other rights than the right of ownership. In the law of contracts, conditions may relate to the formation of contracts or to liability under them. It is a source of confusion of thought that the word condition is frequently used without exact recognition of what the supposed condition qualifies. Generally in contracts when reference is made to conditions, what is meant is conditions qualifying liability under a contract or promise, not conditions qualifying the existence of a contract or promise. In connection with the formation of contracts, the effect of conditions, imposed by the terms of the offer or by rules of law, on the existence of contracts was considered. In connection with fraud and other circumstances rendering contracts voidable, certain rules of law divesting or destroying existing contracts will be considered, though by a term of a contract also, its existence may be destroyed; but under the head of conditional contracts it is generally understood that the conditions referred to, qualify not the existence of the contract, but the liability under it. A condition may qualify the liability of one party to the contract, or of both parties. The fact that no liability on either side can arise until the happening of a condition, does not, however, make the validity of the contract depend upon its happening. Whether there is a contract depends upon the right of the

<sup>7</sup> In Chalmers Sale of Goods Act (5th Ed.) 174, the author says: "In conveyancing, a distinction was drawn between conditions and covenants, which in contracts has now become obliterated." Such a statement goes far beyond the facts. See, *e. g.*, *Sanitary District v. Chicago &c. Trust Co.*, 278 Ill. 529, 116 N. E. 161, for the usage in

construing a deed. Except so far as this nomenclature in the law of sales confuses the distinction it is generally recognized. But if it is evident in an instrument that parties used "condition" in the sense of promise, their intention will be effectuated. *Green County v. Quinlan*, 211 U. S. 582, 29 S. Ct. 162, 53 L. Ed. 335.

parties to revoke their promises. A contract to sell goods to arrive "will impose no liability on either party unless the goods arrive,"<sup>8</sup> but each is irrevocably bound by a contract from the outset.

**§ 666a. Precedent and concurrent conditions.**

A precedent condition in a contract is the typical kind. It must be performed or happen before liability arises on the promise which the condition qualifies. One may also speak of a condition precedent to the existence of a contract. Acceptance is such a condition, but when the question under consideration is the construction of a contract or the duties arising under it, the term means a prerequisite to liability.<sup>9</sup> Liability may arise immediately on the happening of a condition precedent, as in case of a contract to pay if certain work is done; or it may not arise until a later day—as a promise to pay on July 1st, if something has been done or has happened in the previous January. If nomenclature were perfectly consistent, a concurrent condition would be a condition which must happen concurrently with liability, but that is not the meaning of the term. A condition which must so happen is included under the name condition precedent. A covenant to pay A if he jumps six feet, will give rise to liability concurrently with the successful completion of his jump. That there is genuine concurrency in such a case may be seen from supposing such a promise made as an offer. Only on the supposition that the jump and the promise were exchanged at the instant of the jump would the requirements of consideration be satisfied, and the promise by its terms is performable immediately. There must be the same concurrency where the promise is made by covenant and where consequently, the existence of the contract does not depend on the performance of the condition. But as in logic the jump seems prior to the liability, the condition is called a condition precedent. The concurrency indicated by the phrase concurrent condition or conditions, is concurrency in time of the performance of two mutual promisors, or of a promisor and promisee; not a concurrency of the performance of one with the liability of the other. If

<sup>8</sup> Williston, Sales, § 188.

<sup>9</sup> See *infra*, § 667.

two persons are bound to give concurrently, one a book and the other the price, neither party will be liable until performance has either been made or tendered by the other. But though the tender may be absolute, it need be only conditional, that is, subject to receiving concurrent performance from the other side. The obligation of each party, therefore, is subject to the condition precedent to liability thereon of either performance, or absolute or conditional tender, by the other side. Concurrent conditions, then, do not differ from conditions precedent in the relation of time which the happening of the condition bears to liability on the contract. They are, indeed, mutual conditions precedent.<sup>10</sup> In the early law where acts were expressly made mutual conditions precedent, either performance or an unconditional tender was necessary.<sup>11</sup> But this is not now true, and it is the peculiarity of concurrent conditions that only a conditional tender by one party is a condition precedent to the liability of the other.<sup>12</sup>

#### § 667. Conditions subsequent.

The use of the words "condition subsequent" in contracts was borrowed from supposedly similar use in the law of property. "A condition, as affecting real estate, if precedent, must be performed before any estate vests; if subsequent, it divests an estate vested. If the condition precedent is void or impossible to be performed, nothing vests. If the condition subsequent is void or impossible, the estate, having vested, remains undisturbed."<sup>13</sup> But a distinction should be observed. The term condition subsequent in contracts as used in contrast to condition precedent must mean subsequent to liability,—that

<sup>10</sup> *Harriman, Cont.*, § 303. "If either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent." *McGehee v. Hill*, 4 Port. 170.

<sup>11</sup> *Callonel v. Briggs*, 1 Salk. 112. The first recognition of concurrency in the modern sense is in the elaborate decision of *Turnor v. Goodwin*, *Fortescue*, 145, decided about ten years later, which was soon followed by *Merrit v. Rane*, 1 Strange, 458.

<sup>12</sup> See *infra*, §§ 832, 833.

<sup>13</sup> *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 470. A "resolatory condition" as applied to obligations in the civil law seems similar. "It does not suspend the execution of the obligation; it only binds the creditor to return what he has received if the event happens, for which the condition provides." *French Code Civil*, Art. 1183. See also *German Burg. Gesetzbuch*, §§ 158 *et seq.*

is, a condition which divests a liability on a contract after it has once accrued.<sup>14</sup> Such conditions are very rare. They do, however, exist. Where goods are sold with a right to return them a liability for the price arises when the goods are sold (unless a period of credit was agreed upon), but this liability may be divested by the return of the goods. The Statute of Limitations is in effect a condition subsequent since it cuts off a previously existing liability; but this condition is imposed by law not by the will of the parties. In insurance policies, however, a provision is common that suit must be brought within a stated period. The expiration of this time divests a liability previously existing.<sup>15</sup> But it should be observed that though for the reason stated this may truly be classed as a condition subsequent, the fact that the time for bringing suit has not elapsed may be regarded nevertheless as a condition precedent not to the existence of a right of action, but to the maintenance of the particular action which the plaintiff brings; and it seems that even the few true cases of conditions subsequent to liability in contracts, operate in substance as conditions precedent to the plaintiff's right to maintain the particular action which he has brought—and this is the only material thing in any case. What are generally called conditions subsequent in contracts are so called with little propriety. They are in substance conditions precedent to the vesting of liability and are subsequent only in form. A bond is a typical instance. The obligor in terms promises absolutely to pay the penal sum of the bond, but is to be excused from liability on the happening of a condition. In legal effect, however, the condition is precedent. No action will lie until default in the performance of the condition. The form which is given to the contract, though immaterial as matter of substantive law, is important in matters of procedure. The plaintiff originally merely had to establish the bond, and the burden of pleading and proving defeasance of the liability by

<sup>14</sup> Conditions subsequent to the existence of a contract rather than to the liability upon it are not uncommon, *e. g.*, where a right is given to rescind a contract after its formation, on the happening of a certain event.

<sup>15</sup> See *Semmes v. Hartford Ins. Co.*, 13 Wall. 158, 20 L. Ed. 490; *Earnshaw v. Sun Mutual Aid Soc.*, 68 Md. 465, 12 Atl. 884; *Board of Education v. Richmond Const. Co.*, (N. J. L. 1919), 105 Atl. 220.



performance of the condition was thrown on the defendant. But the limitation of the plaintiff's right to recover the full penalty of a penal bond, and the statutes requiring assignment of breaches by him <sup>16</sup> resulted in throwing the burden on the plaintiff, <sup>17</sup> since the legal effect of the instrument became not an obligation to pay the penal sum subject to a condition either precedent or subsequent, but an obligation to perform what is still called the condition of the bond but is treated as a covenant. Where, however, a bond or similar obligation is not penal, so that unless the promisor performs the condition, full recovery can be had upon the obligation, according to its terms, the burden is still upon the defendant, <sup>18</sup> whereas in the case of a condition precedent the plaintiff must set out the condition as well as the promise, and must allege and prove the happening of the condition in order to establish the defendant's breach of contract. The application of this principle to insurance policies is frequent, and the law has been thus stated: "Those clauses usually contained in policies of insurance, which provide that the policy shall become void, or its operation defeated or suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing, or omission to do some act, are not in any proper sense conditions precedent. If they may properly be called conditions, they are conditions subsequent, and matters of defence, which, together, with their breach, must be pleaded by the insurer to be available as a means of defeating a recovery on the policy; and the burden of establishing the defence, if controverted, is, of course, upon the party pleading it." <sup>19</sup>

<sup>16</sup> See *infra*, § 772.

<sup>17</sup> 1 Saund. Pleading (1st ed.) 323; Barrett v. Douglas Park Bg. Assoc., 75 Ill. App. 98; Young v. Stephens, 9 Mich. 500, 505; Holliday v. Cooper, 1 Sm. & Marsh. (9 Miss.) 633. But see Philbrook v. Burgess, 52 Me. 271; Exeter Bank v. Rogers, 6 N. H. 142; Douglas v. Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

<sup>18</sup> Hotham v. East India Co., 1 T. R. 638; Adams v. Way, 33 Conn. 419; Gray v. Gardner, 17 Mass. 188; Thayer

v. Connor, 5 Allen, 25; Root v. Childs, 68 Minn. 142, 70 N. W. 1087; Wooters v. International R. Co., 54 Tex. 294. But see Perkins v. Maurepas Milling Co., 88 Miss. 804, 40 So. 933.

<sup>19</sup> Moody v. Insurance Co., 52 Ohio St. 12, 38 N. E. 1011, citing: Lounsbury v. Insurance Co., 8 Conn. 459, 21 Am. Dec. 686; American Fire Ins. Co. v. Sisk, 9 Ind. App. 305, 36 N. E. 659; Daniels v. Insurance Co., 12 Cush. 416; Newman v. Insurance Co., 17 Minn. 123; Mueller v. Insurance Co., 45 Mo.

Though the nomenclature of these conditions is fixed as "conditions subsequent," the name should not cause it to be forgotten that except for purposes of pleading they are conditions precedent.<sup>20</sup>

### § 668. Express and implied conditions.

Conditions may be created by the expressed assent of the parties thereto, or they may be created by the law without any manifestation of assent by word or act. An express condition is of the first type; a condition implied in law is of the second. Though these types of conditions in an extreme form are easily distinguished, they are often confused and confusion is the more natural because the two kinds shade into one another by imperceptible gradations. Conditions may be expressed not in the usual and appropriate language for conditions, but by the very nature of the thing promised. A promise to deliver goods necessarily involves the condition

84; *Spencer v. Citizens' Mut. L. Assoc.*, 142 N. Y. 505, 37 N. E. 617; *Mumaw v. Western &c. L. Ins. Co.*, 97 Ohio St. 1, 119 N. E. 132; *Insurance Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. See also *Kidder v. Supreme Commandery*, 192 Mass. 326, 78 N. E. 469. In *Benanti v. Delaware Ins. Co.*, 86 Conn. 15, 17, 84 Atl. 109, Ann. Cas. 1913 D. 826, the court said: "It is no part of an insured's duty to negative a condition subsequent. The authorities are practically agreed in holding that the burden of proving the fraud is on the insurer. It is expressly provided, that if there appear any fraud or false swearing, the insured shall forfeit all claim under the policy. It is believed that an averment, that the plaintiff had practiced no fraud nor swore falsely, would sound rather oddly in the ears of a . . . special pleader;" citing: *Schaeffer v. Anchor M. F. Ins. Co.*, 113 Iowa, 652, 656, 85 N. W. 985; *Friedman Co. v. Atlas Assurance Co.*, 133 Mich. 212, 94 N. W. 757; *Sloevich v. Orient Mut. Ins.*

*Co.*, 108 N. Y. 56, 14 N. E. 802; *Western Assurance Co. v. Mohlman Co.*, 83 Fed. 811, 28 C. C. A. 157, 51 U. S. App. 577, 40 L. R. A. 561.

<sup>20</sup> A misleading use of the term condition subsequent may be found in *Thompson v. Insurance Co.*, 104 U. S. 252, 260, 26 L. Ed. 765. "We do not accept the position that the payment of the annual premium is a *condition precedent* to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the assured has a right to reply." Payment of the annual premium is certainly a condition precedent to liability on the insurer's promise. Of course, this condition precedent, like any other, may be waived.

that the promisee will take delivery; a promise to repair another's house involves the condition that the promisor will be allowed access to the house. Such a condition may be called a condition implied in fact, or a necessary condition. It partakes of the nature of an express condition, except in the mode of proof.<sup>21</sup> A step farther away from expressed intention to create a condition may be taken. A promise by one party to pay one hundred dollars, and a promise by the other party to transfer title to a horse, are in terms absolute and unconditional but if the promises were given in exchange for one another, the law will impose concurrent conditions on the ground that the performances must have been intended as the price each for the other, and that justice requires a concurrent exchange. Though this was not formerly the law, it has been so established for a century and a half, and modern business custom is in conformity with this rule of law. Therefore, at the present time a promise to sell not simply by rule of law, but presumably by the understanding of the parties is subject to a condition of contemporaneous payment unless a period of credit is expressly given. Thus it is true not only that custom gradually hardens into law but that a rule of law when once established and become familiar, is adopted in fact by the parties as a term of their bargain.<sup>22</sup>

**§ 669. Importance of distinguishing between express and implied conditions.**

An express condition or a condition implied in fact, depends for its validity on the manifested will of the parties. It has the same sanctity as the promise itself. Though the court may regret the harshness of such a condition, as it may regret the harshness of a promise, it must nevertheless generally enforce the will of the parties unless to do so will violate public policy. Where, however, the law itself has imposed the condition, irrespective of the will of the parties, it can deal with its creation as it pleases, shaping the boundaries of the condition in such a way as to do justice and avoid hardship.

<sup>21</sup> See *infra*, § 893.

<sup>22</sup> See *supra*, § 615.

### § 670. Words necessary to create a promise.

No form of words is necessary to create a promise or covenant; all that is essential is that on a fair interpretation it shall appear that the alleged promisor has agreed to do the act in question.<sup>23</sup> Not only may promises exist then, where the

<sup>23</sup> In *Hale v. Finch*, 104 U. S. 261, 268, 26 L. Ed. 732, Harlan, J., for the court, said:—"It is undoubtedly true, as argued by counsel, that neither express words of covenant, nor any particular technical words, nor any special form of words, is necessary in order to charge a party with covenant. 1 Roll. Abr. 518; *Lant v. Norris*, 1 Burr, 287; *Williamson v. Codrington*, 1 Ves. 511, 516; *Courtney v. Taylor*, 7 Scott, N. R. 749. 'The law,' says Bacon, 'does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant.' Bac. Abr., Covenant, A. So in *Sheppard's Touchstone*, 161, 162, it is said: 'There need not be any formal words, as 'covenant,' 'promises,' and the like, to make a covenant on which to 'ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in whatsoever words it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement.' Mr. Parsons says, 'Words of proviso and condition will be construed into words of covenant, when such is the apparent intention and meaning of the parties.' 2 Parsons, Contracts, 23. There are also cases in the books in which it has been held that even a recital in a deed may amount to a covenant. *Farrall v. Hilditch*, 5 C. B. (N. S.) 840; *Great Northern Railway Co. v. Harrison*, 12 C. B. 576; *Severn and Clerk's Case*, 1 Leon. 122. And there are cases in which the instrument to be construed

was held to contain both a condition and a covenant; as, 'If a man by indenture letteth lands for years, provided always, and it is covenanted and agreed between the said parties, that the lessee should not alien.' It was adjudged that this was 'a condition by force of the proviso, and a covenant by force of the other words.' Co. Litt. 203 b. But according to the authorities, including some of those above cited, and from the reason of those above cited, and from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged, for the performance or non-performance of some act. Comyns, in his Digest (Covenant, A, 2), says that, 'any words in a deed which show an agreement to do a thing, make a covenant,' 'but,' says the same author, 'where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate; as, a lease, provided and upon condition that the lessee collect and pay the rents of his other houses.' Comyns, Dig., Covenant A, 3. The language last quoted is found also in Platt's Treatise on the Law of Covenants. Law Library, vol. iii. p. 17. It there appears in connection with his reference to the case where A. leased to B. for years, on condition that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them. In such case, the author remarks, the

language is in terms that of promise, but also where the agreement shows that the parties must have intended an obligation though they failed so to state in clear terms. These promises implied in fact, as they may be called, are numerous. A notable example is that of a bond. "Until well after Lord Coke's time the only consequence of breaking the condition of a bond was an obligation to pay the penalty. The obligor was held to have an election between performing the condition and payment."<sup>24</sup> "It seems to have been held within half a century after *Hulbert v. Hart*, that, under some circumstances at least, a bond would be construed to import a promise of the event constituting the condition."<sup>25</sup> This illustration of words not strictly appropriate for a promise being construed as such, is an extreme one, for the conclusion seems based on the necessity of finding a justification for limiting the damages on the bond to the actual injury suffered by breach of the condition.<sup>26</sup> Debt for the penal sum not covenant for non-performance of the condition remained the ordinary remedy and "the practice of recovering damages beyond the penalty of a money bond is unknown, a condition of things which could hardly exist if covenant would lie on such an agreement."<sup>27</sup> Clearer cases of promises implied in fact are the promises implied in every bilateral contract not only not to prevent performance by the other party of the performance by which he will become entitled to receive counter performance, but also to cooperate in such performance if cooperation is necessary from the nature of the case.<sup>28</sup> In a contract to buy and sell, each party thus binds himself to accept the performance of the other even if he does not in terms agree to do so.

lessee was held liable to an action for omitting to leave the houses in good plight, 'for here an agreement was implied.'"

<sup>24</sup> *Stewart v. Griffith*, 217 U. S. 323, 328, 54 L. Ed. 782, by Holmes, J., citing: *Bromage v. Genning*, 1 Roll. R. 368; 1 Inst. 206 b; *Hulbert v. Hart*, 1 Vern. 133 (1682).

<sup>25</sup> *Ibid.*, citing: *Hobson v. Trevor*, 1 Strange, 533, S. C., 2 P. Wms. 191 (1723); Anonymous, *Moseley*, 27 (1728); *Roper v. Bartholomew*, 12

Price, 797, 811, 822, 826, 832; *Hooker v. Pyncheon*, 8 Gray, 550, 552. See also *Martin v. Taylor*, 1 Wash. C. C. 1; *New Britain v. New Britain Tel. Co.*, 74 Conn. 326, 50 Atl. 881, 1015; *Philbrook v. Burgess*, 52 Me. 271; *Clark v. Bush*, 3 Cow. 151; *Douglas v. Hennessy*, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583.

<sup>26</sup> See *infra*, § 774.

<sup>27</sup> *Sedgwick on Damages*, § 679. See also *infra*, § 1414.

<sup>28</sup> See *infra*, § 1293.

Whether one who has made a conditional promise undertakes impliedly to make the condition possible, depends on reasonable inferences to be drawn in each case. One who promises to pay for a business or a franchise a percentage of the profit realized therefrom must generally be understood to promise impliedly that he will continue to exercise the business from which the profit is to be derived.<sup>28</sup> A promise to pay wages when the employer resumed work or disposed of his property was held to imply an obligation to do one or the other within a reasonable time.<sup>29</sup> A promise to pay when money was collected from adjoining owners implied an undertaking that the promisor was in a position to collect it and would do so.<sup>29a</sup> Promises to pay when able on the other hand are not usually held to imply a promise to become able;<sup>30</sup> and the retainer of a lawyer coupled with a promise to pay him a further sum if his services are required implies no promise to require them.<sup>31</sup>

#### § 671. Words necessary to create a condition.

Any words will create a condition which express, when properly construed, the idea that the performance of the promise is dependent on some other event. "For the most part conditions have conditional words in their frontispiece and do begin therewith."<sup>32</sup> The early cases on conditions relate generally to estates in land, but the principles involved are the same as in covenants or promises. In the early books there are said to be three words most proper for the purpose: *proviso*, *ita quod*, and *sub conditione*; but there are also other appropriate words as—*si*, or *si contingat*.<sup>33</sup> A great variety of words are now regarded as equally fit for the creation of a condition. Not only those mentioned above, but such words as "when," "after," or "as soon as," clearly indicate that the promise is not to be performed except upon a condition. Whether a present participle makes an express condition has involved

<sup>28</sup> McIntyre v. Belcher, 32 L. J. C. P. (N. S.) 254; *In re* Railway & Electric Appliances Co., 38 Ch. D. 597, 603.

<sup>29</sup> Hood v. Hampton Plains Co., 106 Fed. 408.

<sup>29a</sup> Worthington v. Sudlow, 21 L. J. Q. B. (N. S.) 131.

<sup>30</sup> See *infra*, § 804.

<sup>31</sup> See further, *infra*, § 1015.

<sup>32</sup> Sheppard's Touchstone, 121.

<sup>33</sup> *Ibid.*

some difference of decision; as for instance where A promises B to do something, B "paying" a certain sum or "performing" a certain service, As matter of English construction such words seem to impose a condition.<sup>34</sup> Not infrequently, however, courts have failed to treat them as necessarily conditional.<sup>35</sup> But the words which were most troublesome to the early lawyers, are "for" or "in consideration of." It may seem that a promise to pay \$100 "for" a horse, necessarily imposes a condition, but it is to be observed that the price is equally paid "for" the horse; whether it is paid before or after the transfer of title or possession to the animal, or simultaneously therewith.<sup>36</sup>

Lord Holt in a leading case,<sup>37</sup> laid down certain rules to determine the proper construction of these words, as follows:—  
 "First. If there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do, for another thing, and that day happens to incur before the time the thing for which the promise, agreement, or covenant, is made, is to be performed by the tenor of the agreement; there, though the words be 'that the party shall pay the money,' or 'do the thing for such a thing,' or, 'in consideration of such a thing,' after the day is past, the other shall have an action for the money or other thing, although the thing for which the promise, agreement, or covenant was made, be not performed; but, Secondly. If there be a day for the payment of the money, or doing of other act for another, and that day is to be after the performance of the thing for which the promise, &c., was made, there, if the agreement be to pay the money, or do other thing, 'for,' or 'in consideration,' or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money,

<sup>34</sup> So held in *Large v. Cheshire*, 1 Vent. 147; *Callonel v. Briggs*, 1 Salk. 112; *Anon.*, 4 Leon. 50; *Thomas v. Cadwallader*, Willes, 496. See also *Westacott v. Hahn*, [1918] 1 K. B. 495.

<sup>35</sup> *Hays v. Bickerstaffe*, 2 Mod. 34; *Boone v. Eyre*, 2 W. Bl. 1312; *Dawson v. Dyer*, 5 B. & Ad. 584; *Edge v. Boileau*, 16 Q. B. D. 117; *De Lancey v. Ganong*, 9 N. Y. 9.

<sup>36</sup> In the following cases such words were held to create a condition. *Anon.*, 15 Hen. VII. f. 10 b, pl. 7; *Brocas' Case*, 3 Leon. 219. See also *Peeters v. Opie*, 2 Wm. Saund. 350. But otherwise in *Anon.*, 1 Roll. Abr. 415; *Pordage v. Cole*, 1 Wm. Saund. 319.

<sup>37</sup> *Thorp v. Thorp*, 12 Mod. 455.

or do other thing, must be averred to maintain an action." Later, these rules became the basis for implication of conditions without regard to the use of the word "for" or "in consideration of" <sup>38</sup> It is obvious that performance due by the terms of a contract at a later day can hardly be intended by the parties to be a condition precedent to liability for earlier performance, and though the converse proposition—that the earlier performance is intended to be a condition of the later—is not an equally necessary proposition, it would generally hold true. But it does not always appear from a contract at what times or in what order performance is to take place unless the words relied on to establish a condition give an indication. In determining such a question at the present time little stress would be laid on refinements; rather the court would endeavor to interpret the meaning of the words used according to general principles of interpretation. A special rule of construction was established by the early cases which still might have some weight in case of ambiguity. If the performance which is urged to be a condition was also the subject-matter of a promise by the party from whom the performance was due, so that even though the words were not treated as words of condition there is a remedy to secure the performance of the act, the construction will be favored that no condition is meant; while on the other hand, if there will be no remedy to secure the performance of the act in question, unless the words can take effect as words of condition, because the contract contains no promise to render the performance, the construction will be given that the words create a condition. <sup>39</sup> "Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. The reason of this disinclination is that such a construction prevents the court from dealing out justice to the parties according to the equities of the case." <sup>40</sup>

<sup>38</sup> See *infra*, §§ 820, 821.

<sup>39</sup> *Ughtred's Case*, 7 Co. 9 b. 10 b.; *Pordage v. Cole*, 1 Wm. Saund. 319; *Lock v. Wright*, 1 Strange, 569; *Smith v. Shelberry*, 2 Mod. 33; *Adams v.*

*Guyandotte Valley Ry. Co.*, 64 W. Va. 181, 61 S. E. 341.

<sup>40</sup> *Front Street M. & O. R. Co. v. Butler*, 50 Cal. 574, 577, quoted and followed in *Antonelle v. Kennedy &*



§ 672. Aid to interpretation from considering which party uses language.

When an act is promised, the person to do the act is generally the promisor. A promise that a third person shall do an act though perfectly possible is not very common. Very rarely indeed will the promisee be the person to do the act. Such a promise is conceivable (as a promise by a tutor to his pupil that the pupil shall pass an examination) though it will always be subject to a condition that the promisee will coöperate in the performance. On the other hand, when the performance of an act (not the mere happening of a fortuitous event) is a condition qualifying a promise, the person to do the act is generally not the promisor, but the promisee. Conversely, if language in a contract is that of the party who is to do the act, the language should be construed as a covenant or promise. If the language is that of the other party, words must constitute a condition. The matter has been well expressed by Professor Langdell:<sup>41</sup> "Moreover, the words of such a clause will have, in fact, a different meaning, according to the party who uses them. If they are used in a contract by the party who is to do the act, they plainly import that he binds himself to do it; while, if they are used by the party for whose benefit the act is to be done, they fairly mean that he will require it to be done, *i. e.*, that his own obligation shall be conditional upon its being done. How then shall it be ascertained to whom the language of such a clause is to be imputed? If the contract be clearly unilateral (*e. g.*, a policy of insurance), of course the answer to this question admits of no doubt. In such a contract only one party speaks, and that is the covenantor or promisor. Any clause, therefore, in a policy of insurance, requiring any act to be done by the insured, will be a condition of the covenant or promise of insurance, though its language may more naturally import a covenant or promise by the insured."<sup>42</sup>

Shaw Lumber Co., 140 Cal. 309, 319, 73 Pac. 966. *Cf.* McLaughlin v. Clausen, 85 Cal. 322, 14 Pac. 636. See also Jakel v. Seek, 79 Oreg. 489, 154 Pac. 424, 155 Pac. 1192.

<sup>41</sup> Summary Contracts, § 33.

<sup>42</sup> *Ibid.*, Citing Worsley v. Wood, 6 T. R. 710; Mason v. Harvey, 8 Exch. 819; Roper v. Lendon, 1 E. & E. 825.

This seems to be the true reason why the clauses in marine policies of insurance commonly called warranties have always been held to be conditions. But if the contract be bilateral, the question does not admit of so unqualified an answer, as any clause which the contract contains may be the language of either party. It seems, however, that a clause in a bilateral contract which simply states that a certain thing shall be done, or that a certain event shall happen, or has happened, must be taken *prima facie* to be the language of the party who is to do the act, or within whose knowledge or power the event is supposed to be. Such a clause clearly cannot be imputed to the other party, unless there is some special reason for so doing. It seems, therefore, that a clause which would be a warranty in a marine policy of insurance will *prima facie* be a stipulation by the ship owner in a charter-party.<sup>43</sup> It seems that a bought note or a sold note, although in strictness a part of a bilateral contract, is to be treated as a unilateral contract for the purpose of the present question. In other words, a bought note is the language of the buyer alone, as the sold note is the language of the seller alone; and, therefore, if a bought note requires anything to be done by the seller, or if a sold note requires anything to be done by the buyer, the doing of it will be an express condition.<sup>44</sup> It may be added, that, in a bilateral contract, the same clause may be to some extent the language of both parties, and so be both a stipulation and an express condition; but it seems that that can only be where the clause contains some word or words importing a condition, and some other word or words importing a stipulation.”<sup>45</sup>

<sup>43</sup> *Ibid.*, citing *Glaholm v. Hays*, 2 M. & G. 257; *Ollive v. Booker*, 1 Exch. 416; *Oliver v. Fielden*, 4 Exch. 135; *Behn v. Burness*, 1 B. & S. 787, 3 B. & S. 751; and adding, “This view may be adopted without impeaching any of the foregoing cases, for the clause upon which the question arose in each of them, assuming it to be a stipulation on the part of the plaintiff, also constituted an implied condition of the covenant or promise sued

on.” *Cf. Grafton v. Eastern Counties Ry. Co.*, 8 Exch. 699.

<sup>44</sup> *Ibid.*, citing: *Glaholm v. Hays*, 2 M. & G. 257, by *Tindal, C. J.*, and adding, “In *Graves v. Legg*, 9 Exch. 709, it is not expressly stated that the contract declared on was contained in a bought note, but it may safely be assumed that it was, and therefore the clause upon which the question arose constituted an express condition.”

<sup>45</sup> *Ibid.*

**§ 673. Warranties and conditions.**

Warranty is a word which illustrates as well as any other the fault of the common law in the ambiguous use of terms. The word naturally means promise. It was first used in the law of real property and a distinction exists between the common law warranty—in effect a covenant real—properly attached only to freehold estates which bound the warrantor and his heirs to supply other land of equal value in case of breach, and the modern personal covenants of warranty.<sup>46</sup> In both cases, however, the primary meaning of obligation is preserved.

In the English law of Sales a warranty means a promise generally collateral in form, the breach of which will not excuse performance by the other party to the contract.<sup>47</sup> In charter parties the word means a promise of such importance that on breach thereof not only is the warrantor liable in damages<sup>48</sup> but the other party is excused from performance;<sup>49</sup> and in many American jurisdictions a similar meaning is given to warranty in the law of sales.<sup>50</sup> A contract of insurance is normally a unilateral contract. In fire or marine insurance the insured customarily pays the full premium when the policy is issued, or at least gives a note therefor. In life insurance though it is customary to pay premiums annually, the insured is under no obligation to make the payment, but may let the policy drop if he sees fit. Undoubtedly many policies in terms assert that the insured covenants and agrees to do certain things. It can hardly be denied that such statements are promises by the insured, though no suit is ever brought on such a covenant, and its only object is to give the insurer an excuse if the covenant is broken. But most of the so-called warranties in insurance policies are not even promises in form, but are conditions. The use of the word warranty, therefore, in insurance law is a misnomer. It means a condition inserted on the face of the policy or a statement of fact, on the exact truth or performance of which the insurer's liability depends. Warranties

<sup>46</sup> Tiffany, *Real Property*, §§ 394–398.

<sup>47</sup> See *infra*, § 1461.

<sup>48</sup> *Corkling v. Massey*, L. R. 8 C. P. 395; *Bentzen v. Taylor*, [1893] 2 Q. B. 274.

<sup>49</sup> *Ollive v. Booker*, 1 Exch. 416; *Behn v. Burness*, 3 B. & S. 751; *Bentzen v. Taylor*, [1893] 2 Q. B. 274.

<sup>50</sup> See *infra*, § 1462.

as thus used to designate conditions in insurance policies are divided into two classes, affirmative and promissory warranties. Affirmative warranties are statements of supposedly existing facts, on the truth of which the insurer's liability depends; promissory warranties are agreements that the insurer's liability shall be conditional on the future existence or happening of certain facts.<sup>51</sup>

#### § 674. Pleading in actions on conditional contracts.

It is always the duty of the plaintiff in his declaration or complaint to allege facts sufficient to make out a *prima facie* cause of action. Therefore when suing upon a conditional contract he must first allege the contract as it was made, with a statement of all conditions precedent, including concurrent conditions;<sup>52</sup> and (unless the contract is a formal one) a statement of the consideration making the promise binding. In order to show a breach of duty by the defendant, it must then be alleged that all the conditions qualifying the promise have happened or been performed or been excused. Until comparatively modern times it was necessary for the plaintiff to allege specifically each thing which had happened or been performed in fulfillment of the conditions of the promise.<sup>53</sup>

Where a contract was subject to many conditions, this imposed a serious burden on a plaintiff, and especially was this burden severe after the development of implied conditions. The plaintiff was obliged to determine at his peril what acts or events were conditions. A mistake on his part in construing the meaning of his contract in this respect would lead either,

(1) to insufficient allegations of performance, making the pleading open to demurrer or even to motion in arrest of judgment,<sup>54</sup> or—

(2) to wider allegations than were necessary, and perhaps wider than were easy of proof.

Under modern systems of pleading the plaintiff is now al-

<sup>51</sup> See *infra*, § 1080.

<sup>52</sup> Conditions subsequent in form and collateral stipulations need not be set out. See *supra*, § 667.

<sup>53</sup> 1 Chitty on Pleading (7th Eng.

Ed.), 335 *et seq.*; Stephen on Pleading (Williston's ed.), 370.

<sup>54</sup> A general averment of performance was sufficient after verdict—*Manby v. Cremonini*, 6 Exch. 808.

lowed to make merely a general allegation of the performance or happening of conditions, and the defendant must indicate what, if any, breaches of conditions he relies upon as an excuse for non-performance.<sup>55</sup> This does not change the ultimate burden of proof which remains upon the plaintiff.<sup>56</sup>

**§ 675. Generally conditions must be exactly complied with.**

As a general rule conditions which are either expressed or implied in fact must be exactly fulfilled or no liability can arise on the promise which such conditions qualify. The reason for this is obvious. The promisor can only be held liable according to the terms of the promise which he makes. If he promises five dollars, he cannot be made to pay \$5.01. For the same reason if he makes a promise to do an act on condition that he receives \$5.01 he cannot be required to perform on being paid \$5. The condition is part of his promise qualifying and limiting it, and his promise as matter of plain fact is not broken until the condition has happened or been performed.<sup>57</sup> Thus where a promisor was given the option of cancelling a charter party "if the steamer does not arrive at port of loading and be ready to load on or before midnight of the 10th of Oct." he was held entitled to cancel the charter; though the vessel arrived at 11 P. M., as it was not ready for

<sup>55</sup> The change was introduced in England by the Common Law Procedure Act of 1852, Sec. 57. See Bullen & Leake, *Prec. of Pleading* (1st ed.), 84.

<sup>56</sup> In *Benanti v. Delaware Ins. Co.*, 86 Conn. 15, 18, 84 Atl. 109, Ann. Cas. 1913 D. 826, the court said: "As to all conditions precedent the plaintiff sustains the burden of proof. *Hennessey v. Metropolitan Life Ins. Co.*, 74 Conn. 699, 52 Atl. 490; *Vincent v. Mutual Reserve Fund Life Assoc.*, 77 Conn. 281, 287, 58 Atl. 963. Because of the practical inconvenience of compelling proof of all the conditions precedent in a policy of insurance, the plaintiff under our rule may, upon proof of his interest, the issuance of the policy to him, the loss, and compliance with the

proofs of loss, rest upon the legal presumption that these conditions are *prima facie* established and the case made out. Thereupon the defendant may offer its proof of the several breaches which it may have pleaded, and these the plaintiff may in turn rebut. This burden of proof never shifts. Upon the whole evidence it is where it was at the beginning, upon the plaintiff, to prove his compliance with the terms and conditions precedent of the policy."

<sup>57</sup> "A covenantor is not to be held beyond his undertaking and he may make that as narrow as he likes." Holmes, J., in *Portuguese-American Bank v. Welles*, 242 U. S. 7, 61 L. Ed. 116, 37 S. Ct. 3.

loading until the following morning.<sup>58</sup> Similarly insurance policies, building contracts, contracts of sale, and other contracts, frequently contain express conditions which must be exactly performed in order to create liability on the contract; and the fact that non-performance of the condition or incomplete performance of it has caused no injury to the promisor is immaterial.<sup>59</sup> A distinction in law if not in logic must, however, be observed.

Logically there is no distinction between these three cases:

1. I promise to pay if a house is completed according to plans and specifications.
2. I promise to pay if the house is completed in every respect exactly according to plans and specifications.
3. I promise to pay if the house is completed exactly in every respect according to plans and specifications, and if it is not so completed it is understood that I am to pay nothing at all.

Even in the first of these cases, as the promise is conditional on the house being completed, according to plans and specifications, there is no undertaking to pay except on this condition. And except for such slight qualification as the principle of *de minimis* may justify, the condition naturally means exact and full completion. Nevertheless, modern courts not infrequently deal differently with provisions substantially in the forms above stated. If the promise is in the first form, many courts are disposed to allow recovery where there has been merely substantial performance;<sup>60</sup> while if the promise is in the last form suggested, most courts seem indisposed to set any limits to the defence of the promisor in spite of the forfeiture which may be involved. Doubtless the rule that an instrument is to be construed most strongly against the maker,<sup>61</sup> and that a fair and reasonable interpretation will be preferred to a harsh one,<sup>62</sup> will

<sup>58</sup> The Austin Friars, 71 L. T. 27. See also for the exact enforcement of conditions in charter parties of arrival by a certain day—*Shadforth v. Higgin*, 3 Camp. 385; *Smith v. Dart*, 14 Q. B. D. 105.

<sup>59</sup> See *Life Preserver Suit Co. v. National Life Preserver Co.*, 252 Fed. 139, 164 C. C. A. 251. Other instances

of such conditions will be found in the following sections. See, *e. g.*, cases in § 806; and cases where the promisor's own satisfaction is made a condition collected in § 44.

<sup>60</sup> See *infra*, § 805.

<sup>61</sup> See *infra*, § 621.

<sup>62</sup> See *infra*, § 670.

often justify a recovery where at first sight there seems a breach of condition. Especially in insurance cases courts have gone far in this direction.<sup>63</sup> Moreover, if a promise is in the last of the three forms suggested, it is evident that the minds of the parties were addressed to the particular contingency of substantial performance marred by a slight breach, whereas in the second form and still more clearly in the first the possible effect of their words may not have occurred to them.

<sup>63</sup> See, e. g., *Liverpool &c. Ins. Co. v. Kearney*, 180 U. S. 132, 45 L. Ed. 460, 21 S. Ct. 326, and cases collected in 51 L. R. A. 698 n. in regard to construction of "iron safe" clause; *Globe Mut. L. Ins. Assoc. v. Wagner*, 188

Ill. 133, 58 N. E. 970, 52 L. R. A. 649; *Loesch v. Supreme Tribe* (Tex. Civ. App.), 190 S. W. 506, where warranty that statements were "true" was held to mean "believed to be true."

## CHAPTER XXIV

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### § 676. Enumeration of excuses for non-performance of conditions.

The first matter to be decided when an alleged right under a contract is considered is the interpretation of the contract. If upon such interpretation there is found to be an express condition, or one implied in fact, qualifying the promise alleged to have been broken, the next question is, has that condition been performed exactly. If it has not been so performed the alleged right cannot be sustained unless performance of the condition has been excused. The possible excuses for such conditions are few. It must be noted that so-called conditions implied in law depend to some extent upon different principles;<sup>1</sup> and what is said here though much of it may be applicable to such implied conditions relates strictly only to conditions created by the terms of the contract. When it is said that a promise is excused, the meaning is that no liability arises because of non-performance of the promised act; but when it is said that a condition is excused, it is meant that

<sup>1</sup> See *infra*, § 813.

liability on the promise arises in spite of the non-performance of the condition. The mere fact that a condition is impossible does not excuse it; but there are three clear grounds upon which an excuse may be rested, and the promisee allowed an action in spite of non-performance of the condition, namely,—

(1) Prevention by the promisor.

(2) Waiver by the promisor of the breach of condition, or election by him to continue the contract in spite of the breach.

(3) Facts showing that even if the condition were performed, the promise would not have been kept; and that for this reason only the condition had not been performed.

A fourth ground not yet very clearly admitted may be added, as occasionally applicable, namely—(4) that enforcement of the condition will cause forfeiture to a degree that equity and good conscience will not permit.

The third of these excuses is by a liberal construction of the facts or a somewhat illogical extension of the law of waiver, often allowed when the controlling reason for the decision is in large measure the desire of court to avoid forfeitures, if it can in any reasonable way be accomplished.<sup>2</sup> Where a contract expressly provides for forfeiture on breach of condition, and the provision has not been waived, it is usually enforced, but it will be seen that some courts, especially in the United States, occasionally at least refuse enforcement.<sup>3</sup>

#### § 677. Prevention of performance of conditions or promises.

It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure. The illustrations of this principle are numerous. One who prevents an architect from giving a certificate, which is a condition of liability, cannot set up failure to give the certificate as an excuse for non-payment of the price.<sup>4</sup> One who promises to

<sup>2</sup> *Germania F. Ins. Co. v. Pitcher*, 160 Ind. 392, 397, 64 N. E. 921, 66 N. E. 1003; *Kiernan v. Dutchess County Mutual Ins. Co.*, 150 N. Y. 190, 194, 44 N. E. 698; *Clark v. West*, 193 N. Y. 349, 360, 86 N. E. 1.

<sup>3</sup> See *infra*, §§ 91, 852.

<sup>4</sup> *Batterbury v. Vyse*, 2 H. & C. 42; *Catanzano v. Jackson (Ala.)*, 73 So. 510; *St. Louis, etc., R. Co. v. Kerr*, 153 Ill. 182, 38 N. E. 638; *Crawford v. Wolf*, 29 Ia. 567; *Smith v. White*, 5

buy goods if satisfactory cannot set up the failure to perform the condition if by refusing to examine the goods he has prevented the condition from happening.<sup>5</sup> One who agrees to pay for goods on delivery, cannot set up the lack of delivery when caused by his own act;<sup>6</sup> and the principle that prevention by one party excuses performance by the other both of a condition and of a promise may be laid down broadly for all cases.<sup>7</sup> The condition is excused because the promisor has

Neb. 405; *Feldman v. Goldblatt*, 75 N. Y. Misc. 656, 133 N. Y. S. 945; *Whelen v. Boyd*, 114 Pa. 228, 6 Atl. 384; *Fay v. Moore*, 261 Pa. 437, 104 Atl. 686; *Mills v. Paul* (Tex. Civ. App.), 30 S. W. 558; *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, 104 N. W. 94, 110 Am. St. Rep. 838.

<sup>5</sup> *Sidney School Furniture Co. v. Warsaw School District*, 103 Pac. 76, 18 Atl. 604.

<sup>6</sup> *United States v. Peck*, 102 U. S. 64, 26 L. Ed. 46. See also *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; *Greenwood v. Watson*, 171 Fed. 619, 96 C. C. A. 421; *infra*, § 832; *Williston, Sales*, § 450.

<sup>7</sup> *Blandford v. Andrews*, *Croke Eliz.* 694; *Lancashire v. Killingworth*, 1 Ld. Ray. 686; *Morris v. Timmins*, 1 Beav. 411; *Inchbald v. Western &c. Co.*, 17 C. B. (N. S.) 733; *Mackay v. Dick*, 6 App. Cas. 251; *Peck v. United States*, 102 U. S. 64, 26 L. Ed. 46; *United States v. United Engineering Co.*, 234 U. S. 236, 58 L. Ed. 1294, 34 S. Ct. 843; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 552, 38 L. Ed. 814, 14 S. Ct. 876; *Kingman v. Western Mfg. Co.*, 92 Fed. 486, 34 C. C. A. 489; *Kelly v. Fahrney*, 123 Fed. 280, 59 C. C. A. 298; *Tennesse, etc., R. Co., v. Danforth*, 112 Ala. 80, 20 So. 502; *Wolf v. Marsh*, 54 Cal. 228; *Love v. Mabury*, 59 Cal. 484; *Griffith v. Happersberger*, 86 Cal. 605, 25 Pac. 137, 487; *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 415, 73

Pac. 966; *Anderson v. Quick*, 163 Cal. 658, 126 Pac. 871; *Durland v. Pitcairn*, 51 Ind. 426; *King v. King*, 69 Ind. 467; *Dill v. Pope*, 29 Kans. 289; *National Supply Co. v. United Kansas &c. Co.*, 91 Kans. 509, 138 Pac. 599; *Jones v. Walker*, 13 B. Mon. 163, 56 Am. Dec. 557; *De La Vergne Co. v. New Orleans Co.*, 51 La. Ann. 1733, 26 So. 455; *North v. Mallory*, 94 Md. 305, 51 Atl. 89; *Grice v. Noble*, 59 Mich. 515, 26 N. W. 688; *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477; *Famous Players' Film Co. v. Salomon* (N. H.), 106 Atl. 282; *Hawley v. Keeler*, 53 N. Y. 114, 121; *Gallagher v. Nichols*, 60 N. Y. 438; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561; *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472; *Baker v. Woman's Union*, 57 N. Y. App. Div. 290, 67 N. Y. S. 949; *Custen v. Robison*, 180 N. Y. App. D. 384, 167 N. Y. S. 1013; *Hulbert v. Felber Engineering Works*, 75 N. Y. Misc. 621, 133 N. Y. S. 918; *Browne v. Jno. P. Sharkey Co.*, 58 Oreg. 480, 115 Pac. 156; *Scott v. Hubbard*, 67 Oreg. 498, 136 Pac. 653; *Kress House Moving Co. v. George Hogg Co. (Pa.)*, 106 Atl. 351; *Guilford v. Mason*, 24 R. I. 386, 53 Atl. 284; *Olson v. Snake River Co.*, 22 Wash. 139, 60 Pac. 156; *Jones v. Singer Mfg. Co.*, 38 W. Va. 147, 18 S. E. 478; *Boggess v. Bartlett*, 72 W. Va. 377, 78 S. E. 241; *Mitchell v. Davis*, 73 W. Va. 352, 80 S. E. 491. Prevention also may be breach of an implied promise, see *infra*, § 1318.

caused the non-performance of the condition.<sup>8</sup> Therefore, it is not enough that the promisor evidently would have prevented performance of the condition. If the promisee could not or would not have performed the condition or it would not have happened whatever had been the promisor's conduct, the condition is not excused.<sup>9</sup> Any conditions which the facts show might have been performed by him, it will be assumed would have been performed if the conduct of the promisor was such as to preclude the possibility of performance. It must not be assumed when performance of a condition has been prevented that the promisor necessarily becomes liable for the same amount that he would have been if the condition had been performed. The extent of liability will be the same if performance of the condition was not part of the substantial consideration or exchange for the promisor's performance, but was nothing more than a circumstance on the happening of which performance of the promise became due, having no pecuniary value in itself, as a condition in a building contract requiring an architect's certificate. But if the performance, like the delivery of goods in a contract to buy and sell was the intended exchange for the promisor's performance, and was of pecuniary value, this value will be deducted from the value of what was promised in estimating the promisee's damages.

It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it. The early decisions are to the contrary,<sup>10</sup> but it seems evident that the same principle of justice which

<sup>8</sup> See *supra*, § 595.

<sup>9</sup> *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 221 N. Y. 120, 116 N. E. 789. Thus where the payment of money is a condition qualifying an obligation, though payment or tender of the money is excused by a repudiation of the obligation, yet "the circumstances must be such as to show that the party was ready to make actual payment, and that he would have done so but for such refusal." *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248. See also *McCalley v. Otey*, 99 Ala. 584, 12 So. 406, 4 Am. St. Rep. 87;

*Terrell v. Proctor* (Tex. Civ. App.), 172 S. W. 996, 1000.

<sup>10</sup> In *Morris v. Lutterel*, Cro. Eliz. 672, to debt on a bond conditioned for saving harmless another from an obligation to pay £100 at a certain day and place, the defendant pleaded that on the day of payment he was going to make the payment when the plaintiff "by covin betwixt him and another stranger caused the defendant to be imprisoned and to be detained in prison until after sunset of the same day, to the intent that the said £100 should not be paid." On demurrer the

precludes a promisor from taking advantage of a condition, the performance of which he himself has prevented, precludes him also from setting up a condition the performance of which he has made more difficult. "Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing;" <sup>11</sup> and indeed if the situation is such that the coöperation of one party is an essential prerequisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, <sup>12</sup> but also an implied promise by the former to give the necessary coöperation. <sup>13</sup> An exception to this principle must be made where the hindrance is due to some action of the promisor which under the terms of the contract or the customs of business he was permitted to take. Thus if a party seeking to secure all the merchandise of a certain character which he could, entered into a contract for a quantity of the required goods, and subsequently made performance of the contract by the seller more difficult by making other purchases which increased the scarcity of the available supply, his conduct would furnish no excuse for refusal to perform the prior contract. <sup>14</sup>

Not infrequently a promise is subject to more than one condition. Sometimes such conditions can be performed in any order, but sometimes one condition in the nature of things

plea was held bad on the ground that "such a bare surmise was not any bar."

In *Blandford v. Andrews*, Cro. Eliz. 694, to debt on an obligation conditioned, that the defendant should procure a marriage between the plaintiff and one Bridget Palmer, the defendant pleaded that the plaintiff come to the said Bridget Palmer, called her opprobrious epithets and told her that if he married her he would tie her to a post. On demurrer the court held that "the defendant ought to show that there was not any default in him; and that he did as much as in him lay to procure it; otherwise he does not save his obligation; and these words spoken before the day, at one time only, are not

such an impediment but that the marriage might have taken effect."

<sup>11</sup> *Gay v. Blanchard*, 32 La. Ann. 497, quoted with approval in *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472. See also *United States v. Peck*, 102 U. S. 64, 26 L. Ed. 46; *Kress House Moving Co. v. George Hogg Co.* (Pa.), 106 Atl. 351.

<sup>12</sup> See *infra*, §§ 1293, 1318.

<sup>13</sup> *Ibid.*; and see *Pneumatic Signal Co. v. Texas, etc., R. Co.*, 200 N. Y. 125, 93 N. E. 471.

<sup>14</sup> Even total prevention by the promisor may be contemplated as a contingency of which the promisee takes the chance, but such a case will be very rare.

cannot be performed until another has also been performed. Where a promise is made to pay a sum of money if the promisee constructs a building and if he also secures an architect's certificate, stating that the building has been properly constructed, it is impossible to perform the second condition until the first has been performed. In this case both the conditions were to be performed by the promisee. Sometimes, however, the promisor himself is to perform a condition, and until he performs it, it is impossible for the promisee to perform the condition which he must perform in order to be entitled to the promised performance.

Thus under an insurance policy which makes arbitration of the loss a condition precedent to recovery, and also provides that one of the arbitrators must be named by the insurer, his failure to name an arbitrator will prevent the performance of the condition of arbitration. Such prevention excuses non-performance of the condition.<sup>15</sup>

So the performance of a condition by the promisee may be impossible without notice of some fact from the promisor. A failure to give such notice is a prevention of performance.<sup>16</sup>

<sup>15</sup> In *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 61 N. W. 67, 47 Am. St. Rep. 562, a condition of arbitration was held excused by the unreasonable action of an appraiser appointed by the insurance company. The court say, at page 593, "It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable, and virtually amounts to a refusal to proceed with the appraisal, the fact that the appraisal was not concluded before suit brought will not bar an action on the policy. *McCullough v. Insurance Co.*, 113 Mo. 606, 21 S. W. 207; *Bishop v. Insurance Co.*, 130 N. Y. 488, 29 N. E. 844; *Uhrig v. Insurance Co.*, 101 *id.* 362, 4 N. E. 745; *Bradshaw v. Insurance Co.*, 137 *id.* 137, 32 N. E. 1055."

<sup>16</sup> In *Spooner v. Baxter*, 16 Pick. 409, the defendant had agreed to build a vessel and deliver it at Falmouth or

Boston at the option of the plaintiff. The plaintiff was unable to prove any notice of election at which port he would take the vessel, but the court held that this condition which qualified the defendant's liability was not performable until the defendant himself had given notice that the vessel was completed. For this reason the plaintiff recovered.

*Cf.* *Coombe v. Greene*, 11 M. & W. 480. The defendant there had agreed to expend on certain premises £100 "under the direction or with the approbation of some competent surveyor to be named by the plaintiff." The plaintiff alleged that the defendant had not laid out this sum, though he, the plaintiff, was always ready to appoint a competent surveyor of which the defendant had notice. On demurrer judgment was given for the defendant on the ground that the actual appointment of the surveyor was a condition prece-

### § 678. Waiver.

Performance of a condition may also be excused by waiver. Waiver is a troublesome term in the law. Its use is not confined to conditional contracts, and any satisfactory discussion of it must consider all its applications. It is used with different meanings and there are therefore necessarily conflicting judicial statements as to its requisites. The common judicial definition is: "an intentional relinquishment of a known right,"<sup>17</sup> or words of similar import. This definition is open to criticism for more reasons than one. In the first place it is likely to be understood as implying that any intentional relinquishment of a known right is necessarily effective. This is of course unsound. A contract right or other chose in action as a rule can no more be relinquished than created without consideration or a sealed instrument. A release or an accord and satisfaction is the ordinary way by which contractual rights are effectively relinquished.<sup>18</sup> That there are some exceptions, however, to the generality of the rule that a seal or consideration is needed in order to extinguish an intangible contractual right cannot be disputed. Especially where the

dent to the defendant's obligation. No action by the defendant or notice from him was necessary to enable the plaintiff to name the surveyor.

<sup>17</sup> *Caulfield v. Finnegan*, 114 Ala. 39, 48, 21 So. 484. This definition, or one of identified meaning, sometimes substituting "voluntary" for "intentional" may be found in the following cases and many others: *First Nat. Bank of Los Angeles v. Maxwell*, 123 Cal. 360, 368, 55 Pac. 980; *State v. Hartley*, 75 Conn. 104, 109, 52 Atl. 615; *Star Brewery Co. v. Primas*, 163 Ill. 652, 662, 45 N. E. 145; *Currie v. Continental Casualty Co.*, 147 Ia. 281, 286, 126 N. W. 164, 140 Am. St. Rep. 300; *Hurley v. Farnsworth*, 107 Me. 306, 309, 78 Atl. 291; *Kent v. Warner*, 12 Allen, 561, 563; *West v. Platt*, 127 Mass. 367, 372; *Eaton v. Globe & Rutgers F. Ins. Co.*, 227 Mass. 354, 116 N. E. 536, 539; *Burnham v. Interstate Casualty Co.*, 117 Mich.

142, 153, 75 N. W. 445; *Crawford v. Winterbottom*, 88 N. J. L. 588, 589, 96 Atl. 497; *Parsons v. Lane*, 97 Minn. 98, 105, 106 N. W. 485; *Clark v. West*, 193 N. Y. 349, 360, 86 N. E. 1; *Alsens & Co. Cement Works v. Degnon Contracting Co.*, 222 N. Y. 34, 118 N. E. 210; *List v. Chase*, 80 Ohio St. 42, 49, 88 N. E. 120; *Boynton v. Braley*, 54 Vt. 92, 95; *Barber v. Vinton*, 82 Vt. 327; *Rogers v. Whitney*, 91 Vt. 79, 99 Atl. 419; *Day v. Martin*, 78 Va. 1, 7; *Fraser v. Aetna L. Ins. Co.*, 114 Wis. 510, 523, 90 N. W. 476; *Lukens Iron & Steel Co. v. Hartmann-Greiling Co.*, (Wis. 1919), 172 N. W. 894. And see *Rice v. Fidelity, etc., Ins. Co.*, 103 Fed. 427, 435, 43 C. C. A. 270.

<sup>18</sup> See *supra*, § 120; *infra*, §§ 1820, 1826, 1838, except certain obligations of formal character which may be discharged by cancellation or surrender. See *infra*, §§ 1876 *et seq.*



assertion of such a right seems fraudulent after conduct inducing the other party to suppose the right would not be asserted, courts of equity at least have held that the right is lost; but clear analysis requires recognition of the fact that such decisions involve either exceptions to or violations of rules governing the discharge of contracts laid down in many decisions, and involved in fundamental principles of the common law. Such recognition will aid in fixing the boundaries of any method which the law may allow of discharging rights by leading the other party to believe they would not be asserted. The definition of waiver quoted above gives no aid in determining these boundaries, and is objectionable otherwise. Whether waiver must be intentional and whether the right waived must be known, depend in great degree upon which of the various things called waiver the discussion is about, as will appear from the following sections.

More progress will be made, therefore, if instead of considering what courts have said about waiver, an analysis is attempted of the various meanings given the word and of the possible situations which may involve surrender of rights or excuses for non-performance, together with a statement of fundamental principles applicable to these situations. The decisions may afterwards be examined in more detail.

#### § 679. Different meanings of the word waiver.

The impossibility of an adequate definition of waiver as a legal term without some narrower restriction than is usually imposed upon it will be evident if the different meanings with which the word is commonly used in connection with contracts are considered. The following distinct and different things are called waiver.

1. An agreement for sufficient consideration, made as part of or in substitution for an obligation previously made and still unperformed, which provides for a performance different from or substituted for that to which the parties were bound and entitled by the original obligation. This should be called a collateral promise or substituted contract or accord, which rescinds rather than waives the inconsistent terms of the prior obligation.

2. An election whereby a party who has a choice of alternative rights or remedies adopts one alternative and thereby destroys all right to the other alternatives. This is properly called election.

3. A promise or permission express or implied in fact, supported only by action in reliance thereon, to excuse performance in the future of a condition or to give up a defence not yet arisen, which would otherwise prevent recovery on an obligation. If waiver can be given any legal meaning narrower than the surrender of any right or defence by any means, this kind of surrender may properly be given the name. The promise is binding and the permission effective though without consideration; and though there is often said to be an estoppel and the case said to be distinguishable from waiver, there is not a true estoppel here for there is no misrepresentation of an existing fact.<sup>19</sup> It may be called a promissory estoppel.

4. A promise or permission express or implied, supported only by a promissory estoppel to excuse performance of an obligation not due at the time when the promise is made. Such a promise when effectual may perhaps also fairly be called waiver; for here also the discharge is binding, though there is neither consideration nor seal.<sup>20</sup>

<sup>19</sup> A promise will often be implied from a permission. A permission not to perform a condition almost always implies a promise to fulfil the conditional obligation in spite of non-performance of the condition. This, however, is not universally true. A promisor may say to the promisee in effect: "You need not perform that condition, but whether you do or not, I shall not perform my promise." As to the nature of a promissory estoppel, see § 139.

<sup>20</sup> What is here called waiver may sometimes be implied from silence with knowledge of the facts. This is "acquiescence" in one of the meanings given to that word. In *DeBussche v. Alt*, 8 Ch. Div. 286, 314, Thesiger, J., "The term 'acquiescence' which has been applied to his conduct, is one

which was said by Lord Cottenham in *Duke of Leeds v. Earl Amherst* (2 Ph. 117, 123), ought not to be used; in other words, it does not accurately express any known legal defence, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cotten-

5. A promise express or implied without consideration to give up a defence which has already arisen or to be liable in spite of an excuse which has already freed the promisor; and where, therefore, there can be no promissory estoppel of the sort suggested in case 3.

6. A promise express or implied without consideration to release or discharge an obligor from a duty which has already arisen. Here also there is no promissory estoppel.

7. Actual or prospective prevention of performance of a promise or condition, or words or conduct showing that even though such promise or condition be performed, the counter-performance due will not be furnished.<sup>21</sup>

8. Laches destroying a right to equitable relief, which once existed.

9. Action in the course of judicial proceedings which deprives a party of a right. The plaintiff in an action based on a contract, or on any other cause, may make a *retrahit*, which "is an open and voluntary renunciation of his suit in court, and by this he forever loses his action."<sup>22</sup> So a general appearance

ham said in the case already cited, is the proper sense of the term 'acquiescence' and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an

express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding." Perhaps it should rather be said that acquiescence always means such non-action as to indicate assent that a known situation shall continue. The distinction seems rather to be in the effect of acquiescence than in the meaning of the word. Just as a promise may sometimes create legal consequences and sometimes may not, so acquiescence may form the basis of a true waiver, or it may not, according as change of position is made in reliance upon it.

<sup>21</sup> For cases of this sort see *supra*, § 677, *infra*, §§ 767, 789.

<sup>22</sup> 3 Bl. Com. 296. See further *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159; *Barnard v. Daggett*, 68 Ind. 305, 310; *Hodges v. Council*, 86

precludes objection to jurisdiction over the person of a defendant.

In view of these different meanings of the word waiver it is obviously idle to attempt to define the requirements of a valid waiver unless its use is first confined to some one or more of its ordinary applications wherein the requirements of the law are identical. Until that is done there will be constant confusion of expression. One court will say "no question of estoppel as distinguished from waiver arises;" <sup>23</sup> another court will say "The basis of waiver is estoppel;" <sup>24</sup> another will say waiver unsupported by consideration is not binding; <sup>25</sup> another that "There should be, to constitute a waiver . . . either a contract supported by a consideration, or the necessary elements of estoppel;" <sup>26</sup> another that "The defence of waiver does not require any consideration beneficial to the waiver nor any element of estoppel." <sup>27</sup> All of these statements may be true of some one or more of the situations to which the word waiver is applied. None of the statements are true of all. An understanding of the law requires that each of these different legal transactions be looked at separately and its requirements determined.

N. C. 181; *Olcott v. Banfill*, 7 N. H. 469, 479; *Small v. Hoskins*, 26 Vt. 209, 217.

<sup>23</sup> *Holdsworth v. Tucker*, 143 Mass. 369, 376, 9 N. E. 764.

<sup>24</sup> *Equitable Life Assur. Soc. v. M'Elroy*, 83 Fed. 631, 638, 49 U. S. App. 548, 28 C. C. A. 365. See also *Hampton Stove Co. v. Gardner*, 154 Fed. 805, 83 C. C. A. 521; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487. See also *Northwestern Ins. Co. v. Amerman*, 119 Ill. 329, 10 N. E. 225, 59 Am. Rep. 799; *New York, etc., Ins. Co. v. Watson*, 23 Mich. 486; *Underwood v. Farmers', etc., Ins. Co.*, 57 N. Y. 500; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

<sup>25</sup> *Stackhouse v. Barnston*, 10 Ves. 453. See also *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476; *Lantz v. Vermont Ins. Co.*, 139 Pa. St. 546, 21

Atl. 80, 10 L. R. A. 577, 23 Am. St. Rep. 202; *Adams v. Paton* (Tex. Civ. App.), 173 S. W. 546.

<sup>26</sup> *American Central Ins. Co. v. McCrea*, 8 Lea, 513, quoted with approval in *Dale v. Continental Ins. Co.*, 95 Tenn. 38, 50, 31 S. W. 266; See to similar effect *Hasler v. West India S. S. Co.*, 212 Fed. 862, 129 C. C. A. 382; *Haggarty v. Elyton Land Co.*, 89 Ala. 428, 7 So. 651; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Underwood v. Farmers' Ins. Co.*, 57 N. Y. 500; *Atlantic, etc., R. Co. v. Bryan*, 109 Va. 523, 528, 65 S. E. 30.

<sup>27</sup> *Cowie v. Strohmeyer*, 150 Wis. 401, 136 N. W. 956, 982. See also *Washburn v. Union Central Life Ins. Co.*, 143 Ala. 485, 38 So. 1011; *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. 324; *Parsons v. Lane*, 97 Minn. 98, 106 N. W. 485; *Titus v. Glens*

§ 680. Contract for substituted performance.

Either prior to the time for performing a contract, or after its breach, the parties may agree that one or both of them shall do something different from the performance which the original contract specified. If the agreement is made after breach, it is an accord, and when executed it is an accord and satisfaction.<sup>28</sup> The new contract may be like the old except for the single particular of the time of performance. Thus, where, after failure to carry out a marriage contract at the agreed time, negotiations are begun to arrange for a subsequent date, whatever rights may have accrued from such failure are thereby discharged.<sup>29</sup> If the new agreement is made when there has as yet been no breach of the original contract it is not technically an accord but the principles involved are the same, being merely those involved in the formation of any contract. Whether the agreement is made before or after breach, therefore, there must be consideration to support it. The instances where the word waiver is most commonly applied to such a substituted agreement are where the substituted performance agreed upon lacks some requisite of the original contract.<sup>30</sup>

Thus where in sales of personal property, the buyer accepts as satisfactory goods which do not fulfil the requirements of the original bargain, perhaps because delivered too late, perhaps because different in quantity, perhaps because differing in kind or quality; the defect is often said to be waived. In contracts for the sale of real estate, similarly, the buyer may accept a deed which does not give him precisely the estate or the covenants for which he originally bargained. If in any case

Falls Ins. Co., 81 N. Y. 410; Metcalf v. Phenix Ins. Co., 21 R. I. 307, 43 Atl. 541; Webster v. State Mut. F. Ins. Co., 81 Vt. 75, 80, 69 Atl. 319.

<sup>28</sup> See *infra*, § 1837.

<sup>29</sup> Falk v. Burke, 93 Kan. 93, 143 Pac. 498, L. R. A. 1915 B. 279.

<sup>30</sup> See, *e. g.*, Bennie v. Becker-Franz Co., 14 Ariz. 580, 134 Pac. 280; California Raisin Growers' Assoc. v. Abbott, 160 Cal. 601, 117 Pac. 767; Mahoney v. Hartford Inv. Corporation, 82 Conn. 280, 73 Atl. 766.

<sup>31</sup> So a stipulation in a building contract that on any disagreement as to the performance of any agreement or value of extra work the same shall be referred to arbitrators and a decision by a majority shall be final supersedes the provision for an engineer's final certificate as a condition precedent to the right of payment. Central Union Stock Yards Co. v. Uvalde Asphalt Paving Co., 82 N. J. Eq. 246, 87 A. 235.

the substituted performance given or agreed to be given is different from that originally contracted for, and is not merely less, the later agreement is supported by sufficient consideration,<sup>31</sup> and is unquestionably binding. If, however, as matter of necessary reasoning from the terms of the bargain itself, and not simply from proof of its value in fact, the substituted performance is less than that originally bargained for, there is no sufficient consideration;<sup>32</sup> and if the agreement is enforced, it must be on principles not applicable to accord and satisfaction, but to one of the other classes of cases included under the broad and inaccurate name of waiver.<sup>33</sup> A case analogous to that of a new substituted contract is presented by the so-called waiver by a servant when entering into a contract of employment to surrender the rights given him by an employers' liability law, or by the common law, for injuries. Such agreements are part of the contract of employment and do not lack consideration. They are, however, generally held to be opposed to public policy.<sup>34</sup> Where statutes impose liability to creditors on the stockholders of a corporation, "A corporate creditor may, by express contract, when the debt is incurred, waive his right to collect from the stockholder debts which the corporation fails to pay."<sup>35</sup> In the last two illustrations the so-called waiver is part of the original contract, but this involves no distinction in principle from cases where a second contract dispensed with some condition or promise in an earlier contract.

**§ 681. A substituted contract need not be intended as a surrender of a right.**

It is constantly stated in the books that waiver must be intentional or voluntary.<sup>36</sup> So far as this means that waiver procured by fraud or duress is ineffectual, no fault can be found with the statement, but as it is ordinarily and naturally understood, more than this is meant. It seems to be asserted that the party waiving a right must have the intention of giving it

<sup>31</sup> See *supra*, § 130.

<sup>32</sup> Either class 5 or 6 under the classification in the previous section.

<sup>34</sup> See 1 Mechem, Agency, § 1681.

<sup>35</sup> Cook on Corporations, § 216, and

cases cited, quoted with approval in *Bush v. Robinson*, 95 Ky. 492, 26 S. W. 178.

<sup>36</sup> See *supra*, § 678.

up in order to be deprived of it. Here as always when any statement is made about waiver, it is essential to consider the application of the statement to each of the various legal situations which go by that name.<sup>37</sup> It is obvious that if the so-called waiver is made by a substituted contract or accord based on valid consideration, the requirements of the law must be the same as for the formation of any contract. There must be an expression of mutual assent, but the actual mental intent is immaterial.<sup>38</sup> When a case of surrendering a right by a substituted contract is presented where the apparent intent differs from the actual intent, the apparent intent controls.<sup>39</sup> But the expressions generally found in the cases are somewhat misleading, because they imply that the actual intent is the vital matter. It is only where words or actions are ambiguous and where more than one possible meaning might rightfully be ascribed to them by the party speaking or acting, that his actual intent becomes material.<sup>40</sup>

**§ 682. Knowledge of facts is not necessary for a substituted contract.**

Not only is actual intent and even apparent intention to waive unimportant in some, at least, of the various things called waiver, but even knowledge of the facts may or may not be essential according as one or another of the kinds of obli-

<sup>37</sup> See *supra*, § 679.

<sup>38</sup> See *supra*, § 21.

<sup>39</sup> In *West v. Platt*, 127 Mass. 367, 372, the court said: "A waiver is indeed the intentional relinquishment of a known right; but the best evidence of intention is to be found in the language used by the parties. The true inquiry is, what was said or written, and whether what was said indicated the alleged intention. The plaintiff had a right to act on the natural interpretation of the correspondence, and the defendants' conduct in reference to it. The secret understanding or intent of the defendants or their agents could not affect his rights. Thus, when an attorney consented

that a deputy sheriff might take a receipt for goods attached, it was held erroneous to tell the jury that such consent should have been expressed with the intent of influencing or controlling the officer's conduct, and of assuming the risk. *Wright v. Willis*, 2 Allen, 191; *Gould v. Norfolk Lead Co.*, 9 Cush. 338, 345, 57 Am. Dec. 50. A delivery, apparently unrestricted, of goods sold for cash, is a waiver of the condition that payment is to be made before the title passes, although the seller has an undisclosed intent not to waive the condition. *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446."

<sup>40</sup> See *supra*, §§ 94, 613.

gation or defence going under the name of waiver is under consideration. Knowledge of the facts is not essential for the formation of a valid contract, though mutual mistake of an essential fact may be an equitable reason for avoiding it.<sup>41</sup> A contract to surrender a right or a defence must be subject to the same rules as other contracts in this respect. If both parties made the bargain under a mistaken assumption of essential facts relating to the existence or nature of the supposed right of action or defence their bargain should be voidable; and if one knowing the facts took advantage of the other's ignorance, it would likewise be voidable; and if an agreement were made to excuse a breach of condition, facts showing that unknown to the promisor there had already been a fatal breach thereof would doubtless be so essential as to afford ground for the application of the equitable principles. But the mere circumstance that the promisor was ignorant of important collateral facts would not be an excuse. Whether the facts of which the promisor was ignorant might have been learned had reasonable diligence been exercised, may also be a material circumstance.<sup>42</sup>

### § 683. Election.

Election as a term in the law is properly applied to a case where a person has the choice of one or two alternative rights or remedies.<sup>43</sup> In choosing the one, he necessarily surrenders the other. This principle is not inconsistent with the general rule that the surrender of a right requires a sealed release or consideration, because the choice made by election gives the one making it an advantage which he could not otherwise have had. Though he surrenders one right he gains or keeps by so doing another and inconsistent right. Thus where a contract

<sup>41</sup> See *infra*, §§ 1535 *et seq.*

<sup>42</sup> See *infra*, § 1596. Also see §§ 690 *et seq.* regarding sales of goods. Whether or not acceptance of defective goods operates as a discharge of the seller's liability for damages, if the defects were discoverable on inspection, certainly the defect ceases to operate as a breach of condition.

See also similarly in regard to contracts for the sale of real estate and for work and labor, §§ 712, 713.

<sup>43</sup> A person may also contract to perform one of two alternatives, and thus have an election between duties. See *infra*, § 1407, but this is immaterial to the present discussion.



is broken in the course of performance the injured party has a choice presented to him of continuing the contract or of refusing to go on. If he chooses to continue performance he has doubtless lost his right to stop performance; but in the nature of the case he could not exercise the two inconsistent rights of which he had the choice.

It is to be observed that election involves no requirement of mutual assent. Where the question is one of a substituted contract or accord and satisfaction, such mutual assent is an obvious necessity. And there is much the same requirement for a waiver based on a promissory estoppel. Such an estoppel cannot arise unless the person claiming the benefit thereof knew of the promise and showed assent thereto by acting in reliance upon it. Even a promise unsupported by either estoppel or consideration whenever such a promise is binding, may be thought to require, if not an actual manifestation of assent by the promisee for its validity, at least a presumption of assent based on the beneficial character of the promise.<sup>44</sup>

One who elects one alternative is often said to waive the other;<sup>45</sup> but, unless "waive" is given a very broad meaning, the expression is inexact, since he could not have both. His only right was to make a choice. In some cases involving election, the party having this right of choice may take no action for an indefinite period. Only exigencies of fact rather than any rule of law compel him to act. For instance, an infant who has entered an executory contract presumably may, with-

<sup>44</sup> Mr. Justice Holmes, speaking for the Supreme Court of the United States in *Bierce v. Hutchins*, 205 U. S. 340, 346, 51 L. Ed. 828, 27 S. Ct. 524: "Election is simply what its name imports: a choice shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, 'if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election.' Co. Litt. 145a. So a man may ratify or repudiate an unauthorized act done in his name. *Metcalf v. Williams*, 144 Mass. 452, 454, 11 N. E. 700. He may take the goods or

the price when he has been induced by fraud to sell. *Dickson v. Patterson*, 160 U. S. 584, 40 L. Ed. 543, 16 S. Ct. 373. He may keep in force or may avoid a contract after the breach of a condition in his favor. *Oakes v. Manufacturers' F. & M. Ins. Co.*, 135 Mass. 248, 249. In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else."

<sup>45</sup> See, e. g., *State Bank v. Brown*, 142 Ia. 190, 198, 119 N. E. 81; *First Nat. Bank v. Exchange Nat. Bank*, 179 N. Y. App. D. 22, 164 N. Y. S. 1092.

out losing his right to avoid the contract, wait after he comes of age until the time when performance is due from him, or from his co-contractor. That time may come early or late, and only when it does is some action necessary. In other cases the failure to act promptly deprives the party having the right of election of any choice. For instance, though one who has been induced to enter into a contract by fraud may elect after discovering the fraud to avoid the contract, prompt action is in some cases at least essential; the mere lapse of time may destroy the election.<sup>46</sup> The same is true of rescission for breach of contract; <sup>47</sup> and so where an agent has entered into an unauthorized contract with a third person, it is "the duty of the principal to act immediately after knowledge, and his passivity or silence will be construed into an acquiescence or satisfaction, so as to protect the innocent third party."<sup>48</sup> Election to take advantage of breach of condition in a contract generally need not be exercised until the time arrives when, by the terms of the contract, the party entitled to elect must render some performance. Then either performing or failing to perform will indicate an election.<sup>49</sup> Even prior to that time, however, any conduct which under the circumstances is deceptive except on the assumption that a choice has been made, may amount to an election.

#### § 684. Election does not depend on intention.

In a correct definition of waiver wherever that word is used

<sup>46</sup> See *infra*, § 1526.

<sup>47</sup> See *infra*, § 1469.

<sup>48</sup> *Pacific Vinegar, etc., Works v. Smith*, 152 Cal. 507, 511, 93 Pac. 85; and see *supra*, § 278.

<sup>49</sup> "The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant, on which the lessor has a right of re-entry, he may elect to avoid, or not to avoid the lease, and he may do so by deed or by word; if with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does

an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, or does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? Or has he elected to avoid it? or has he made no election?" *Croft v. Lumley*, 6 H. L. C. 672, 705, approved in *Clough v. London, etc., Co.*, L. R. 7 Ex. 26.

in the sense of election, the requisite of even apparent intention to surrender a right is absent. The law simply does not permit a party in the case supposed to exercise two alternative or inconsistent rights or remedies. Even though he expressly states that he intends to reserve a right, he will, nevertheless, lose it if he takes an inconsistent course. Thus one who continues to receive benefits under a contract and assert rights under it after knowledge of a breach which would justify him in refusing to go on, cannot subsequently set up this breach as an excuse for his own non-performance even though he asserted from the outset, and consistently, that he proposed to do so.<sup>50</sup>

It is indulging in a fiction which is likely to lead to confusion of thought to express this result by saying that the intention to surrender a right is necessary but that the intention will on occasion be conclusively presumed from circumstances, which do not as a matter of fact necessarily show the existence of such an intention. Expressions of this kind, however, are common enough.<sup>51</sup> That intention is not a material fact may

<sup>50</sup> *Croft v. Lumley*, 6 H. L. Cas. 672, 706; *Davenport v. Queen*, 3 App. Cas. 115. See further *infra*, § 687.

<sup>51</sup> In *Insurance Co. v. Wolff*, 95 U. S. 326, 330, the court said: "The principle that no one shall be permitted to deny that he intended the natural consequences of his acts when he has induced others to rely upon them, is as applicable to insurance companies as it is to individuals, and will serve to solve the difficulty mentioned. This principle is one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the com-

pany ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment.

"The company, notwithstanding the provision in the policy that its agents were not authorized to waive forfeitures, sent to them renewal receipts signed by its secretary, to be used when countersigned by its local manager and cashier, leaving their use subject entirely to the judgment of the local agent. The propriety of their use, in the absence of any fraud in the matter, could not afterwards be questioned by the company." See also *Grippio v. Davis*, 92 Conn. 693, 104 Atl. 165; *Fraser v. Aetna L. Ins. Co.*, 114 Wis. 510, 523, 90 N. W. 476.

An exceptional and, it must be added, an erroneous decision to the contrary is *Block v. Taylor* (Mich.), 168 N. W. 536. The defendant had

be seen also from the converse case. If a party erroneously supposing he had an election offered him actually intended to surrender a right and assert a supposed alternative which did not exist, the right which in fact he had would not be lost in the absence of circumstances of promissory estoppel.<sup>52</sup> It should be observed that though intent to surrender a right is not essential to election, the question whether an election has

contracted to buy a number of barrels of whiskey, and after two had been delivered and found inferior, he ordered out of bond two more of the barrels, but thereafter refused to continue the contract or to pay for what he had received. When sued he set up the inferiority of the goods. The plaintiff, however, contended that the defendant by ordering more after he had "tested the first two barrels affirmed the contract, and he was therefore estopped from repudiating it thereafter." Defendant's explanation of his act in this regard was: "I wanted to bring the lawsuit here instead of having to go to New York City to try it." The court submitted this question to the jury instructing them if they found that the second two barrels ordered in February were so ordered as a continuation of the deal under the original order that such action would constitute an affirmation of the original order and work an estoppel against defendant, but further: "If, on the other hand, this order was but an attempt on Taylor's part to regain the amount of money that he claimed was fraudulently obtained from him in excess of the price of the goods and expenses of the barrels of whiskey that he received, and you so find from the proofs, then you are warranted in finding that the second order does not operate as an estoppel." The jury found for defendant and the upper court stated as its conclusion: "There has been no miscarriage of justice in this case, and the judgment is affirmed."

<sup>52</sup> "A party has an election only between existing, not supposed, rights. The plaintiff could not destroy his rights under the lease by mistakenly following other supposed rights which turned out not to exist. That would be to put him, not to an election, but to a correct estimate of his right under pain of forfeiture." *Doyle v. Hamilton Fish Co.*, 234 Fed. 47, 51, 148 C. C. A. 63.

So in *Asher v. Pegg*, 146 Iowa, 541, 543, 123 N. W. 739, 30 L. R. A. (N. S.) 890, the court said: "If a claim is made which, as developed in subsequent proceedings, does not exist, then the claimant is not barred from asserting in an independent action that an inconsistent claim existed entitling him to legal redress. *Zimmerman v. Robinson*, 128 Iowa, 72, 102 N. W. 814; *Bierce v. Hutchins*, 205 U. S. 340, 27 S. Ct. 524, 51 L. Ed. 828; *Water, L. & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 90 C. C. A. 547, 19 L. R. A. (N. S.) 219; *Sullivan v. Ross' Estate*, 113 Mich. 311, 71 N. W. 634, 76 N. W. 309; *Bandy v. Cates*, 44 Tex. Civ. App. 38, 97 S. W. 710; *Calhoun County v. Art Medal Const. Co.*, 152 Ala. 607, 44 So. 876." Cf. the decisions in *Globe & Rutgers Ins. Co. v. Prairie &c. Co.*, 248 Fed. 452, 456, 160 C. C. A. 462; *Bersche v. Globe Ins. Co.*, 31 Mo. 546, where it was held that after an insurance company had expressed an election to restore destroyed property, it could not thereafter deny liability because of any facts then known.

been made may depend upon whether certain admitted acts are to be attributed to the performance of a previous obligation or to the creation of a new one, and this in turn may depend on apparent if not actual intention—not, however, intention to relinquish a right, but intention to continue performance of the old obligation.<sup>53</sup>

**§ 685. Whether knowledge of facts is essential for election.**

Though no element of promissory estoppel may be necessary to constitute a binding election, such an element frequently, if not usually, exists. The choice of an alternative right by one entitled thereto will often be followed by action of the other party based on justifiable reliance upon the apparent attitude of the former; or at least the situation of the parties will be so materially changed as to make a new choice unfairly prejudicial. Where either of these circumstances exists, knowledge of facts by the party entitled to choice should not be necessary to make the election binding.<sup>54</sup> Where, however, neither circumstance enters into the case an election should not be binding without either actual knowledge or blameworthy ignorance of the material facts. The principle of election is an equitable one and unless the other party has been deceived or the situation changed it is inequitable to regard a choice as final unless the party having the right of election was aware, or should have been aware, of all material facts making one

<sup>53</sup> In *Alsens &c. Cement Works v. Degnon Contracting Co.*, 222 N. Y. 34, 118 N. E. 210, the defendant was entitled by contract to 175,000 barrels of cement to be ordered before March 1, at \$1.41 a barrel, 36,000 barrels had not been ordered prior to March 1, but 1900 barrels were ordered and supplied between that date and the ensuing May. The seller claimed the market value for these barrels on the ground of a new implied contract. The buyer contended that he was liable for only the contract price of \$1.41. The court rightly held the question one of fact, but held that the jury must determine whether the intention to

waive existed. It seems clear that the only issue was whether the 1900 barrels were furnished under the old contract or not. If they were no intention or lack of intention to waive could entitle the seller to more than \$1.41 a barrel. Whether they were or not was a question of fact, not depending on the seller's intention alone, but on the apparent intention of both. If the buyer clearly ordered them under the old contract, the seller though justified in refusing the order could not fill it and then assert that he intended to do something different from what the buyer requested.

<sup>54</sup> See the preceding section.

choice desirable or the reverse.<sup>55</sup> It is often stated in positive terms that knowledge of facts is necessary;<sup>56</sup> but blameworthy ignorance is sufficient;<sup>57</sup> and it is better to say so plainly than to indulge in a fictitious conclusive presumption of knowledge.<sup>58</sup>

<sup>55</sup> In *Dushane v. Beall*, 161 U. S. 513, 40 L. Ed. 791, 16 S. Ct. 637, the question concerned the right of election of an assignee in bankruptcy to take or reject onerous property belonging to the bankrupt. It was held that in the absence of knowledge by the assignee of the existence of the property in question, his conduct in failing to reduce it to possession could not be regarded as an election to refuse the property and allow the bankrupt to retain it.

<sup>56</sup> "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumour are not enough. There must be knowledge of facts which will enable the party to take effectual action." *Pence v. Langdon*, 99 U. S. 578, 581, 25 L. Ed. 420. See also *Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729, 8 Ann. Cas. 1024; *Georgi v. Texas Co.*, 225 N. Y. 410, 122 N. E. 238.

<sup>57</sup> In *Mosiman v. Benefit Association*, 82 Kans. 670, 674, 109 Pac. 413, the court said, in speaking of the effect upon an insurance contract already in default, of receiving payment of an assessment: "It has been held under similar circumstances that the acceptance of payment from a member under suspension, without knowledge of his illness, cannot effect a waiver. *Knights of Pythias v. Quinn*, 78 Miss. 525, 29 So. 826; *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 So. 354. We do not find the reasoning convincing. True, when the association accepted the delinquent assess-

ments it had no knowledge that Mosiman was sick when he paid them, but it did know that the certificate of health which it had a right to require had not been furnished, and in waiving the prescribed showing in that regard it waived all inquiry into the member's physical condition. Of course, if it had been misled by any false representation or fraudulent concealment a different situation would be presented. *Spitz v. Mutual Ben. Life Assn.*, 25 N. Y. S. 469, 472, 5 N. Y. Misc. 245; *Rice v. New England Mutual Aid Society*, 146 Mass. 248, 15 N. E. 624." In *Knights of Pythias v. Kalinski*, 163 U. S. 289, 298, 41 L. Ed. 163, 16 S. Ct. 1047, the court said:—"The continued receipt of assessments upon Kalinski's certificate up to the day of his death was a waiver of any technical forfeiture of the certificate by reason of the non-payment of the lodge dues. Granting that the continued receipt of premiums or assessments after a forfeiture has occurred will only be construed as a waiver when the facts constituting a forfeiture are known to the company, *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Bennecke v. Insurance Co.*, 105 U. S. 355, 26 L. Ed. 990, this is true only of such facts as are peculiarly within the knowledge of the assured. If the company ought to have known of the facts, or with proper attention to its own business, would have been apprised of them, it has no right to set up its ignorance as an excuse." See also *infra*, § 720.

<sup>58</sup> In *Pabst Brewing Co. v. Milwaukee*, 126 Wis. 110, 117, 105 N. W. 563, the court said: "It is suggested that there can be no waiver without intent to waive based on knowledge of the facts. True, but one is presumed to

§ 686. What manifestation of election is final.

The question when election of one of two inconsistent courses has gone so far as to preclude subsequent choice of the second course when the first proves ineffectual, is raised in several classes of cases. If the change from the first alternative to the second involves any substantial injury to the other party, clearly the change ought not to be permitted: but frequently there is no such injury; yet there has been a plain manifestation of the choice of one course rather than the other. Thus one whose goods have been converted may make a demand for the proceeds of the converted property, thereby indicating a choice to affirm the wrongdoer's action. This is ordinarily called an election of remedies merely; but the choice of remedies is also a choice of rights. Though it has been said by high authority that as soon as a party having a right of election "has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further,"<sup>59</sup> such a demand has been held, not to preclude a subsequent election to enforce the claim in tort.<sup>60</sup> On the other hand, prosecuting the claim to judgment is a final election.<sup>61</sup> Even bringing an action is by some courts held conclusive.<sup>62</sup> The same sort of question arises where one entitled to sue either for

know that which in contemplation of law he ought so know, and one is presumed to waive that which is necessarily implied from his conduct. Constructive as well as actual knowledge of the facts, and implied as well as express intent, satisfies the prime essential of a conclusive waiver." In *Reed v. Union L. Ins. Co.*, 21 Utah, 295, 309, 61 Pac. 21, the court said: "It is said that the plaintiff was bound to know the law, and that he must have known the facts. So far as the written contract alone was concerned, if not ambiguous or contradictory, this may be true."

<sup>59</sup> Lord Blackburn in *Scarf v. Jardine*, 7 App. Cas. 345, 360.

<sup>60</sup> *Valpy v. Sanders*, 5 C. B. 886;

*Baker v. Hutchinson*, 147 Ala. 636, 41 So. 809.

<sup>61</sup> *Hitchin v. Campbell*, 2 W. Bl. 827; *Bacon v. Moody*, 117 Ga. 207, 43 S. E. 482; *Roberts v. Morse*, 127 Ky. 657, 106 S. W. 297; *Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565; *Walsh v. Chesapeake, etc., Canal Co.*, 59 Md. 423; *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; *International Paper Co. v. Purdy*, 136 N. Y. App. Div. 189, 120 N. Y. S. 342.

<sup>62</sup> *Daniels v. Smith*, 15 Ill. App. 339; *Thomas v. Watt*, 104 Mich. 201, 62 N. W. 345; *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604. See, however, *contra*—*Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206; *Otto v. Young*, 227 Mo. 193, 127 S. W. 9.

breach of an express contract or for the fair value of what has been given under it<sup>63</sup> manifests a choice of one or the other remedy. Thus, taking judgment is a conclusive choice,<sup>64</sup> and even beginning an action is generally held conclusive.<sup>65</sup> Beginning a suit for specific performance has also been held an election by the plaintiff (the vendee) to proceed with the contract, in spite of all defects in the title then known to him.<sup>66</sup> Any conduct calculated to deceive the other party to his injury in regard to the choice of the party entitled to elect will also conclude the latter.<sup>67</sup> Similarly proof in bankruptcy by a secured creditor of the full face of his claim is an election to surrender the security.<sup>68</sup> And where one who enters into a contract is acting for an undisclosed principal, the other party on discovering the facts is put to his election whether he will hold the agent or the principal.<sup>69</sup> According to the generally accepted statement of a promisee's rights on repudiation by the promisor of his obligation under a bilateral contract, the promisee has an election to treat the repudiation as a breach or not to do so.<sup>70</sup> The result of the decisions on the subject seems rather inconclusive of the question whether a manifestation of election is final unless a change from the alternative first chosen will work, or may work, an injury to the other party. Perhaps a rule might find support, both on principle and from convenience that after any manifestation of election an inconsistent position cannot be taken as matter of right, but that unless consideration has been given or there is an element of estoppel, a court having equitable powers may relieve from a hard situation by allowing rescission of the election.<sup>71</sup>

<sup>63</sup> See *infra*, § 1454.

<sup>64</sup> *Goodman v. Pocock*, 15 Q. B. 576; *Graham v. Holloway*, 44 Ill. 385.

<sup>65</sup> *Brown v. St. Paul, etc., Ry. Co.*, 36 Minn. 236, 31 N. W. 941; *Graves v. White*, 87 N. Y. 463. See also *Theussen v. Bryan*, 113 Ia. 496, 85 N. W. 802; *Holman v. Updike*, 208 Mass. 466, 94 N. E. 689.

<sup>66</sup> *Gray v. Fowler*, L. R. 8 Exch. 249.

<sup>67</sup> *Mizell v. Watson*, 57 Fla. 111, 49 So. 149; *Harden v. Lang*, 110 Ga. 392,

36 S. E. 100; *Axtel v. Chase*, 77 Ind. 74; *Mills v. Osawatomie*, 59 Kans. 463, 53 Pac. 470; *Graham v. Hatch Storage Battery Co.*, 186 Mass. 226, 71 N. E. 532; *J. B. Alfree Mfg. Co. v. Grape*, 59 Neb. 777, 82 N. W. 11.

<sup>68</sup> *First Nat. Bank v. Exchange Nat. Bank*, 179 N. Y. App. D. 22, 153 N. Y. S. 818, 164 N. Y. S. 1092.

<sup>69</sup> See *supra*, § 289.

<sup>70</sup> See *infra*, § 1322.

<sup>71</sup> On the right to make a new elec-



**§ 687. Acceptance of continued benefits under a contract with knowledge of a defence is an election; leases.**

The commonest case of election in the law of contracts arises where, with knowledge of a breach of condition or a defence excusing performance, a promisor either refuses or continues to accept performance from the other party. As the only theory upon which the benefit of such performance can be rightfully received is on the assumption of an election to continue the contract, that assumption is made if the injured party accepts further performance. This principle was early established in the law of landlord and tenant. Acceptance of rent accruing after breach of condition with knowledge of the breach is a discharge of the breach.<sup>72</sup> The principle of election precludes a purchaser in possession of real estate under a contract from refusing to make payments under the contract

tion after bringing action, in cases of waiver of tort, see Woodward, Quasi-Contracts, § 298; Griffith, Election of Remedies, 15 L. Quar. Rev. 160; Corbin, Waiver of Tort and Suit in Assumpsit, 19 Yale L. J. 221, 239. See also *infra*, §§ 1469, 1526-1528. In a case of a different character the theory has been adopted that some change of position in reliance on an election is necessary to make it final. In *List & Son Co. v. Chase*, 80 Oh. St. 42, 49, 88 N. E. 120, the court said: "Mere silence will not amount to waiver where one is not bound to speak. In this case the goods were perishable and exceedingly liable to be damaged by heat. The shipment was in the month of June and therefore the shortest and speediest route was a material condition. It is true that if the contract bound the plaintiff to ship by such a route, the defendant might have rescinded the contract on receiving the bill of lading showing a shipment on another and more hazardous route; but he was not bound to do so then. He might wait until inspection because inspection might show that the goods were not damaged, and he could

then accept them or if damaged reject them. The purchaser therefore waived no right by waiting and the seller lost none, because the latter had already made a breach of his contract and could not remedy it." While the principle that an election may be open to change, if the change works no injury to the other party, seems sound, it may be questioned whether the court did not go too far here in suggesting that the buyer might throw the risk of transit on the seller by deferring his election. True the seller had already irretrievably broken his contract, but the consequences of that breach would vary with the position which the buyer took; and it seems unfair to allow him to say "I will take neither position now, but will wait and see which is more advantageous to me (and more disadvantageous to you)." See *infra*, n. 80.

<sup>72</sup> *Marsh v. Curteys*, Cro. Eliz. 528; *Harvie v. Oswel*, Cro. Eliz. 572; *Dendy v. Nicholl*, 4 C. B. (N. S.) 376; *Cotesworth v. Spokes*, 10 C. B. (N. S.) 103; *Ward v. Day*, 4 B. & S. 337; *Commercial Trust Co. v. L. Wertheim & Co.*, 88 N. J. Eq. 143, 102 Atl. 448.

or dispute his vendor's title, so long as he retains possession of the property;<sup>73</sup> for the possession can only rightfully be held under the contract, and therefore while he retains possession the purchaser necessarily elects to continue the contract. The familiar principles that a tenant is estopped to deny his landlord's title, and a bailee that of his bailor, are based on the same fundamental principle. So in contracts for the sale of goods, one who voluntarily continues to deliver installments of goods in response to the buyer's orders after the buyer's right has expired by lapse of time cannot refuse without an additional breach by the buyer to fill orders for all the goods for which the contract provided.<sup>74</sup> An employer who is entitled to discharge an employee because of the latter's temporary illness, but who nevertheless continues the employment after the illness, in the absence of agreement to the contrary must pay for the period during which the employee was ill.<sup>75</sup> Similarly in insurance law, the acceptance of a premium or assessment, liability for which exists only on the assumption that the policy is to continue in force, is an election not to terminate it because of a known breach of condition or defence.<sup>76</sup>

<sup>73</sup> *Burnett v. Caldwell*, 9 Wall. 290, 19 L. Ed. 712; *Union Stave Co. v. Smith*, 116 Ala. 416, 22 So. 275, 67 Am. St. Rep. 140; *Shorman v. Eakin*, 47 Ark. 351, 1 S. W. 559; *Coates v. Cleaves*, 92 Cal. 427, 28 Pac. 580; *Goodwin v. Markwell*, 37 Fla. 464, 19 So. 885; *Harris v. Amoskeag Lumber Co.*, 101 Ga. 641, 29 S. E. 302; *Page v. Bradford-Kennedy Co.*, 19 Ida. 685, 115 Pac. 694; *Leshar v. Sherwin*, 86 Ill. 420; *Towne v. Butterfield*, 97 Mass. 105; *Curran v. Banks*, 123 Mich. 594, 82 N. W. 247; *Mitchell v. Chisholm*, 57 Minn. 148, 155, 58 N. W. 873, 874; *Pershing v. Canfield*, 70 Mo. 140; *Kirtz v. Peck*, 113 N. Y. 222, 21 N. E. 130; *Nance v. Rourke*, 161 N. C. 646, 77 S. E. 757; *McPherson v. Johnson*, 69 Tex. 484, 6 S. W. 798; *Cutler v. Babcock*, 79 Wis. 484, 48 N. W. 494.

<sup>74</sup> *Schulder v. Edward R. Ladew Co.*,

178 N. Y. App. D. 458, 165 N. Y. S. 504.

<sup>75</sup> *Cuckson v. Stones*, 1 E. & E. 248; *Bassett v. French*, 10 N. Y. Misc. 672, 677, 31 N. Y. S. 667.

<sup>76</sup> *Insurance Co. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Bennett v. Union Central L. Ins. Co.*, 203 Ill. 439, 67 N. E. 971; *Watts v. Equitable Mut. Life Assoc.*, 111 Ia. 90, 82 N. W. 441; *Mosiman v. Benefit Association*, 82 Kans. 670, 674, 109 Pac. 413; *Powell v. Factors', etc., Ins. Co.*, 28 La. Ann. 19; *Williams v. Maine State Relief Assoc.*, 89 Me. 158, 36 Atl. 63; *McNicholas v. Prudential Ins. Co.*, 191 Mass. 304, 77 N. E. 756; *Reed v. Bankers' Union*, 121 Mo. App. 419, 99 S. W. 55; *Clifton v. Mutual Life Ins. Co.*, 168 N. C. 499, 84 S. E. 817; *Chicago, etc., Life Soc. v. Ford*, 104 Tenn. 533, 58 S. W. 239.

**§ 688. After election to continue a contract in spite of a known excuse, the excuse cannot be asserted.**

The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform,<sup>77</sup> unless the right to retain the excuse is not only asserted but assented to.<sup>78</sup>

<sup>77</sup> *Bentsen v. Taylor*, [1893] 2 Q. B. 274; *Panoutsos v. Raymond Hadley Corp.*, [1917] 1 K. B. 767, 2 K. B. 473; *Bierce v. Hutchins*, 205 U. S. 340, 346, 51 L. Ed. 828; *German Sav. Inst. v. DeLaVergne Refining Co.*, 70 Fed. 146, 17 C. C. A. 34; *Jeffrey Mfg. Co. v. Central Coal & Iron Co.*, 93 Fed. 408; *Miami &c. Mfg. Co. v. Robinson*, 245 Fed. 556, 563, 158 C. C. A. 22; *Andrews v. Tucker*, 127 Ala. 602, 29 So. 34; *Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 166 Cal. 302, 136 Pac. 57; *Herr v. Sullivan*, 25 Colo. 190, 54 Pac. 637; *Dean v. Connecticut Tobacco Corp.*, 88 Conn. 619, 92 Atl. 408; *Grippio v. Davis*, 92 Conn. 693, 104 Atl. 165; *King v. Lipsey*, 142 Ga. 832, 83 S. E. 957; *McArthur Bros. Co. v. Whitney*, 202 Ill. 527, 530, 67 N. E. 163; *Big Run Coal Co. v. Employers' Indemnity Co.*, 163 Ky. 596, 174 S. W. 25; *Prentiss v. Lyons*, 105 La. 382, 29 So. 944; *Orem v. Keelty*, 85 Md. 337, 36 Atl. 1030; *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648; *Barnard v. McLeod*, 114 Mich. 73, 72 N. W. 24; *Neosho City Water Co. v. Neosho*, 136 Mo. 498, 38 S. W. 89; *Edward Thompson Co. v. Vacheron*, 69 N. Y. Misc. 83, 125 N. Y. S. 939; *Schulder v. Edward R. Ladew Co.*, 178 N. Y. App. D. 458, 165 N. Y. S. 504; *Griggs v. Renault Selling Branch*, 179 N. Y. App. D. 845, 167 N. Y. S. 355; *Benjamin Harris Co. v. Appelbaum*, 172 N. Y. S. 709; *Massey v. Becker* (Oreg.), 176 Pac. 425; *In re Moore's Est.*, 191 Pa. 600, 43 Atl. 474; *Linch v. Paris, etc., Elevator Co.*, 80 Tex. 23, 15 S. W.

208; *Loftis v. Pacific Mut. L. Ins. Co.*, 38 Utah, 532, 114 Pac. 134; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Garbes v. Roberts*, 98 Wis. 173, 73 N. W. 995. On this principle it was held in *Kunze v. Jones*, 200 Mich. 453, 166 N. W. 904, that an architect empowered by contract to adjudge the fulfillment of a builder's obligation could not stand by and allow the builder to proceed after bad work had been discovered, but must reject the work at once.

<sup>78</sup> In *Northwestern Mutual Life Ins. Co. v. Amerman*, 119 Ill. 329, 337, 10 N. E. 225, 59 Am. Rep. 799, the court said: "If, as before substantially stated, the assured paid the premium under the belief, fairly induced by the acts and declarations of the agents of the defendant company, that the policy was to be in force while he continued in the prohibited occupation, the acceptance of the money by the company would estop it from insisting upon the condition of the policy as a defence. The mere act, however, of receiving or collecting the premium, by the insurance company, with knowledge of an existing right of forfeiture, has, so far as we know, never been held to estop the company from setting up such forfeiture, if the assured had no reason fairly to conclude, from the acts and declarations of the company, or its agents, that the forfeiture had been or would be waived, when he made the payment of the premium, or unless the payment was made in reliance upon the validity of his policy,

The case may be thought distinguishable where a party to a bilateral contract knowing of a breach of condition or defence which would excuse him, continues to act under the contract in some other way than receiving benefits from the other party,—for instance, continues to render performance himself; as if an employee having just ground for refusing to continue performance of his contract of employment, and, knowing the facts excusing him, nevertheless renders some further services. Is he thereby precluded from subsequently asserting the breach as an excuse for his own failure to perform the contract? This depends in theory upon the inquiry whether any element of estoppel is necessary to constitute a final election.<sup>79</sup> The employee is entitled to choose between the prize of further employment with the pecuniary and other advantages that may flow from it, and the prize of freedom from his own liabilities under the contract. By continuing work he has manifested an intent to take the former, but he has benefited rather than injured the employer who will suffer no greater injury if the choice is revocable, than he would have suffered if the employee had refused promptly to continue performance. It seems probable that the election is final. Even silence when it is likely to mislead the other party and induce him to believe that further performance of the contract will be accepted, may amount to an election.<sup>80</sup>

induced by the acts, declarations or silence of the company. If the assured knew or understood that the company intended to insist upon the forfeiture for breach of the condition of the policy under consideration, if he came to his death by reason of or while in an employment in violation of such condition, and with such knowledge, for the purpose of keeping his policy from lapsing for non-payment of the premium, so that it might be in force after he should quit such employment, as suggested by the company's State agents, or for any other reason he might deem to his advantage, paid the premium, the company might rightfully accept it for the purpose for which it was paid, without being

guilty of fraud in setting up the breach of such condition, which it had never consented to waive, and which the assured knew it intended to insist upon."

<sup>79</sup> See *supra*, § 686.

<sup>80</sup> In *Morgan v. McKee*, 77 Pa. 228, 231, the court said: "It was their duty to act promptly on the occurrence or discovery of the breach, and if they were guilty of undue delay, they must be regarded as having waived their right to rescind and elected to treat the contract as still subsisting: *Lawrence v. Dale*, 3 Johns. Ch. R. 23; *Pearsoll v. Chapin*, 44 Pa. 9; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427; *Leaming v. Wise*, 73 Pa. 173. They could not take the chance of a rise

If an obligation is purely unilateral, however, and all consideration for it has already been received, a continuance of performance by the promisor after circumstances have occurred that would justify him in refusing to go on, while still retaining the consideration, involves no election. It is at most evidence of a promise to perform, unsupported by consideration. If relied on by the promisee to his inquiry the injury must be, is such a promise binding? If it is given effect under the name of waiver, boundaries should be fixed which will enable it to be known when gratuitous promises are binding under this inclusive designation. In the law of insurance such a situation is not infrequently presented. But accepting a benefit for which the consideration has been entirely rendered, though it may operate as an election not to rescind the executed transfer of consideration, where that is legally possible (as for example if it were induced by fraud), does not preclude a refusal to continue performance for the future, because even though the rest of the contract is abrogated, payment is still due for what has been done. Therefore, the receipt of such rent (or endeavor to collect it) as has become due before breach of condition by a tenant does not operate as an election by the landlord to continue the tenancy,<sup>81</sup> since he is entitled to this rent even though the lease is terminated; and for the same reason acceptance of a payment abso-

in the market-price of petroleum, and then elect to rescind the contract or not as might be most for their advantage. They were bound to make their election within a reasonable time; and what is reasonable time or undue delay where the facts are not disputed, is a question of law to be determined by the court. *Leaming v. Wise, supra*. Reasonableness in such cases belongeth to the knowledge of the law, and is therefore to be decided by the justices: 1 Tho. Coke Litt. 644 (52 b). Did the defendants then elect to rescind the contract in a reasonable time? The petroleum was deliverable monthly, and the breach of which the complaint was made, was the plaintiff's

failure to make the September delivery. They did not elect or give notice of their intention to rescind the contract until the October delivery was due and tendered by the plaintiff. The court below ruled, and we think rightly, that the delay was unreasonable. When the article is a subject of speculation, and the market price varies with the demand and supply, if the purchasers, instead of rescinding the contract as soon as it is broken, or within a reasonable time after the occurrence of the breach, take the chance of a rise in the price, it is but equitable and just that they should be treated as having waived the right to rescind."

<sup>81</sup> *Price v. Worwood*, 4 H. & N. 512.

lutely due under any contract does not preclude rescission of the contract for reasons existing and known when the payment was made.<sup>82</sup> Nor will the compulsory continuance of a contract entered into by an agent operate as an election to ratify the agent's breach of duty in entering into the contract.<sup>83</sup> A continuing breach of condition also is not necessarily excused permanently because, while it is still possible to perform the condition for the future, the injured party elects to go on with the contract.<sup>84</sup>

**§ 689. Waiver of condition not yet broken or defence not yet arisen.**

The peculiarity of the doctrine of waiver used in the narrow sense which seems desirable is that effect is given to a promise, express or implied in fact, when, in reliance thereon, action has been taken by the promisee though no consideration is given in exchange for the promise. Not all promises can thus be made enforceable, but a promise to forego the advantage not yet accrued of a breach of condition and sometimes of a breach of a promise may be. There has been a distinct tendency in

<sup>82</sup> *Chicago Washed Coal Co. v. Whittsett*, 278 Ill. 623, 116 N. E. 115; *Ohio Valley Buggy Co. v. Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 574; *De Vivo v. Gallerani*, 174 N. Y. S. 13.

<sup>83</sup> In *Pacific Vinegar, etc., Works v. Smith*, 152 Cal. 507, 511, 93 Pac. 85, the court said: "If an agent with ostensible authority to sell his principal's wheat, but under instructions to sell it for not less than a dollar a bushel, shall sell and deliver it for fifty cents a bushel, there is no power in the principal to rescind the sale. Shall the principal by accepting the fifty cents be held to have exonerated his agent from liability for the other fifty cents per bushel? Such a doctrine certainly does not commend itself and is not sustained. It is limited, so far as the agent is concerned, to those cases where there remains with the principal, after his first complete knowledge of

the transaction, the power to rescind, and failing so to do he is properly charged with full acceptance of all the responsibilities of the contract, even to the exoneration of his agent, because, with the ability to rescind, if he had rescinded, the transaction would be at an end and nobody would be injured." The court cites in support of its position, *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *Bank of St. Mary's v. Calder*, 3 Strob. (S. Car.) 403; *White v. Sanders*, 32 Me. 188; *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11; *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 593; *Continental Ins. Co. v. Clark*, 126 Iowa, 274, 100 N. W. 524. See further, *supra*, § 200.

<sup>84</sup> *Panoutsos v. Raymond Hadley Corp.*, [1917] 1 K. B. 767; *Finnigan v. Worden-Allen Co.*, 201 Mich. 445, 167 N. W. 930; *De Vivo v. Gallerani*, 174 N. Y. S. 13; and see *infra*, § 741.

courts of equity to enforce promises where something resembling a fraud would otherwise be perpetrated.<sup>85</sup> Nothing could well have a more fraudulent operation than to allow one who is bound by a conditional promise to indicate by words or acts while performance of the condition is still possible that its non-performance will not affect his own action under the contract, and, subsequently, when in reliance on this statement, the promisee has failed to perform the condition, and the time has passed when it is possible to do so, to set up the failure as an excuse for the non-performance. It is immaterial whether the condition is express or imposed by law. Thus where before expiration of the time originally fixed for performance the time is extended, though without consideration, performance within the extended time is sufficient;<sup>86</sup> where the contract requires a written order as a condition of liability, an oral order when fulfilled may impose liability.<sup>87</sup> Present-

<sup>85</sup> See, *e. g.*, *supra*, § 139.

<sup>86</sup> *Thayer v. Meeker*, 86 Ill. 470, and see cases cited *infra*, n. 98.

<sup>87</sup> An illustration of such a waiver may be found in *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810, 825, where the court said: "A waiver may be inferred from an order to perform extra work under such circumstances as imported a promise to pay therefor. *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N. E. 549, 2 L. R. A. 625. It has been held that where the owner requested the contractor, without writing, to furnish a large number of items of work and materials, and the same were furnished by the contractor and accepted by the owner, and part of them were paid for, a provision in the contract that the contractor would make no charge for extra work unless ordered in writing by the owner or its engineer was waived. *Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co.*, 132 Fed. 957, 66 C. C. A. 67; *McGrath Constr. Co. v. Waupaca-Green Bay R. Co.*, 148 Wis. 372, 134 N. W. 824; *Schmullbach v. Caldwell*, 196 Fed. 16, 115 C. C. A. 650; *O'Keefe*

*v. St. Francis' Church*, 59 Conn. 551, 22 Atl. 325. In *Davis v. La Crosse Hospital Assn.*, 121 Wis. 579, 99 N. W. 351, 1 Ann. Cas. 930, it was said:

"If, under a contract containing such a provision, a builder were requested to and did perform extra work of such magnitude that the idea that it was intended he should have no additional pay therefor would appear highly unreasonable or absurd, a court might, nothing appearing to the contrary, conclude that there was a mutual intention to waive such provision.' The fact that, throughout the performance of the work called for by the written contract, the commissioners entirely disregarded the stipulation therein as to the form of the orders for extra work or materials, the order given in every instance being verbal, taken with the other evidence bearing upon the question, was sufficient to justify a finding of a general waiver, an intentional relinquishment altogether, by the commissioners, of the provision requiring orders for such work and materials to be in writing. *Meyer v. Berlandi*, 53 Minn. 59, 54 N. W. 937;

ment<sup>88</sup> and notice of dishonor of a negotiable instrument<sup>89</sup> may be waived before maturity by the party entitled to them.<sup>90</sup> So a subscription to corporate stock generally is subject to the condition either express or imposed by law, that a call be made;<sup>91</sup> but "the subscriber may by his acts or express agreement waive the call itself, or informalities in its making or notice thereof."<sup>92</sup> Further illustrations in insurance law and other branches of the law are given in subsequent sections.

The same principle is applicable to other excuses for non-performance of a promise besides breach of conditions. Whenever the promisee has allowed a legal excuse to arise relying upon express or implied statements of the promisor that the latter would not avail himself of the excuse, there is waiver. This is a principle distinct from the ordinary equitable estoppel, since the representation is promissory, not a misstatement of an existing fact. The promisor misstates no fact; he says at most simply, I will perform though you do not comply with the condition or, though you subject yourself to a legal defence.<sup>93</sup> To bring the case within the reason of the rule it is essential that the promisee could and would have performed the condition, or would not have allowed the defence to arise, had it not been for the promisor's waiver. For if the promisee could not have entitled himself to performance of the promise, even if there had been no waiver, there is no equitable reason why the promisor should not take advantage of the breach of condition or other defence. He has promised that he would not, but his promise was not only wholly gratuitous, but has not been acted on.<sup>94</sup> Even though the original contract was under seal and the local law still denies the possibility of varying a sealed contract by parol, a condition of the contract may be excused by a parol promise or permission, such as is described in this section.<sup>95</sup> Since the basis of waiver is promissory

Campbell v. Kimball, 87 Neb. 309, 127 N. W. 142; Emslie v. Livingston, 51 N. Y. App. Div. 628, 64 N. Y. S. 259."

<sup>88</sup> See *infra*, § 1168.

<sup>89</sup> See *infra*, § 1186.

<sup>90</sup> Liability may be revived even after maturity, but that is not material to the present section.

<sup>91</sup> Cook, Corporations, § 105.

<sup>92</sup> *Ibid.*, § 120.

<sup>93</sup> See *supra*, § 139.

<sup>94</sup> See cases cited, *supra*, § 139.

<sup>95</sup> Ratcliff v. Pemberton, 1 Esp. 35; Fleming v. Gilbert, 3 Johns. 528. See also Smith v. Smith, 45 Vt. 433.



estoppel the waiver may be withdrawn before change of position in reliance upon it.<sup>96</sup> As will be seen,<sup>97</sup> in some cases, and in some jurisdictions, promises to forego a defence have been held binding, even though made after the defence had arisen and though there was no consideration or element of estoppel to support the promise. A jurisdiction which takes this view might logically hold that reliance on a promise to forego an excuse need never be supported by estoppel, and so holding might hold revocation impossible after a promise has once been made to forego the excuse.<sup>98</sup> Such a view, however, seems inconsistent with the fundamental principles of the common law regarding the formation of contracts.

§ 690. Waiver of promise before maturity.

The distinction is not always observed between excusing another from performance of a condition or from the effect of a defence, and excusing him from liability on an obligation. The confusion is due in great measure to the circumstance that in bilateral contracts the performance of an act operates frequently as performance both of a condition and of an obligation. In a contract for example where an employee promises to serve faithfully and the employer promises to pay him a specified salary if he works faithfully, faithful service is both a performance of the employee's obligation and also a perform-

<sup>96</sup> *Panoutsos v. Raymond Hadley Corp.*, [1917], 1 K. B. 767, 2 K. B. 473; *Haaler v. West India S. S. Co.*, 212 Fed. 862, 129 C. C. A. 382; *Grippio v. Davis*, 92 Conn. 693, 104 Atl. 165; *Dunning v. Mauzy*, 49 Ill. 368, 370; *Fox v. Grange*, 261 Ill. 116, 103 N. E. 576. In *Webb v. Hughes*, L. R. 10 Eq. 281, 286, the court said: "If time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while

the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated. But, having once gone on negotiation beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shewn." See also *Massey v. Becker*, 90 Oreg. 461, 176 Pac. 425, and *infra*, § 741 *ad fin.*

<sup>97</sup> See *infra*, § 693.

<sup>98</sup> See *Beauchamp v. Retail Merchants' & Co. F. Ins. Co.*, 38 N. Dak. 483, 165 N. W. 545.

ance of the condition qualifying the employer's obligation. It is entirely possible that the performance of an act be excused as a condition, and yet not excused as an obligation. A voluntary statement by a creditor even before a debt has become due that the debt need not be paid, would generally not be held to excuse the debtor from liability.<sup>99</sup> The principle can be no different when instead of a money debt there is an obligation to deliver land or goods or to render services.<sup>1</sup> But if the payment of the debt were a condition qualifying a promise by the creditor, the latter's statement that he would perform his promise irrespective of payment of the debt, would waive the payment as a condition though not as an obligation if the debtor in reliance on the statement failed to pay. It may, however, sometimes operate as a fraud to enforce liability on a promise after the promisee has stated that performance need not be made. And though an excuse of the promisee from liability seems inconsistent with the general doctrine that a promissory estoppel is not a substitute for consideration either in creating or discharging obligations,<sup>2</sup> there are many cases where liability is held discharged in the case supposed. This may be called waiver of liability as distinct from waiver of a condition or excuse. Though a debt of five dollars cannot be discharged by mere assent, yet if the debt is due on a particular day, the obligation to pay it on that day may be discharged without consideration, if relying on the creditor's permission to defer payment the debtor allows the day to go by. And permission to defer payment given prior to the day of maturity will operate as a continuing license.<sup>3</sup>

<sup>99</sup> *Hayford v. Andrews*, Cro. Eliz. 697. See also *Terrall v. Proctor* (Tex. Civ. App.), 172 S. W. 996; and *infra*, §§ 1829 *et seq.*

<sup>1</sup> *C. F. Adams Co. v. Helman*, 58 Ind. App. 394, 400, 106 N. E. 733.

<sup>2</sup> See *supra*, § 139, and *infra*, §§ 1831, 1841 *et seq.*

<sup>3</sup> Even this was not formerly true in the case of sealed instruments. In *Hayford v. Andrews*, Cro. Eliz. 697, to an action of debt upon an obligation, the defendant pleaded that before the

day, the plaintiff, in respect of a trespass made by his beasts in the defendant's land, gave unto him a longer day of payment, which has not yet come. The plaintiff demurred, and though the defendant argued that since it "was before the day, the plaintiff might well by word defer it, . . . the court without argument held it to be no plea for an agreement, that parol can not dispense with an obligation." Cf. the preceding section.

There is the same principle of fairness involved in excusing damages for failure to make prompt payment in such a case as exists where performance is actually prevented. Permission is not strictly prevention, but it is likely to produce the same consequence of non-performance. Though the creditor after such waiver has been acted upon by letting the day go by cannot demand damages for failure to pay on the day, he can demand performance on a subsequent day and recover damages if payment is not then made. Waiver, therefore, in such a case excuses temporary breach of the obligation, but does not permanently excuse performance. But let it be supposed that the obligation was to serve on December 20th, and the obligee says, in effect: "you need not serve on that day." This similarly will excuse the servant from liability for failure to perform on that day, but will have further consequences. The employer cannot say on December 25th "I demand the day's service which you owe me." Service on December 25th or even on December 21st is regarded as a different thing from service on December 20th,<sup>4</sup> though payment of five dollars for the conveyance of Blackacre is regarded as substantially the same thing whenever the performance is rendered. From these illustrations the correct principle may be deduced; namely,—waiver of performance of an obligation which means permission not to perform it, excuses the obligor from performing so long as the waiver or permission continues and if the waiver continues so long that performance by the obligor will be essentially different from that which he originally bargained to render, all right to enforce the obligation is lost. Prior to that time the creditor may withdraw his permission even though he originally stated that he waived permanently all right. He cannot act in such a way as to make his permission work an injury to the obligor, but this is the only limitation on his right of revocation.<sup>5</sup>

See modern applications to contracts generally of the principle stated in the text. *Williams v. Wheeler*, 8 C. B. (N. S.) 299; *Plevins v. Downing*, 1 C. P. D. 220; *Thomson v. Poor*, 147 N. Y. 402, 42 N. E. 13; and *supra*, § 595.

<sup>4</sup> *Bast v. Byrne*, 51 Wis. 531, 8 N. W.

494, 37 Am. Rep. 841; see also *Rickard v. Coutts*, 5 Hawaii, 507.

<sup>5</sup> Thus a landlord who has given his tenant permission to surrender his lease may withdraw the permission at any time prior to actual surrender. *Dunning v. Maury*, 49 Ill. 368, 370.

Cases may be found where promises to give up a right to damages for an accrued breach of an obligation have been enforced without either consideration or promissory estoppel, just as promises to forego excuses have been similarly enforced.<sup>6</sup> But such decisions are necessarily at variance with the ordinary requirements for the discharge of obligations.

**§ 691. A promissory estoppel does not require an intent to surrender a right.**

As has been seen, neither a contract for substituted performance nor an election of one right rather than another requires for its validity any actual intent to surrender the right which is lost. Waiver, as that word is used in the cases, is not generally based on contract for consideration but on promissory estoppel. And the suggestion that where such is the basis there must be an intent to surrender a right is at least equally misleading. It is not the intention of the party estopped but the natural effect upon the other party which gives vitality to an estoppel.<sup>7</sup> It

On the other hand, in *Orvis v. British-American Cotton Co.*, 242 Fed. 835, 155 C. C. A. 423, the plaintiff sued for a balance of account under a contract in substance as follows: The plaintiff having deposited a margin of eight dollars a bale, the defendants paid drafts for the purchase in the United States of cotton secured by bills of lading; the plaintiff was to resell the cotton in England and it was sent forward with drafts on an English bank secured by ocean bills of lading. With the price thus obtained the defendants were to be reimbursed, and any balance remaining was payable to the plaintiff. The original agreement contemplated that the defendants should hold the margin of eight dollars a bale until the cotton had been disposed of. Subsequently, however, without consideration, the defendants agreed that the amount of the margin should be credited to the plaintiff in England where its agent was going to negotiate the sale of the cotton. Still

later, however, after the agent had gone to England, the defendants refused to keep this promise. The plaintiff was unable to negotiate a sale in England at a price sufficient to pay the drafts against the bills of lading under which the cotton had been forwarded to England, and ultimately it was sold at a loss by the defendants. The court held that the defendants' agreement to credit the margin in England was admissible to support the plaintiff's contention that had the credit in England been given the drafts would have been taken up and the cotton then resold, whereby the subsequent loss due to depreciation would have been avoided. The reliance by the plaintiff on the defendants' promise was held sufficient though the court admitted no consideration had been given for it.

<sup>6</sup> See the preceding section.

<sup>7</sup> *Tobin v. Western Mutual Aid Society*, 72 Ia. 261, 264, 33 N. W. 663; *Moore v. Order of Ry. Conductors*, 90

may be said here, as in the case of assent to a substituted contract, that it is the justifiable belief of the party relying on the so-called waiver which is the essential thing.

**§ 692. Knowledge of facts is not necessary for a promissory estoppel.**

The fundamental basis of waiver, so far as there may be said to be a distinct legal principle going by that name, is promissory estoppel. The doctrine of estoppel *in pais*, though included by Lord Coke in his description of estoppels received for the first time wide application in recent years, and it has been extended far beyond the limits formerly set for it. In a case decided in the first half of the nineteenth century, which is usually regarded as the leading authority on the subject,<sup>8</sup> it was stated as a necessary element that the misrepresentation forming the basis of the estoppel should be "wilfully" made. It was not long, however, before the use of this word was explained in such a way as to deprive it of its natural meaning.<sup>9</sup> Long before this time, moreover, equity cases had illustrated the doctrine and applied it, in a special class of cases though not under the name of estoppel.<sup>10</sup> At the present time, though in many jurisdictions there are expressions still used which seem to mean that either fraud or culpable negligence is an essential element for estoppel,<sup>11</sup> it is certain that the great weight of recent authority supports the view that positive statements of fact as to matters upon which the speaker may fairly be supposed to be informed may give rise to an estoppel,

la. 721, 727, 57 N. W. 623; May, Insurance, § 507.

<sup>8</sup> Pickard v. Sears, 6 Ad. & El. 469.

<sup>9</sup> In Freeman v. Cooke, 2 Exch. 654, 663, Parke, B., said: "By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take

the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." In Bloomenthal v. Ford, [1897] A. C. 156, 160, it is said: "Whether a wilful misrepresentation or not it is immaterial to inquire."

<sup>10</sup> See opinion of Kay, L. J., Low v. Bouverie, [1891] 3 Ch. 82, 107.

<sup>11</sup> See for a recent illustration Conway Nat. Bank v. Pease, 76 N. H. 319, 82 Atl. 1068.

though there is neither of these elements.<sup>13</sup> And this is no more than right.<sup>13</sup>

It should be observed, however, that where conduct rather than words is relied on as constituting a false representation, the conduct can hardly be considered such if the party against whom the estoppel is claimed is ignorant of the facts which make his conduct deceptive. His conduct is like the use of ambiguous language in ignorance of the facts which make it ambiguous.<sup>14</sup> The peculiarity of a promissory estoppel is that there is no misstatement of an existing fact, but merely a promise, agreement, or permission for future conduct. For the ordinary purposes of estoppel this is not enough. The only representation of existing fact is that a promise has been made or permission given, and an estoppel to deny this affords no help to the promisee, unless it is further held that a promise when the promisee has acted in reasonable reliance thereon must be kept.

<sup>13</sup> In *Prickett v. Sibert*, 75 Ala. 315, 319, the court said: "Declarations or admissions, deliberately made, are conclusive upon the parties making them, in all controversies involving their truth between him and the person whose conduct he may knowingly influence by them. It is not of importance, whether the declaration or admission is made innocently or fraudulently; whether in point of fact it is true or false; it is the fact, that another has been induced to act on it, and must suffer injury if its truth is gain-said, that renders it conclusive." So in *Criley v. Cassel*, 144 Ia. 685, 123 N. W. 348, 349, the court said: "A party may not deny that which he has solemnly asserted to be true when such denial will prejudice one who has relied upon his former statement. *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125. And he will be estopped, although he was in error as to the truth, if his statement was intended to, and did, influence another to act thereon. *Smith v. Cramer*, 39 Iowa, 413; *Kirchman v. Standard Coal Co.*, 112 Ia. 668, 84 N. W. 939, 52

L. R. A. 318." In *Pearson v. Hardin*, 95 Mich. 360, 387, 54 N. W. 904, the same view is expressed:—"The doctrine of estoppel *in pais* had its origin in willful misrepresentation. Under the genial influence of courts of equity the rule has been much extended, and to-day includes mistaken and ignorant misrepresentation, and even silence, wherever a clear duty to know and speak the truth exists." See also *Carr v. The London & Northwestern Railway Co.*, L. R. 10 C. P. 307, 317, quoted with approval in *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614, 619; and the definition of Lord Blackburn in *Burkinshaw v. Nicolls*, 3 App. Cas. 1004, 1026, quoted with approval in *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614, 623.

<sup>14</sup> See *infra*, §§ 1508, 1510.

<sup>15</sup> *Stiff v. Ashton*, 155 Mass. 130, 133, 29 N. E. 203; *Woodward v. Tudor*, 81 \* Pa. 382, 394. Though many contrary expressions may be found, they are generally repeated from early cases and are not necessary for the decision.

Such is not the general rule in regard to promises; <sup>16</sup> but, as indicated in the preceding sections, it is true of promises to excuse conditions and to some extent of promises to surrender rights. Nor is it material here, though it is for establishing fraud, that there shall be any purpose, at the time when it is given, to break the promise or to withdraw the permission. If knowledge of any facts were necessary to a promissory estoppel, it would be not knowledge of the truth or falsity of a fact represented, but knowledge of surrounding circumstances making it desirable or otherwise to give the promise or agreement or the permission forming the basis of the estoppel. That there is always necessity for such knowledge cannot be admitted. The fundamental basis for the estoppel is the justifiableness of the conduct of the party claiming the estoppel. His reliance is equally justifiable whether the party estopped knows or does not know all the material facts bearing on the matter, provided that he himself does not know such facts which he fails to disclose. If an insurer gives permission to the insured to keep gasoline on the insured premises, though to do so is forbidden by a condition in the policy, and the insured thereupon keeps a quantity of the substance which leads to the destruction of the building, it surely can be no defence to the insurer that when permission was given he was ignorant that on adjoining property dangerous chemicals were secretly stored, if the insured was equally ignorant. Nor could it be material that discoveries of science subsequent to the permission proved that gasoline was a more dangerous substance than had been supposed. On the other hand, even courts which hold that such conduct as asking for amended proofs of loss or stating the wrong ground of defence as a reason for non-payment, after the insured has acted thereon, estops an insurer from setting up a breach of condition which has already occurred, would not so hold unless the insurer knew or should have known the essential facts at the time he asked for proofs or misstated his ground of defence. It will be observed that in these latter cases the breach of condition or duty had already occurred. In the former case it had not occurred, and was induced by the permission of the insurer. Probably it may safely be said,

<sup>16</sup> See *supra*, § 139.

then, that where a breach of condition has already occurred, or a defence already arisen, a promissory estoppel will not preclude the promisor from taking advantage thereof unless he was aware, or should have been aware, of the facts showing the breach of condition or the defence. Knowledge of collateral facts even though of material importance seems, however, unessential.<sup>16</sup>

**§ 693. Agreement to be liable in spite of a defence already accrued.**

In most of the cases supposed in the preceding sections, the waiver of excuse or of liability is made before the time for the performance of the condition or the happening of other excuse, or before the liability has arisen; and in reliance on the waiver, the party afterwards seeking to take advantage of it has changed his position. The case now to be considered is where the promisee has failed without excuse to perform a condition, or has allowed a defence to arise and subsequently the promisor undertakes expressly or impliedly not to take advantage of the breach of condition or other excuse. As the promisor, *ex hypothesi*, is already freed from liability, his agreement is, on exact analysis, a new undertaking. Whether such an undertaking can ever be enforced without the same consideration that is necessary to support promises generally is properly dealt with under the heading of Consideration.<sup>17</sup> It is confusing the issue to speak of waiver here, without some defini-

<sup>16</sup> In some decisions it is true that it is broadly stated that the party surrendering a right must have full knowledge of all the essential or material facts. See *Bucklin v. Johnson*, 19 Ind. App. 406, 49 N. E. 612; *Norton v. Catholic Order of Foresters*, 138 Ia. 464, 469, 114 N. W. 893; *Knights of Pythias Supreme Lodge v. Quinn*, 78 Miss. 525, 20 So. 826. The principle was more narrowly expressed in *St. Louis Electric L. & P. Co. v. Edison General Electric Co.*, 64 Fed. 997, 1001, where the court said there must be "full knowledge of all the essential or material facts of the acts and conduct

of the other party," which goes no further substantially than saying there must be knowledge of a breach, if one has taken place. To this effect is *Patterson v. Equitable Life Assur. Soc.*, 112 Ark. 171, 165 S. W. 454; *Benanti v. Delaware Ins. Co.*, 86 Conn. 15, 84 Atl. 109; *Callies v. Modern Woodmen of America*, 98 Mo. App. 521, 72 S. W. 713; *Dodge v. Minnesota, etc., Roofing Co.*, 14 Minn. 49; *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Neb. 43, 144 N. W. 1044, 51 L. R. A. (N. S.) 261; *Johnson v. Schar*, 9 S. Dak. 536, 70 N. W. 838.

<sup>17</sup> See *supra*, §§ 139, 151 *et seq.*



tion of the boundaries of the doctrine, as if some special principle permitted defences to be so surrendered.<sup>18</sup>

It may be argued that there is a distinct principle of waiver wide enough to cover any such situation; and authorities may be cited to support the argument that there is a general rule to the effect that even after a perfect defence has arisen to a promise, either because of the breach of condition, or because of some rule of law, an agreement to surrender the excuse is binding without more. And if the generality of this statement be thought too great, it may be argued that at least if the excuse of the promisor is of a narrow or technical character, the principle is applicable. As to the first suggestion it may be replied that presumably no court would hold an insurer bound if he made a promise to pay a policy of insurance against fire, in spite of the fact that the house had not burned down within the term of the policy. The condition of burning would not be so easily "waived." Similarly a promise made after the destruction of the building to pay insurance though the premium had never been paid and a condition of the policy required that it should be would probably not be enforced.<sup>19</sup>

<sup>18</sup> Lord Eldon said in *Stackhouse v. Barnston*, 10 Ves. Jr. 453, 466: "As to a waiver, it is difficult to say precisely, what is meant by that term, with reference to the legal effect. A waiver is nothing, unless it amounts to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea."

<sup>19</sup> In *Wheeler v. United States Casualty Co.*, 71 N. J. L. 396, 59 Atl. 347, the court said: "The fact that the defendant knew the assured to be 64 years of age when the policy was issued cannot change the construction heretofore adopted by this court, that the policy requires that the accident shall have happened while the person in-

jured was over 16 and under 65 years of age.

The averment of waiver does not make the count good. It is not a waiver of performance of conditions precedent by the assured, such as furnishing proof of loss. *Hibernia Mutual Fire Ins. Co. v. Meyer*, 39 N. J. L. 482; *Carson v. Jersey City Insurance Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *MERCHANTS' INS. CO. v. GIBBS*, 56 N. J. L. 679, 29 Atl. 485, 44 Am. St. Rep. 413; *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. Rep. 625. Nor can the waiver be held good as an estoppel, for the declaration shows that the plaintiff could not have been led to any act or encouraged in any omission to her prejudice by the act relied on as a waiver, as in *Fire Ins. Co. v. Building Assoc.*, 43 N. J. L. 652, where a condition as to alienation was held to be waived: *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 274, where a

A promise by a guarantor to be absolutely liable though there was for some reason no debt due from the intended principal debtor, would doubtless be similarly unenforceable. But, as has been seen, promises to pay debts voidable for incapacity,<sup>20</sup> or barred by the Statute of Limitations,<sup>21</sup> or by discharge in bankruptcy,<sup>22</sup> or by a failure to charge a party secondarily liable on negotiable paper,<sup>23</sup> or released by one of the technical defenses allowed a surety,<sup>24</sup> have all been enforced; and it may be argued that these cases are merely illustrations of a more far reaching general principle applicable to technical defences. Such a proposition of law is not without much in its favor. Undoubtedly the enforcement of harsh conditions or technical defences frequently works hardship, and if certainty could be obtained both in regard to the requirements of the law in the way of subsequent promise or recognition by the obligor, and in regard to proof of whether such requirements in a particular case have been satisfied, a less drastic rule than that previously supported<sup>25</sup> would have much to commend it. If, however, any subsequent oral promise or recognition of liability is held sufficient to do away with any defence, or even any technical defence, it will be easy to manufacture testimony of the necessary facts. It has generally been thought necessary to require promises to pay debts barred by the Statute of Limitations to be put in writing in order to make them binding;<sup>26</sup> and reasons have been given previously,<sup>27</sup> for regarding the doctrine of waiver of a defence as inadequate to explain the decisions on that subject. Moreover, there is great difficulty in determining when a particular defence or excuse is technical. This objection is not perhaps insuperable; but certainty of application is a positive merit in a rule of law, and lack of such certainty though necessarily existing in the application of

forfeiture due to increase of hazard was waived; *Redstrake v. Cumberland Insurance Co.*, 44 N. J. L. 294, where a provision avoiding the policy in case of effecting other insurance was waived, and the present chancellor called attention to the distinction between cases of waiver and cases of estoppel; *Martin v. State Ins. Co.*, 44 N. J. L. 485, 43 Am. Rep. 397, where delay in bringing

suit was induced by the conduct of the defendant company."

<sup>20</sup> See *supra*, § 151.

<sup>21</sup> See *supra*, § 160.

<sup>22</sup> See *supra*, § 158.

<sup>23</sup> See *supra*, §§ 157, 1186.

<sup>24</sup> See *supra*, § 157.

<sup>25</sup> See *supra*, § 203.

<sup>26</sup> See *supra*, § 164.

<sup>27</sup> *Supra*, § 203.

many equitable principles, is a disadvantage. Whatever may be the conclusion as to the desirable course for the law, it is at least true that everything is to be gained and nothing lost by clearly recognizing the nature of a so-called waiver which recreates a liability, or an obligation which by its terms has already been extinguished or made impossible of performance. There is no class of cases so well suited as insurance cases to test the existence of any general principle that an agreement to give up technical defences is binding without promissory estoppel or consideration.

The conditions in insurance policies are often harsh and highly technical. The disposition to stretch the law to its utmost in order to favor the insured is constantly observable in the decisions of the courts; and whatever scope be given other principles, there are decisions which can only be explained on the assumption that some courts at least recognize as a principle of law that a technical defence may be surrendered without consideration or estoppel;<sup>28</sup> but the great weight of authority is clearly against the validity of such decisions.<sup>29</sup>

#### § 694. Agreement to discharge from a liability already arisen.

Methods provided by the law for discharging an obligor from a contractual liability already arisen are properly considered under the head of the Discharge of Contracts. The normal methods are release or accord and satisfaction. It is sure to lead to confusion of thought to apply the word waiver to such a situation;<sup>30</sup> and illustrations of this confusion may be found in

<sup>28</sup> In this connection may be considered conditions in deeds providing by condition subsequent for forfeiture of the estate conveyed on breach of the condition. In *Sanitary District v. Chicago &c. Trust Co.*, 278 Ill. 529, 116 N. E. 161, a statement by the grantor, after breach of the condition, that he would not take advantage of it, was held irrevocable, so that the grantee acquired an indefeasible title.

<sup>29</sup> See *infra*, §§ 763 *et seq.*

<sup>30</sup> In *Willoughby v. Backhouse*, 2 B. & C. 821, 824, Littledale, J., said: "The plaintiff does not, by the agreement

profess to waive his right of action. But even if he did, still it would not be a sufficient answer; for a right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done." See also *De Bussche v. Alt*, 8 Ch. D. 286, 314; *Nesbitt v. McGehee*, 26 Ala. 748; *Southern States Co. v. Long*, 15 Ala. App. 286, 73 So. 148; *Snow v. Indiana &c. R. Co.*, 109 Ind. 422, 9 N. E. 702; *C. F. Adams Co. v. Helman*, 58 Ind. App. 394, 400, 106 N. E. 733; *Stoner v. Chicago &c. R. Co.*, 109 Ia.

the cases.<sup>31</sup> In a parol transaction there is no magic in a word. A "waiver" of an accrued right can only mean an agreement to surrender it for nothing. Such an agreement has no more validity than any other parol promise without consideration.<sup>32</sup> Logically this same criticism might seem applicable to the rule that a right of action against an agent for an act done by him in violation of his contract with his principal may be discharged by ratification;<sup>33</sup> but when once the doctrine of fictitious relation of ratification is accepted, as it must be, there is no difficulty here.

### § 695. Laches.

Courts of equity refuse to give relief to a plaintiff who has been guilty of such delay in asserting a right of action after it

551, 80 N. W. 569; *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 76 N. W. 380, 44 L. R. A. 415; and cases cited *infra*, § 1826.

In *Fraser v. Young*, [1913] 1 Ch. 272, a legacy had been left to trustees in trust to pay the plaintiff the income for her life, and thereafter to her son for life. On his death the capital and income were to fall into a residuary trust for others. Shortly after the creation of the trust the plaintiff wrote to one of the trustees saying she preferred to have no interest in the trust, and on being sent a check for the interest, replied "I made it very plain, I think, to you and Mr. Young, that I have no interest whatever in Miss Young's will, and wish for none, so do not let me be troubled further." The income was thereafter paid to the plaintiff's son. After some years, however, he died and the plaintiff thereupon demanded a future income. She was held entitled to it on the ground that she had received no consideration for giving up the income; that no one had changed position on the faith of what she had done, as she did not seek to disturb any past payments under the trust.

<sup>31</sup> In *Grubbe v. Lahay*, 156 Wis. 29,

145 N. W. 207, 51 L. R. A. (N. S.) 358, the court held that even though the creditor of two joint debtors received no sufficient consideration in the promise of one of the debtors to assume the whole indebtedness which would support a promise to discharge the other, yet the creditor might "waive" his claim against the latter so as to preclude a subsequent suit against him. As the Wisconsin court holds with most others that payment of a lesser amount cannot discharge a greater (*supra*, § 120), the grotesque result is therefore reached that though an agreement to settle a ten dollar claim for nine dollars is invalid an agreement to "waive" it for nothing is effectual. So it has been held that where a contractor, after the expiration of the time limit prescribed by the contract, is permitted to continue to work and receives payment therefor, the owner cannot claim the liquidated damages for delay for which the contract provides. *Pressey v. McCormack*, 235 Pa. 443, 84 Atl. 427. See also *Maltbie v. Gadd*, 101 Wash. 483, 172 Pac. 557.

<sup>32</sup> See *supra*, §§ 120, 130.

<sup>33</sup> See *supra*, § 200.

has arisen as to make the assertion unjust. If he has led the defendant to believe that the right will not be asserted either by word or conduct, this circumstance will have an important bearing on the question of inexcusable delay; but as in the case of election, it is not essential that the defendant should have assented to any promise or proposition, or relied on any statement of the plaintiff. If the plaintiff said to the defendant every day from the time when his claim first arose—"I am going to sue you very soon," so that no reliance on misleading conduct could be urged, delay might none the less be fatal if a court of equity thought the plaintiff had remained inactive so long that it would be an injustice to allow recovery. The doctrine of laches is peculiar to courts of equity and is not ground for an equitable injunction of legal rights. Accordingly it is only an equitable remedy to enforce a legal right, or an equitable right which is wholly unrecognized by a court of law which can be thus barred.<sup>34</sup>

**§ 696. Whether intention is essential for gratuitous surrenders or for laches.**

Where promises without consideration to discharge rights or assume liabilities are enforced under the name of waiver, the immateriality of intention is not so clear, as in some of the cases already considered, since the enforcement of such promises is anomalous and gives the promisee an advantage for which he has not bargained, and on the strength of which he has not changed his position. There is ground here for asserting that unless the promisor actually intended the surrender of a legal right of the existence of which he was aware, the promise should not be enforceable. It is to be observed, however, that such is not the law in regard to new promises by a surety to pay debts to which the law gives him a defense.<sup>35</sup> And a new promise to pay a debt will extend the period of the Statute of Limitations irrespective of the debtor's knowledge of the existence of the statute or intentions with reference to it.<sup>36</sup> As a final blow to the word "intentional" or "voluntary" in the traditional defi-

<sup>34</sup> See Pomeroy, *Equitable Remedies*, §§ 19-36.

<sup>35</sup> See §§ 160 *et seq.* and cases therein cited.

<sup>36</sup> See *supra*, § 157.

nition of waiver,<sup>37</sup> it may be added that when waiver is given the last of the meanings suggested for it,<sup>38</sup> that of laches, it cannot be admitted that intention is a necessary element. A negligent failure to assert an equitable right promptly is surely ground for denying an equitable remedy, with whatever intention or lack thereof the negligence may be accompanied.<sup>39</sup>

**§ 697. Knowledge of facts is necessary to make binding a promise to give up an accrued defence or to constitute laches.**

If a so-called waiver, which is merely promise, unsupported by consideration or promissory estoppel, to give up a matured right or a defence, is ever valid (save in a few exceptional cases like the Statute of Limitations) it can only be so where the promisor clearly manifests an intent to promise with full understanding of the facts. It is perhaps with this sort of case chiefly in mind that the statement is commonly made that knowledge of the facts is necessary to an effective waiver;<sup>40</sup> and though no sharp boundaries can be drawn defining the requisites of laches or acquiescence, a court would be slow to refuse relief on this ground unless there was either actual knowledge of the facts or at least great negligence in the matter.<sup>41</sup>

As the doctrine of laches is an equitable limitation of rights given by the law, all circumstances of the case may be considered, and here the knowledge or ignorance not only of facts but of legal rights is material.<sup>42</sup>

<sup>37</sup> See *supra*, § 678.

<sup>38</sup> See *supra*, § 679.

<sup>39</sup> See, *e. g.*, *Commercial Trust Co. v. L. Wertheim & Co.*, 88 N. J. Eq. 143, 151, 102 Atl. 448.

<sup>40</sup> *Crosthwaite v. Lebus*, 146 Ala. 525, 41 So. 853; *Pease v. Trench*, 98 Ill. App. 24, *affd.* 197 Ill. 101, 64 N. E. 368; *Patterson v. Nixon*, 79 Ind. 251; *Bannon v. Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170; *Centennial Eureka Min. Co. v. Juab County*, 22 Utah, 395, 62 Pac. 1024.

<sup>41</sup> See *Cholmondeley v. Clinton*, 2 Meriv. 171, 362; *Royce v. Carpenter*, 80 Vt. 37, 66 Atl. 888.

<sup>42</sup> It is of this sort of case that the court in *Vyvyan v. Vyvyan*, 30 Beav. 65, 74, is speaking: "Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim." Similar statements are made in other cases: "The person who acquiesces must know exactly the nature of the thing to which his acquiescence is supposed to be given. He must know that, and he must know also the effect of his acquiescence." *Strange v.*

**§ 698. Ignorance of the legal effect of known facts is not material except in the case of laches.**

It is generally true in the common law that ignorance of the legal consequences of known facts is immaterial. Certainly such ignorance will not prevent appropriate conduct from amounting to a promissory estoppel or an election; and in cases where a new promise to pay an obligation subject to a defence imposes liability, though knowledge of the facts is essential, knowledge of their legal effect is not.<sup>43</sup> In a few decisions, however, repetition of the formula that waiver is an intentional surrender of a known right has induced courts to suppose that there must be not only knowledge of the facts but of their legal effect.<sup>44</sup>

**§ 699. Illustration of the foregoing principles: Building contracts.**

The various ways in which defences and rights may be surrendered find frequent illustration. Though the discharge of vested rights by parol agreement is primarily dealt with in other portions of this book,<sup>45</sup> it is not possible wholly to dissociate treatment of waiver in the narrow sense to which it is desirable to confine it from cases where the other principles which have been distinguished from waiver in the preceding sections are involved; and in considering various groups of cases, commonly dealt with under the head of waiver, the fundamental principles underlying them will be sought. Those classes of cases especially will be considered which give the best opportunity for analyzing the different principles that may be involved in the varying situations where what is called a waiver occurs; though the instances thus noted are not the only ones that may be found.<sup>46</sup>

Fooks, 4 Giff. 408, 413. "Acquiescence, without full and sufficient knowledge and understanding of the real nature and effect of the instrument, can be of no avail." *Prideaux v. Lonsdale*, 9 Jur. (N. S.) 488, 491.

<sup>43</sup> See *supra*, §§ 157, 239.

<sup>44</sup> *Globe Brewing Co. v. American Malting Co.*, 152 Ill. App. 194; *Rosen*

*v. German Alliance Ins. Co.*, 106 Me. 229, 232, 76 Atl. 688; *List v. Chase*, 80 Ohio St. 42, 88 N. E. 120; *Wilson v. Carpenter*, 91 Va. 183, 192, 21 S. E. 243, 50 Am. St. Rep. 824.

<sup>45</sup> See *supra*, §§ 120 *et seq.*, *infra*, §§ 1793 *et seq.*

<sup>46</sup> See *supra*, § 139.

Many cases have arisen where builders and contractors have failed to complete the agreed work by the time fixed in the contract. If prior to the expiration of the time the owner has extended it, and the builder relying thereon fails to use the utmost diligence to finish the work within the time originally agreed upon, there is a waiver in the strict sense of the word, and the situation thereafter is the same as if the extended time had been that originally fixed in the contract.<sup>47</sup> If after the time has already elapsed the owner permits the builder to continue to work, even if the contract or materiality of the breach gave the owner power to terminate the contract on such a contingency, his conduct is an election to go on with the contract rather than to forfeit it, and on the completion of the work the owner is liable for the price,<sup>48</sup> though he is entitled to a cross-claim for any damages caused by the delay.<sup>49</sup>

<sup>47</sup> *Thornhill v. Neats*, 8 C. B. (N. S.) 831; *Mundy v. Stevens*, 61 Fed. 77, 9 C. C. A. 366; *O'Keefe v. St. Francis Church*, 59 Conn. 551, 22 Atl. 325; *Young v. Wells Glass Co.*, 187 Ill. 626, 632, 58 N. E. 605, affm. 87 Ill. App. 537; *Erskine v. Johnson*, 23 Neb. 261, 36 N. W. 510; *Emslie v. Livingston*, 51 N. Y. App. Div. 628, 64 N. Y. S. 259. See also *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714. But even though the promised extension preceded the expiration of the time allowed in the contract if the builder did not act in reliance on the promise, he is not excused from liability. *Jobst v. Hayden*, 84 Neb. 735, 121 N. W. 957, 50 L. R. A. (N. S.) 501. See also *Empire State Surety Co. v. Hanson*, 184 Fed. 58, 107 C. C. A. 1.

<sup>48</sup> *Lucas v. Godwin*, 3 Bing. (N. C.) 737; *Van Stone v. Stillwell*, etc., Mfg. Co., 142 U. S. 128, 35 L. Ed. 961, 12 S. Ct. 181; *Nibbe v. Brauhn*, 24 Ill. 268; *Cummings v. Pence*, 1 Ind. App. 317, 27 N. E. 631; *Krause v. School Trustees* (Ind. App.), 66 N. E. 1010; *Adams v. Hill*, 16 Me. 215; *Dunn v. Steubing*, 120 N. Y. 232, 24 N. E. 315; *Deeves v. Manhattan Life Ins. Co.*,

195 N. Y. 324, 88 N. E. 395; *Smith v. Smith*, 45 Vt. 433; *Foster v. Worthington*, 58 Vt. 65, 4 Atl. 565.

<sup>49</sup> *Lawrence County v. Stewart*, 72 Ark. 525, 81 S. W. 1059; *Eureka Stone Co. v. First Church*, 86 Ark. 212, 110 S. W. 1042, 126 Am. St. 1088; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637; *McIntire v. Barnes*, 4 Colo. 285; *Cannon v. Wildman*, 28 Conn. 472; *Snell v. Cottingham*, 72 Ill. 161; *Cummings v. Pence*, 1 Ind. App. 317, 320, 27 N. E. 631; *Kenny v. Monahan*, 53 N. Y. App. Div. 421, 424, 66 N. Y. S. 10, aff'd 169 N. Y. 591, 62 N. E. 1096; *Deeves v. Manhattan L. Ins. Co.*, 195 N. Y. 324, 330, 88 N. E. 395; *Smith v. Smith*, 45 Vt. 433, 440. In Pennsylvania, apparently misled by the ambiguity of the word waiver, the court has held that the owner's consent to the continuance of the contract involves a surrender of his claim to damages. *Coryell v. Du Bois Borough*, 226 Pa. 103, 75 Atl. 25; *Philadelphia v. Tripple*, 230 Pa. 480, 79 Atl. 703; *Pressy v. McCornack*, 235 Pa. 443, 84 Atl. 427; and see *Hutchinson v. New Sharon &c. Ry.*, 63 Ia. 727, 18 N. W. 915; *Henderson Bridge Co. v.*



Whether this claim may be voluntarily surrendered by the owner by paying the full agreed price<sup>50</sup> seems analogous to questions elsewhere discussed involving the surrender of a right in consideration of the performance of a contractual duty.<sup>51</sup>

**§ 700. Acceptance of defective performance of a contract to sell goods does not necessarily indicate release of liability for defective performance.**

Much confusion exists in American law on the right of a buyer who has accepted goods to sue for damages thereafter because of their defective quality, or because of other defects in the seller's performance. The question involved is not peculiar to the law of sales. It arises in every branch of the law of contracts. The problem is simply this: Does one party to a contract who has acquired a right to rescind it or refuse to go on with it, and who, nevertheless, allows the party in default to continue with the contract and accepts his defective performance, thereby manifest an agreement that the performance so received shall be taken as full satisfaction of all obligations? If a party in default on a contract is allowed to continue to perform, this must necessarily involve the loss of any right of rescission or refusal to go on with the contract because of any known default that has already taken place. Thus where a buyer knowingly accepts goods which are not what he contracted to buy, he cannot rescind the sale;<sup>52</sup> and the retention of articles purchased is as effectual an acceptance of them as if the purchaser intimates to the seller that they are accepted.<sup>53</sup> This presents a case of election,<sup>54</sup> but the obligation of the party in default is not necessarily thereby terminated, nor his liability to pay damages for his insufficient performance. To produce such a result mutual assent is surely necessary; and unless it is asserted that surrender of a right may be made

O'Connor, 88 Ky. 303, 11 S. W. 18, 957.

<sup>50</sup> In *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714, though full payment was not made, the court held the owner barred from claiming the liquidated damages for which the contract provided.

<sup>51</sup> See *supra*, § 130; also *infra*, §§ 704 *et seq.*

<sup>52</sup> *Barry v. Danielson*, 78 Wash. 453, 139 Pac. 223.

<sup>53</sup> *Ohio Elec. Co. v. Wisconsin, etc., Co.*, 161 Wis. 632, 155 N. W. 112.

<sup>54</sup> See *supra*, § 683.

without either promissory estoppel or consideration, there must also be one of these elements.<sup>55</sup> The acceptance of defective performance does not in fact always justify the conclusion that the injured party agrees to accept the defective performance in full satisfaction, and where no such assent is indicated in fact there is no mutual assent in law, except as stated in the following section.<sup>56</sup>

<sup>55</sup> See *infra*, § 727.

<sup>56</sup> In *Frankfurt-Barnett Co. v. William Prym Co.*, 237 Fed. 21, 28, 29, 150 C. C. A. 223, the court said: "Unless a waiver is under seal, or arises from conduct creating an estoppel, it must be supported by an agreement founded upon a valuable consideration. *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360; *Hastings v. Lovejoy*, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462; *Underwood v. Farmers', etc., Ins. Co.*, 57 N. Y. 500; *Atlantic Coast Line R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30. . . .

"In *Page on Contracts*, vol. 3, § 1519, that writer correctly says that waiver of the right to treat a breach of contract as a discharge of contract liability may take place without a waiver of the right to maintain an action for damages, and the weight of authority is that it is not such a waiver. And in section 1510 the same writer states that acceptance after breach is not a waiver of a right of action for damages is apparent when it is considered that the party not in default is often constrained by his necessities to take what he can get under his contract when he can get it. . . .

"In *Granniss, etc., Co. v. Deeves*, 72 Hun, 171, 25 N. Y. S. 375, Judge Van Brunt, speaking for the court said: 'Undoubtedly the defendant had the right to terminate the contract if the plaintiff was not proceeding with that diligence which the terms of the contracts required; but this was not his only remedy. He had a right to let the plaintiff go on and complete his work, and then he had the right to say: 'I

will pay you for the work you have done, but I want the damages you have caused me in not doing my work as you agreed to do it.' The court understood that to be the principle decided in *Dunn v. Steubing*, 120 N. Y. 232, 24 N. E. 315. In *Crocker-Wheeler Co. v. Varick Realty Co.*, 104 N. Y. App. Div. 568, 88 N. Y. S. 412, 94 N. Y. S. 23, the parties had entered into a contract for the installation of an elevator in a building. The contractor did not complete the contract within the prescribed time. The owner did not exercise the right to terminate the contract, but permitted the contractor to go on and complete the work. The court held that the owner thereby waived the right which it otherwise might have asserted to plead the delay in the performance of the contract as a defence to an action for the agreed price of the elevator; and it was also held, and that is the portion of the decision with which we are particularly concerned, that the owner did not thereby waive its right to counterclaim, in an action brought by the contractor to recover the agreed price of the elevator, the amount of any actual damages which it had suffered by reason of the delay in performance.

"This doctrine was again announced in *Beyer v. Henry Huber Co.*, 115 N. Y. App. Div. 342, 100 N. Y. S. 1029; and in *Reading Hardware Co. v. City of New York*, 129 N. Y. App. Div. 292, 113 N. Y. S. 331; as well as in *General Supply & Construction Co. v. Goelet*, 149 N. Y. App. Div. 80, 133 N. Y. S. 978."

**§ 701. If goods are offered as full satisfaction they must be taken as such if taken at all.**

Where an offer is made which contemplates action on the part of the offeree, which can only be rightfully taken if the offer is accepted, the offeree is not allowed to take the action and yet assert that he did not accept the offer. The commonest illustration of this principle is where a check is sent in full satisfaction of an unliquidated claim.<sup>57</sup> But it is equally applicable where unspecified goods are contracted to be sold by description. If, therefore, the seller notifies the buyer that the goods which he, the seller, is tendering are tendered in full discharge of the seller's liabilities, an acceptance of the goods by the buyer will necessarily involve assent to the proposition. Only on the assumption of such assent is the buyer entitled to the goods. True, he may have a contract right for some goods of the sort, but he has no right to enforce the contract by taking goods from the seller against the latter's will. As, however, a contract, of accord and satisfaction, if made, will be in derogation of the buyer's rights and will operate to discharge one who is by hypothesis failing to perform a legal duty, no artificial presumption should be made that the offer of the seller when he tenders the goods is made only on the condition that they shall be accepted as full satisfaction. Moreover, there is involved a question of consideration as well as of mutual assent. If the seller is merely fulfilling a legal duty in delivering the goods, his doing so will not support an agreement to discharge him from liability;<sup>58</sup> and though the giving of goods, different—even inferior—to those contracted for will suffice as consideration,<sup>59</sup> the mere fact that goods which are due are delivered later than was agreed, it seems will not make the delivery sufficient. It is true that unless the contract was for specific goods, the seller, though he was bound to deliver goods of the kind which he does, was not bound to deliver those particular goods. But neither is a debtor who pays part of a debt in attempted satisfaction of the whole bound to pay the particular money which he does, yet that fact does not make his payment suffice as consideration for a promise by the creditor.<sup>60</sup>

<sup>57</sup> See *infra*, § 1854.

<sup>58</sup> See *supra*, § 130.

<sup>59</sup> *Ibid.*

<sup>60</sup> See *supra*, § 121, also *infra*, § 704.

**§ 702. Acceptance of defective performance by a buyer.**

There is no reason why the rule in the law of sales should differ from that elsewhere in the law of contracts. When insufficient performance is tendered to the buyer he should not be debarred from recovering damages because of the insufficiency, unless he has agreed to accept what has been offered him as full satisfaction of all his rights, and has received sufficient consideration or his agreement. There seems no ground for saying that the mere fact that he has taken the goods indicates such assent.<sup>61</sup>

If ten barrels of flour are contracted for and five are sent, the fact that the buyer takes the five sent certainly does not indicate that he assents to the performance as a full satisfaction. It is a partial performance and partial satisfaction, and he takes it as such; nor is he bound to assume that the seller intended it otherwise. If all ten barrels are sent, but later than they should have been, the same reasoning is applicable. And in the common case where the defect in the performance is the inferior quality of the flour, it is also true that taking the flour does not prove that the buyer agrees to accept it as full satisfaction. As the hypothesis is that the performance is not what the contract requires, the burden is upon the seller to prove an assent to receive it as such. Taking the flour does not necessarily show assent, in fact, to excuse the seller from his breach of contract, and there seems no reason for laying down as an absolute rule of law, which must in a measure be fictitious, that assent is to be conclusively presumed. The weight of authority supports the view here taken but less definitely in regard to the last proposition than the others.

**§ 703. The buyer may sue for defective quantity.**

The buyer need not accept any performance if the goods offered are too many or too few to satisfy the contract.<sup>62</sup> Sometimes, however, he does take what is offered to him, but

<sup>61</sup> "It is not the law that the acceptance of the performance of one service or duty when two are due, is an abandonment of all claim of damages for the service not performed." *Dicks v.*

*Belsher*, 80 Ala. 369; *North Alaska Salmon Co. v. Hobbs, etc., Co.*, 159 Cal. 380, 113 Pac. 870, 120 Pac. 27.

<sup>62</sup> See *infra*, § 958.

in such a case it is safe to assume that it would generally be held in the absence of other evidence of assent to an accord and satisfaction that the buyer could recover damages for the failure to deliver as much as the seller had agreed to deliver.<sup>63</sup> If such assent could be established, there would be no difficulty in finding sufficient consideration, unless the changed agreement involved a delivery of a smaller quantity than that contracted for, at the price of the larger quantity. It may be observed that where there is defective quantity the seller must generally be assumed to have knowledge of the fact and not to dispute it. Whereas when quality is alleged to be defective this cannot be said. If too large a quantity is sent and accepted, the conclusion of assent to a substituted bargain is irresistible.<sup>64</sup> Where goods are delivered in instalments, however, an insufficient quantity may be accepted on the assumption that the remainder will be delivered later. In such a case the buyer if still able to do so may return what he has received and refuse to pay for them or, if he has already paid, may recover the payment.<sup>65</sup>

§ 704. The buyer may sue for delay in performance.

Lord Blackburn in his treatise on the Law of Sales <sup>66</sup> says: "The vendee may accept the goods and bring his action for any damages he may have actually suffered in consequence of the late delivery. He does not by accepting the late delivery waive any claim he may have for damages arising from the delay." This rule is acknowledged in most of the American

<sup>63</sup> *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. 71; *Harber v. Moffat Cycle Co.*, 151 Ill. 84, 37 N. E. 676; *Hjorth v. Albert Lea Mach. Co.* (Minn.), 172 N. W. 488; *Fox v. Baggett*, 101 Miss. 519, 58 So. 481; *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; *Kipp v. Meyer*, 5 Hun, 111; *Hall v. New Hartford Canning Co.*, 153 N. Y. App. Div. 562, 138 N. Y. S. 866. The buyer is liable to pay for what he accepts. *Lorraine Mfg. Co. v. Oshinsky*, 182 Fed. 407; *Hall v. New Hartford Canning Co.*, 153 N. Y. App. Div. 562, 138 N. Y. S. 866; and *infra*, § 958.

<sup>64</sup> *Capper v. Manufacturers' Paper Co.*, 86 Kans. 355, 121 Pac. 519; *Linger v. Wilson*, 73 W. Va. 669, 80 S. E. 1108.

<sup>65</sup> *Oxendale v. Wetherell*, 9 B. & C. 386, 387; *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128, 138, 140; *Boyd v. Second Hand Supply Co.*, 14 Ariz. 36, 123 Pac. 619; *Polhemus v. Heiman*, 45 Cal. 573; *Williston, Sales*, § 460.

<sup>66</sup> (2d ed.), 524. The doctrine of the text is supported by the later decision of *Clydebank Co. v. Yzquierdo y Castaneda*, [1905] A. C. 6.

decisions.<sup>67</sup> It seems to be generally assumed that if the buyer does accept delayed performance as full satisfaction of the seller's obligation, he has no further claim, but some evidence other than mere acceptance of the goods is necessary to warrant this conclusion.<sup>68</sup> Payment of the price in full has been held sufficient evidence of assent,<sup>69</sup> and so has giving a note for the price after the delayed receipt of the goods.<sup>70</sup> Either of these circumstances undoubtedly shows assent on the buyer's part, but it is troublesome to find a sufficient consideration. Even though there was assent to an accord and satisfaction when the goods were received, the only consideration for the buyer's agreement to surrender his right to damages for late

<sup>67</sup> *Phillips & C. Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Jeffrey Mfg. Co. v. Central Coal & I. Co.*, 93 Fed. 408; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299; *Poland Paper Co. v. Foote Co.*, 118 Ga. 458, 45 S. E. 374; *Hansen v. Kirtley*, 11 Iowa, 565; *Medart Pulley Co. v. Dubuque Mill Co.*, 121 Iowa, 244, 96 N. W. 770; *Morgan v. Sutlive*, 148 Ia. 318, 126 N. W. 175; *Johnson v. No. Baltimore Glass Co.*, 74 Kans. 762, 88 Pac. 52, 7 L. R. A. (N. S.) 1114; *Koehler v. York Mfg. Co.*, 193 Fed. 981, 113 C. C. A. 601; *Carson Muse Lumber Co. v. Fairbanks*, 151 Ky. 404, 152 S. W. 256; *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Whalon v. Aldrich*, 8 Minn. 346; *Redlands Orange Growers' Assn. v. Gorman*, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718; *Wall v. St. Joseph Storage Co.*, 112 Mo. App. 659, 87 S. W. 574; *Beyer v. Henry Huber Co.*, 100 N. Y. S. 1029; *Crocker-Wheeler Co. v. Varick Realty Co.*, 104 N. Y. App. Div. 568, 94 N. Y. S. 23; *Kleinfelter v. Granger*, 136 N. Y. S. 485; *Mohn v. New York & C. Coal Co.*, 145 N. Y. S. 116; *Reagan Round Bale Co. v. Dickson Car Wheel Co.*, 55 Tex. Civ. App. 509, 121 S. W. 526;

*Perry Tie Co. v. Reynolds*, 100 Va. 264, 40 S. E. 919; *Wisconsin Lumber Co. v. Pacific Tank Co.*, 76 Wash. 452, 136 Pac. 691; *Lukens Iron & Steel Co. v. Hartmann-Greiling Co.*, (Wis. 1919), 172 N. W. 894. But see *contra*, *Minneapolis Threshing Mach. Co. v. Hutchins*, 65 Minn. 89, 67 N. W. 807.

<sup>68</sup> See cases cited in the preceding note; also *Ramsey v. Tully*, 12 Ill. App. 463; *Belcher v. Sellards*, 19 Ky. L. Rep. 1571, 43 S. W. 676; *Russell v. Clark*, 112 Me. 160, 91 Atl. 602; *Merrimac Mfg. Co. v. Quintard*, 107 Mass. 127; *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25; *Murmann v. Wissler*, 116 Mo. App. 397, 92 S. W. 355; *Rockwell Mfg. Co. v. Cambridge Springs Co.*, 191 Pa. St. 386, 43 Atl. 327; *Strain v. Pauley Mfg. Co.*, 80 Tex. 622, 16 S. W. 625; *Schweickhart v. Stuewe*, 71 Wis. 1, 36 N. W. 605, 5 Am. St. Rep. 190.

<sup>69</sup> *Medart Pulley Co. v. Dubuque Mill Co.*, 121 Iowa, 244, 96 N. W. 770; *Roby v. Reynolds*, 65 Hun, 486, 20 N. Y. S. 386. But see *contra*, *Clydebank Co. v. Yzquierdo y Castaneda*, [1905] A. C. 6. See also *Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976.

<sup>70</sup> *Reid v. Field*, 83 Va. 26, 1 S. E. 395.

delivery, is the actual delivery of the goods. It may be urged that the late delivery is a different thing from the earlier delivery and therefore the consideration is valid. If the late delivery involves a corresponding delay in payment, this seems true and sufficient, but if payment has already been made, or the time of payment is fixed without regard to the date of delivery, it would seem that late delivery though a different thing from early delivery must be regarded as a worse thing. It certainly is true that delayed payment of money is a worse thing than early payment, and will not serve as consideration.<sup>71</sup> Similar difficulties arise where the price has been paid in full, or a note given for it. If the payment is not made until the time of the delivery of the goods, what has been said sufficiently indicates that there will generally be sufficient consideration to support the agreement of the parties.<sup>72</sup> If, however, the payment is made at the same fixed date as if there had been prompt delivery of the goods, and assent at the time of delivery is relied upon, as a discharge of the seller from liability for his delay, on ordinary principles of contract there must be consideration given at that time, for the buyer's agreement to surrender his claim. This cannot possibly be found.

It may well be that the English court would follow this reasoning and hold the agreement invalid, but it seems evident that American courts overlook or disregard the point, and the situation must probably be accepted by an American lawyer as one of the cases where an agreement to surrender a right is binding without seal, consideration or estoppel. A few cases, indeed, hold as matter of law that the acceptance of the goods necessarily involves an acceptance of them as full satisfaction of the contract and discharges any right to damages for the delay.<sup>73</sup> In a few other decisions the same rule is laid down,

<sup>71</sup> See *supra*, § 120. See also *Weeks v. Rector*, 56 N. Y. App. D. 195, 200, 67 N. Y. S. 670.

<sup>72</sup> There would not be unless the payment would have been due earlier had the goods been seasonably delivered.

<sup>73</sup> *Fraser v. Roes*, 1 Pennew. 348, 41 Atl. 204; *Jones v. Bloomgarden*, 143

Mich. 326, 106 N. W. 891; *Burrowes Co. v. Rapid Safety Filter Co.*, 97 N. Y. S. 1048; 45 N. Y. Misc. 539; *Baker v. Henderson*, 24 Wis. 509. In *Lee v. Bangs*, 43 Minn. 23; s. c., *sub nom.*, *Sole Leather Over Mfg. Co. v. Bangs*, 44 N. W. 671, acceptance of goods prematurely sent was said to conclude the buyer's rights.

but subject to the qualification that the buyer's acceptance to have this effect must be without making objection on the ground of delay.<sup>74</sup> Acceptance of goods prematurely offered may more readily warrant the conclusion of acceptance as full satisfaction, since if the buyer preferred to have the goods strictly at the time when performance was due, he could probably secure this result by a refusal to receive them earlier.<sup>75</sup> Analogous to the case of late delivery of goods is a situation where the owner of premises delays a contractor in the performance of his contract. The election of the contractor to continue performance in spite of the delay does not deprive him of a right to damages therefor.<sup>76</sup>

**§ 705. Circumstance under which the buyer may have a right to sue for defective quality.**

In the discussion of the seller's liability for defective quality of goods which have been accepted by the buyer, it must be borne in mind that the question cannot arise unless the seller has broken a promise. If the seller's performance fulfills his obligation in regard to the quality of goods whether because the seller made no promises in regard to their quality or because such promise as he did make has been fulfilled, no question can arise as to his liability. The hypothesis, is, therefore, that the goods which the seller tenders in his performance of the contract might have been refused by the buyer on account of the seller's failure to fulfill his obligation. The obligation of the seller may have been stated either in adjective form as part of the description of the goods (what has been called a condition by some writers and judges),<sup>77</sup> or the broken promise may have been in the form of a collateral warranty, or it may have been a warranty implied by law. It is to be noticed that all these

<sup>74</sup> *Baldwin v. Farnsworth*, 10 Me. 414; *Minneapolis Threshing Machine Co. v. Hutchins*, 65 Minn. 89, 67 N. W. 807; *Bock v. Healy*, 8 Daly, 156; *Jones v. Nat. Printing Co.*, 13 Daly, 92.

<sup>75</sup> *Lee v. Bangs*, 43 Minn. 23; s. c., *sub nom.*, *Sole Leather Over Mfg. Co. v. Bangs*, 44 N. W. 671. See also *Ros-*

*enthal v. Rambo*, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678.

<sup>76</sup> *Louisville &c. R. Co. v. Hollerbach*, 105 Ind. 137, 5 N. E. 28; *Weeks v. Rector*, 56 N. Y. App. D. 195, 67 N. Y. S. 670.

<sup>77</sup> See criticism on this nomenclature, *supra*, § 665; *Williston, Sales*, § 179.



possible forms of obligations are equally possible where the seller's breach of duty is a delay in time. The obligation to perform within a certain time, though not naturally stated as part of the description of the goods, may be so stated. It is more naturally and commonly stated as a collateral stipulation. If no provision in regard to time is stated in the contract, the obligation to perform within a reasonable time will be implied.<sup>78</sup>

**§ 706. Buyer's agreement to surrender his right must be proved as a fact.**

In the cases relating to default in time, the results reached do not seem to have been made to depend on the way in which the seller bound himself to perform within a certain limit of time. It is hard to see why any greater importance should be given to such distinctions where the seller's breach of duty relates to the defective quality of the goods. It is doubtful if the intention of the parties varies with the form in which the promise is put, whether as part of the description of the goods, or as a strictly collateral warranty. No doubt it is possible, however, for the buyer not merely to accept title to the goods offered, but to accept the transfer of title as full satisfaction of all the seller's obligations under the contract. Whether the buyer thus agrees to waive deficiencies in performance is logically and should, it seems, be legally a question of fact in each case, unless the seller has made it clear that the goods, such as they are, must be taken as full satisfaction, if taken at all. In that case it may well be that the buyer must refuse the goods or surrender any claim for their defects. But that case seldom occurs. What is here insisted upon is that in the ordinary case where goods are offered without discussion, the mere fact that title to the goods has been accepted does not, of itself, warrant the conclusion that the buyer has agreed to surrender a claim against the seller because the latter failed to perform his promise. The view here advocated, that acceptance of title does not as matter of law indicate a waiver of claims for inferior quality of the goods, is supported by a

<sup>78</sup> See *supra*, § 38.

large number of decisions in the United States,<sup>79</sup> and is the unquestioned law of England.<sup>80</sup>

### § 707. Effect of retention without complaint.

While merely taking title to the goods does not warrant

<sup>79</sup> *English v. Spokane Commission* Co., 48 Fed. 196; *Meyer v. Everett Pulp & Paper Co.*, 193 Fed. 857, 113 C. C. A. 643; *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Frith v. Hollan*, 133 Ala. 583, 32 So. 494, 91 Am. St. Rep. 54; *Baer v. Mobile Cooperage Co.*, 159 Ala. 491, 49 So. 92; *North Alaska Salmon Co. v. Hobbs*, 159 Cal. 380, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501; *Grisinger v. Hubbard*, 21 Ida. 469, 122 Pac. 853; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *Morris v. Wilbaux*, 159 Ill. 627, 43 N. E. 837; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987 (but see *Eureka Steel Co. v. Morden Frog Works*, 23 Ill. App. 591; *Barker v. Turnbull*, 51 Ill. App. 226, 229; *McLeod v. Andrews*, 116 Ill. App. 646, where the Illinois Court of Appeals, misinterpreting *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. 71, fails to follow the doctrine of the Illinois Supreme Court); *Hege v. Newson*, 96 Ind. 426, 431; *Graff v. Osborne*, 56 Kans. 162, 42 Pac. 704; *Payne v. Lumber Co.*, 110 La. 750, 34 So. 763; *Campion v. Marston*, 99 Me. 410, 59 Atl. 548; *Taylor v. Cole*, 111 Mass. 363; *Gilmore v. Williams*, 162 Mass. 351, 38 N. E. 976; *Borden v. Fine*, 212 Mass. 425, 98 N. E. 1073; *St. Louis Brewing Assn. v. McEnroe*, 80 Mo. App. 429; *Edwards v. Noel*, 88 Mo. App. 434; *Huber Mfg. Co. v. Hunter*, 99 Mo. App. 46, 72 S. W. 484; *Monarch Metal Weather Strip Co. v. Hanick*, 172 Mo. App. 680, 155 S. W. 858; *Simrall v. American Multigraph Sales Co.*, 172 Mo. App. 384, 158 S. W. 437; *Spiers v. Halsted, Haines & Co.*, 74

N. C. 620; *Lewis v. Rountree*, 78 N. C. 323; *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115 (but see *Parker v. Fenwick*, 138 N. C. 209, 50 S. E. 627); *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 67 N. W. 298; *Morse v. Union Stock Yards*, 21 Oreg. 239, 28 Pac. 2, 14 L. R. A. 157; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570; *Jacot v. Grossmann Seed Co.*, 115 Va. 90, 78 S. E. 646; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890; *Konnerup v. Allen*, 56 Wash. 292, 105 Pac. 639; *Eichbaum v. Caldwell Bros. Co.*, 58 Wash. 163, 108 Pac. 434; *Nicoll v. Modern Steel Structural Co.*, 143 Wis. 545, 128 N. W. 72. See also *Smith v. Mayer*, 3 Colo. 207; *Shupe v. Collender*, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; *Central Trust Co. v. Arctic Mfg. Co.*, 77 Md. 202, 26 Atl. 493; *Dayton v. Hooglund*, 39 Ohio St. 671.

<sup>80</sup> In Benjamin, *Sale* (5th ed.), 1006, it is said: "The second proposition that the buyer may, after receiving and accepting the goods, bring his action (or set up his counterclaim, per Brett, L. J., in *Thomson v. S. E. Ry. Co.*, [1882] 9 Q. B. D. 320, at 330) for damages in case the quality is inferior to that warranted by the seller, needs no authority. It is (so enacted by the Code, § 11 [1] [a], and § 53 [1]), taken for granted in all the cases, there being nothing to create an exception from the general rule that an action for damages lies in every case of a breach of promise made by one man to another for a good and valuable consideration. See the opinions of the judges in *Poulton v. Latimore*, [1829] 9 B. & C. 259."

the conclusion that the buyer has agreed to take the goods in full satisfaction of all the seller's obligation, the retention and use of the goods for a considerable period without any complaint warrants a strong inference either that the goods are what the contract called for, or that the buyer agreed to accept them instead of such goods.<sup>81</sup> Accordingly in many of the decisions to which reference has been made, stress is rightly<sup>82</sup> laid on the importance of accepting under protest or giving prompt notice of defects if the buyer desires to assert a claim for damages.<sup>83</sup> But in other cases this seems less insisted upon. The Supreme Judicial Court of Maine has well stated the doctrine which apart from statute seems sound on principle.<sup>84</sup>

"The fact of acceptance, however, as a matter of evidence,

<sup>81</sup> *Jacot v. Grossman Seed Co.*, 115 Va. 90, 78 S. E. 646. Evidence of such uncomplaining delay may be submitted to the jury on the question of the buyer's good faith in setting up a breach of warranty for the first time when the price is finally sued for. *Fuller v. Harris*, 48 Wash. 519, 93 Pac. 1060. In *Puffer Mfg. Co. v. Krum*, 210 Mass. 211, 96 N. E. 139, the court said: "We do not mean to intimate that the auditor was not justified in his finding, that the giving of the lease and check, and payment of the notes after the defendant had full knowledge of the imperfections in the fountain was in fact an acceptance of the fountain as a fulfillment of the contract of purchase." See also *Maltbie v. Gadd*, 101 Wash. 483, 172 Pac. 557.

<sup>82</sup> *Hodge v. Tufts*, 115 Ala. 366, 22 So. 422; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. 71; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224; *Parker v. Fenwick*, 138 N. C. 209, 50 S. E. 627; *Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. Dak. 81, 54 N. W. 311; *White v. Oliver*, 32 Okl. 479, 122 Pac. 156; *Morse v. Union Stock Yards*, 21 Oreg.

289, 28 Pac. 2, 14 L. R. A. 157; *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915 B. 1131; *Nicoll v. Modern Steel Structural Co.*, 143 Wis. 545, 128 N. W. 72. But the notice need not point out the particular defects. *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018.

<sup>83</sup> In *Taylor v. Cole*, 111 Mass. 363, the court held that where one for whom a kettle had been made examined it and knew that it leaked but ordered it to be delivered without objection, and notwithstanding the fact that it continued to leak gave his promissory note for the price without objection, there was not conclusive evidence of waiver of all claims to damages. A finding of the jury for the buyer was, therefore, not set aside. See also *Richardson v. Grandy*, 49 Vt. 22; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890; *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893.

<sup>84</sup> *Morse v. Moore*, 83 Me. 473, 481, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783. This extract is quoted with approval in *English v. Spokane Commission Co.*, 48 Fed. 196.

may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond—evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterward, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The laws permit explanation and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury under the direction of the court."

The Uniform Sales Act in section 48 first defines what amounts to acceptance:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

The statute then states the effect of acceptance.<sup>84</sup>

**§ 708. In some states acceptance of title waives right of damages for inferior quality.**

In some States the views which have been expressed in the preceding sections are not supported by the decisions. Especially in New York prior to the enactment in that State of the

<sup>84</sup> See *infra*, § 714.

Uniform Sales Act has it been held that taking title to the goods indisputably proves an assent to accept the goods in full satisfaction of the seller's obligations as to the quality of the goods;<sup>85</sup> and the doctrine of the New York courts has been followed in other jurisdictions.<sup>86</sup>

<sup>85</sup> *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660; *Waeber v. Talbot*, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712; *Staiger v. Soht*, 191 N. Y. 527, 84 N. E. 1120, affg. 116 N. Y. App. Div. 874, 102 N. Y. S. 342; *Ferguson v. Netter*, 204 N. Y. 505, 98 N. E. 16; *Lifshitz v. McConnell*, 80 N. Y. App. Div. 289, 80 N. Y. S. 253; *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 136 N. Y. App. Div. 22, 120 N. Y. S. 163; *Motley v. Elmenhorst*, 142 N. Y. App. Div. 830, 127 N. Y. S. 625; *Howes v. Corti Building Co.*, 76 N. Y. Misc. 507, 135 N. Y. S. 562; *Atlantic Coast Lumber Corp'n v. McCaldin Bros. Co.*, 76 N. Y. Misc. 528, 135 N. Y. S. 627; *R. Young Bros. Feed Co. v. Seymour*, 151 N. Y. App. Div. 549, 136 N. Y. S. 80; *Lowenberg Co. v. Block*, 140 N. Y. S. 375. The law of New York is changed by the Sales Act. See *infra*, § 714.

<sup>86</sup> *Carleton v. Jenks*, 80 Fed. 937, 47 U. S. App. 734, 26 C. C. A. 265; *Oakland Mill Co. v. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93; *Corey's Wholesale Fruit Co. v. Fuller*, 62 Fla. 146, 56 So. 800; *Henderson Elev. Co. v. North Georgia Mfg. Co.*, 126 Ga. 279, 55 S. E. 50; *Springer v. Indianapolis Brewing Co.*, 126 Ga. 321, 55 S. E. 53; *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St.

Rep. 329; *Maynard v. Render*, 95 Ga. 652, 23 S. E. 194; *Underwood v. Caldwell*, 102 Ga. 16, 29 E. S. 164; *Gandy v. Seymour Slack Stave Co. (Ind. App.)*, 90 N. E. 16; *Allison v. Vaughan*, 40 Iowa, 421; *Hirshhorn v. Stewart*, 49 Iowa, 418; *Mackey v. Swartz*, 60 Iowa, 710, 15 N. W. 576; *Schopp v. Taft*, 106 Iowa, 612, 76 N. W. 843; *Keniston v. Todd*, 139 Iowa, 287, 117 N. W. 674; *Jones v. McEwan*, 91 Ky. 373, 16 S. W. 81, 12 L. R. A. 399; *Forsythe v. Russell Co.*, 148 Ky. 490, 146 S. W. 1103; *Albin Co. v. Kentucky Table Co.*, 23 Ky. L. Rep. 2261, 67 S. W. 13; *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 96; *Williams v. Robb*, 104 Mich. 242, 62 N. W. 352; *Henderson Co. v. Stilwell*, 130 Mich. 124, 80 N. W. 718; *Brown v. Harris*, 139 Mich. 372, 102 N. W. 960; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Columbus, etc., Iron Co. v. See*, 169 Mich. 661, 135 N. W. 920; *Gill v. Nat. Gaslight Co.*, 172 Mich. 295, 137 N. W. 690; *Lee v. Bangs*, 43 Minn. 23; s. c., *sub nom. Sole Leather Over Mfg. Co. v. Bangs*, 44 N. W. 671; *Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. 718; *Stilwell Co. v. Biloxi Co.*, 78 Miss. 779, 29 So. 513; *Roman v. Bressler*, 32 Neb. 240, 49 N. W. 368; *Havens v. Grand Island Light, etc., Co.*, 41 Neb. 153, 59 N. W. 681; *Hasen v. Wilhelmie*, 68 Neb. 79, 93 N. W. 920; *Patrick v. Norfolk Lumber Co.*, 81 Neb. 267, 115 N. W. 780; *Brooke v. Laurens Milling Co.*, 78 S. Car. 200, 58 S. E. 806; *Parks v. O'Connor*, 70 Tex. 377, 390, 8 S. W. 104; *Easton v. Dozier (Tex. Civ. App.)*, 148 S. W. 603; *Hurley-Mason*

### § 709. Difficult position of the buyer under this rule.

In jurisdictions where the law, like that of New York prior to the enactment of the Uniform Sales Act, holds that acceptance of the goods (barring the excepted cases hereafter considered) precludes subsequent remedy for inferiority, and also denies the buyer of goods under an executed sale the right of rescission for breach of warranty,<sup>87</sup> a buyer to whom goods are tendered is in a difficult position. If the property in the goods has already passed the buyer will be committing a breach of his obligation if he fails to take the goods even though they do not conform to the warranty. He must take the goods and seek redress in a cross-action or by a counterclaim, when sued for the price. On the other hand, if the property has not passed the buyer must not take the goods if they do not conform to the contract, for if he does so he will thereby extinguish all claims on account of such inferiority. It is frequently a very difficult question to determine whether the property has passed in a given case—a question of doubt even for lawyers and courts. To require a business man offhand to determine whether a contract is executory or whether the property in the goods has already passed, and to impose a severe penalty upon him if he guesses wrong, is certainly an unfortunate state of the law, which should not be tolerated if, as in the matter under consideration it is not necessary.<sup>88</sup>

*Co. v. Stebbins, etc., Co.*, 79 Wash. 366, 140 Pac. 381; *Olson v. Mayer*, 56 Wis. 551, 14 N. W. 640; *Northern Supply Co. v. Wangard*, 117 Wis. 624, 94 N. W. 785, 98 Am. St. Rep. 963; *Northfield Nat. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451. See also *Smith v. New Albany Mill Co.*, 50 Ark. 31, 6 S. W. 225. Of the jurisdictions where the cases in this note were decided, Iowa, Michigan, Minnesota and Wisconsin have subsequently enacted the Uniform Sales Act, the effect of which is stated *infra*, § 714.

<sup>87</sup> As to this, see *infra*, §§ 1461, 1462.

<sup>88</sup> The New York court itself seemed even prior to the enactment of the

Uniform Sales Act, not much disposed to defend the rules which had become established in that State upon the matter. In *Heath Dry Gas Co. v. Hurd*, 124 N. Y. App. Div. 68, 108 N. Y. S. 410, after quoting from *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, a passage to the effect that a warranty, though express, if no other than the law would imply had there been no words of express contract, would not survive acceptance, the court said: "Whatever may be said for or against the principle thus enunciated as formulating one amongst other somewhat refined rules governing the subject of warranties, it seems to have been recognized and to have

**§ 710. Exceptional cases where acceptance of goods does not preclude subsequent objection.**

In the jurisdictions which follow the former New York decisions it is conceded that the rule that acceptance of the goods precludes subsequent objection to quality does not apply to all cases; but the excepted cases do not seem to coincide exactly in all jurisdictions; and it is a matter of extraordinary difficulty to distinguish under this rule in what cases the acceptance does not involve an absolute discharge. The excepted cases may be divided into two classes <sup>89</sup>—the exception in the first class depending upon the character of the seller's promise or warranty, and the exception in the second class depending upon the difficulty of discovering the defect. As to the first class, according to some authorities the test is simply between executory contracts to sell and executed sales. If the original contract is executory, whatever its form, it is intimated in some cases the buyer by accepting the goods loses all right. Whereas in case of an executed sale a subsequent action or counterclaim because of inferiority is permitted.<sup>90</sup>

passed without criticism in later cases."

<sup>89</sup> A third class is suggested in *Summers Fiber Co. v. Walker*, 33 Ky. L. Rep. 153, 109 S. W. 883, vis: where the buyer has paid the price or a large part of it in advance. To require him to reject the goods is to deprive him of security for what he has paid.

<sup>90</sup> *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515. "In the absence of fraud or latent defects, an acceptance of the articles sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and as conforming to the contract, and bars all claim for compensation for any defects that may exist in the article." So in later New York decisions reference is made to the distinction as being between

executory contracts and executed sales. *Stuart v. Manhattan Bathtub Co.*, 34 N. Y. Misc. 165, 68 N. Y. S. 816; *Waeber v. Talbot*, 167 N. Y. 48, 57, 60 N. E. 288, 82 Am. St. Rep. 712. See also *Davidson Bros. Co. v. Smith*, 143 Ia. 124, 121 N. W. 503. In view of the New York decisions cited in the following notes it is probable, however, that the law of New York permitted the buyer, in case of some executory contracts, to receive the goods and yet recover damages for their inferior quality. But under an executory contract with an express warranty it was held that all rights were lost by acceptance, in *Locke v. Williamson*, 40 Wis. 377, and *Cocke v. Big Muddy Coal & Iron Co.* (Tex. Civ. App.), 155 S. W. 1019 (if defect known).

**§ 711. Nature of warranty as affecting the consequences of accepting goods.**

Instead of distinguishing between executory and executed contracts, the New York courts and others holding similar views have sometimes stated that only an express warranty will survive acceptance,<sup>91</sup> or in some States perhaps any warranty.<sup>92</sup> But in Georgia no warranty whatever will survive acceptance of the goods if the buyer knows of their defective quality when he accepts them, though an express warranty will excuse examination of the goods even for obvious defects.<sup>93</sup>

<sup>91</sup> *Rubin v. Sturtevant*, 80 Fed. 930, 51 U. S. App. 286, 26 C. C. A. 259; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Dounce v. Dow*, 57 N. Y. 16; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; *Staiger v. Soht*, 191 N. Y. 527, 84 N. E. 1120, affg. 116 N. Y. App. Div. 874, 102 N. Y. S. 342; *Ferguson v. Netter*, 204 N. Y. 505, 98 N. E. 16; *Ames v. Norwich Light Co.*, 122 N. Y. App. Div. 319, 106 N. Y. S. 952; *Ralph B. Carter Co. v. Fischer*, 121 N. Y. S. 614; *Schoenberg v. Thorne*, 140 N. Y. S. 1028. See also *Smith v. Mayer*, 3 Colo. 207; *Shupe v. Collender*, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; *Dayton v. Hooglund*, 39 Ohio St. 671; *Frey v. Failes*, 37 Okl. 297, 132 Pac. 342; *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915 B. 1131; *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 154 Pac. 123.

<sup>92</sup> *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 26 L. R. A. 96; *Parks v. O'Connor*, 70 Tex. 377, 389, 8 S. W. 104; *Best v. Flint*, 58 Vt. 543, 5 Atl. 192, 58 Am. Rep. 570.

<sup>93</sup> *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50; *Springer v. Indianapolis Brewing Co.*, 126 Ga. 321, 55 S. E. 53. In the former case the court said:

"A vendee who has exacted of the seller a warranty as to quality and knowingly accepts goods deficient in the quality warranted will be denied to subsequently assert their defective quality. His duty is to reject the article and his acceptance with knowledge of the defect amounts to a waiver of the warranty as to such defect. *Miller v. Moore*, 83 Ga. 692, 10 S. E. 360. There is no duty resting upon the purchaser who has bought goods under an express warranty to inspect the article purchased or exercise care in discovering any defects. He may rely on the contractual obligation of the seller that he will deliver goods of the quality warranted. *Haltiwanger v. Tanner*, 103 Ga. 314, 29 S. E. 965; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143. If subsequently to acceptance the buyer discovers that the goods do not come up to the warranty, he may rely on the warranty and plead partial failure of consideration." See also *Polhemus v. Heiman*, 45 Cal. 573, 579; *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722; *North Georgia Milling Co. v. Henderson Elevator Co.*, 130 Ga. 113, 60 S. E. 258. Compare with the statement quoted above the following from *Parks v. O'Connor*, 70 Tex. 377, 389, 8 S. W. 104: "The buyer may accept an article sold with a warranty, though he may know it is not such as is warranted and may recover damages for the breach."



§ 712. What is meant by express warranty in this connection.

The distinction between express warranties and other promises, it will be observed, is inconsistent with the view that the matter depends on whether the contract is executory or not, unless it is said that there can be no express warranty in an executory contract. But this is not generally so held, certainly it has not been so held in New York. What is meant in that State by the use of the term "express warranty" in regard to an executory contract is not clear. Any express promise or affirmation in regard to the quality of the goods might well be so called.<sup>94</sup> But it was clearly established that an express promise which imposed no other obligation upon the seller than that which would have been implied had no express promise been made as to the quality of the goods did not survive acceptance.<sup>95</sup> Where a promise or warranty in an executory contract in regard to the quality of the goods is something other than that which the law would imply, the rule formerly established in New York is not so clear. Doubtless where the word "warrant" or "guarantee" <sup>96</sup>

<sup>94</sup> This is the usage of the term in the Sales Act and in this work. See *infra*, § 970. And in *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753, this seems to have been the usage of the court. The court defines a warranty as an express or an implied statement of something which a party undertakes shall be part of the contract and, though part of the contract, collateral to the express object, and said: "Where there is an express warranty it is unimportant whether the sale be regarded as executory or *in presenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory as in a present sale." A decision similar in principle is *Bull v. Bath Iron Works*, 75 N. Y. App. Div. 380, 78 N. Y. S. 181.

<sup>95</sup> This was first laid down in *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, where an executory contract for tobacco provided that it was "to be delivered well cured and in good con-

dition," and it was held that no liability for breach of this promise survived acceptance. The doctrine was followed in *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515, where the contract provided that the goods were "to be of the best quality and suitable to the purpose designed." It may be observed that the court seems to have been in error in holding in this case that the express promise was no more than the law would imply. The law implies an obligation to furnish goods of merchantable quality, but never implies an obligation to furnish them of "the best quality." In *Heath Dry Gas Co. v. Hurd*, 124 N. Y. App. Div. 68, 108 N. Y. S. 410, the contract was for the manufacture of goods which were "to be constructed in a careful, workmanlike, and skillful manner;" and here also it was held that the warranty did not survive acceptance.

<sup>96</sup> *Condict v. Onward Construction Co.*, 210 N. Y. 88, 103 N. E. 886.

is used as part of a promise which goes beyond that which the law would imply, the promise would be held collateral, and in all jurisdictions where any warranties in executory contracts survive acceptance, such a promise would survive; but what promises other than those where such words are used may be held so collateral in form or effect as to sustain an action where the distinction in question is taken, is open to doubt.<sup>97</sup> In New York it has been held that in a sale by sample a warranty that the bulk equals the sample survives acceptance,<sup>98</sup> but this has been denied in Minnesota.<sup>99</sup> Both of these States, however, have now enacted the Uniform Sales Act.<sup>1</sup> Not uncommonly courts which follow the doctrine that acceptance of title in general involves an extinguishment of all claims of defective quality have been driven to express the exception as including all cases in which there is "a warranty manifestly intended to survive acceptance."<sup>2</sup> Such a definition as this is obviously very difficult to apply. An implied warranty is not within the excepted class of obligations which survived acceptance in New York prior to the enactment of the Uniform Sales Act and in some other States.<sup>3</sup>

<sup>97</sup> See *Parks v. O'Connor*, 70 Tex. 377, 389, 8 S. W. 104.

<sup>98</sup> *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Kent v. Friedman*, 101 N. Y. 616, 3 N. E. 905; *Zabriskie v. Central Vt. R. R. Co.*, 131 N. Y. 72, 29 N. E. 1006; *Larrowe Mfg. Co. v. Lyons Beet Sugar Refining Co.*, 137 N. Y. App. Div. 732, 122 N. Y. S. 567; *Bloom v. Reisman*, 76 N. Y. Misc. 524, 135 N. Y. S. 547 (apparently executory); *Rosen v. F. W. Woolworth Co.*, 136 N. Y. S. 1; *Powell v. New England Cotton Yarn Co.*, 154 N. Y. App. Div. 875, 139 N. Y. S. 569. See also *Pennock v. Stygles*, 54 Vt. 226. But in *Smith v. Coe*, 55 N. Y. App. Div. 585, 67 N. Y. S. 350, it was said that the term "sale by sample" properly included only executed sales (as to this see *Williston, Sales*, § 250); and that, therefore, in case of an executory contract to manufacture goods like a sample, the acceptance of the goods barred

all subsequent objection to their quality. The case of *Brigg v. Hilton*, *supra*, however, seems to have been a case of the same sort, yet there the New York Court of Appeals held the warranty survived acceptance.

<sup>99</sup> *Lee v. Bangs*, 43 Minn. 23; s. c., *sub nom.*, *Sole Leather Over Mfg. Co. v. Bangs*, 44 N. W. 671. See also *Columbus, etc., Iron Co. v. Lee*, 169 Mich. 661, 135 N. W. 920; *Robinson v. Huffstetler*, 165 N. C. 459, 81 S. E. 753.

<sup>1</sup> For the provisions of the Act, see *infra*, § 714. The States in which it is in force are enumerated, *supra*, § 506.

<sup>2</sup> *Schopp v. Taft*, 106 Iowa, 612, 613, 76 N. W. 843; *Stilwell Co. v. Biloxi Co.*, 78 Miss. 779, 29 So. 513; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702.

<sup>3</sup> *Waerber v. Talbot*, 167 N. Y. 48, 60 N. E. 258, 82 Am. St. Rep. 712. This was a contract for the sale of

§ 713. Right of objection to latent defects is not lost.

The second exception to the rule that acceptance of title operates as satisfaction, arises where the defect in the goods is one which cannot be discovered by inspection. In such a case whether the seller's breach of promise is of an express warranty, an implied warranty, or, under the terminology of the court, of a promise not properly classified as a warranty, the buyer may recover damages;<sup>4</sup> and so he may where inspection is not possible or is prevented.<sup>5</sup> But here, too, a difference of opinion must be noted. In Georgia at least the question seems to turn, not on whether the defect might have been discovered, but on whether it was in fact discovered.<sup>6</sup> For the same reason that acceptance

canned peas. The court assumed that there was an implied warranty that the peas should be merchantable. They were not merchantable, but as they had been accepted and as there was a mode of inspection well known to the trade by which the difficulty might have been discovered, the court held the acceptance amounted to a waiver of all rights upon the warranty. See also *De Loach Mfg. Co. v. Tutweiler Coal Co.*, 2 Ga. App. 493, 58 S. E. 790; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Ferguson v. Netter*, 204 N. Y. 505, 98 N. E. 16. Compare *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. 655, 26 L. R. A. 96.

<sup>4</sup> *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Kronman v. Roush Produce Co.*, 3 Ga. App. 152, 59 S. E. 320; *Grisinger v. Hubbard*, 21 Ida. 469, 122 Pac. 853; *Loxtercamp v. Lininger Implement Co.*, 147 Ia. 29, 125 N. W. 830, 33 L. R. A. (N. S.) 501; *Marbury Lumber Co. v. Stearns Mfg. Co.*, 32 Ky. L. Rep. 739, 107 S. W. 200; *Webb v. Milford Shoe Co.*, 128 Ky. 308, 108 S. W. 229; *Jones v. Bloomgarden*, 143 Mich. 326, 335, 106 N. W. 891; *Zabriskie v. Central Vt. R. R. Co.*, 131 N. Y. 72, 29 N. E. 1006; *Bell v. Mills*, 78 N. Y. App. Div. 42, 80 N. Y. S. 34;

*White Mfg. Co. v. De La Vergne Co.*, 84 N. Y. S. 192; *Tompkins v. Lamb*, 121 N. Y. App. Div. 366, 106 N. Y. S. 6; *Motley Green & Co. v. Elmenhorst*, 142 N. Y. App. Div. 830, 127 N. Y. S. 625; *Kleeb v. McInturff*, 62 Wash. 508, 114 Pac. 184; *Buffalo Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295; *Northern Supply Co. v. Wangard*, 117 Wis. 624, 94 N. W. 785, 98 Am. St. Rep. 963. See also *Henderson Elevator Co. v. North Georgia Mfg. Co.*, 126 Ga. 279, 55 S. E. 50; *Brooke v. Laurens Milling Co.*, 78 S. Car. 200, 58 S. E. 806. The severity with which this rule would be applied would, perhaps, vary in different jurisdictions. In *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660, wine was delivered under a contract and accepted. The wine did not conform to the requirements of the contract, and the defect was only discoverable at the time of delivery by chemical analysis. Nevertheless, the buyer was held precluded from claiming damages when the wine afterward fermented, owing to its inferior quality.

<sup>5</sup> *Showalter v. Winchester Grocery Co.*, 148 Ky. 579, 147 S. W. 16; *Bradley v. Lexington Hogshead Co.*, 156 Ky. 813, 162 S. W. 83.

<sup>6</sup> *Burr v. Atlanta Paper Co.*, 2 Ga. App. 52, 58 S. E. 373. So in *Planters'*

of goods with latent defects does not bar redress, it has been held that, if the price is paid in advance or without opportunity to inspect the goods, the subsequent acceptance of title does not bar a claim for damages.<sup>7</sup> Likewise if complaint is made when the goods are delivered and the seller promises to rectify the defect, acceptance of the goods does not excuse the seller.<sup>8</sup> Complaint may certainly show the buyer's lack of assent to take the goods in full satisfaction, but if the seller offers them only on the condition that they shall be so taken, the buyer's words of dissent would seem immaterial if he actually took the goods.<sup>9</sup> The existence of latent defects does not so much tend to show any lack of assent to an accord and satisfaction, as to show that assent if given, was given under a mistake of fact.

#### § 714. Provisions of the Uniform Sales Act.

It is provided in Section 49 of the Uniform Sales Act:<sup>10</sup> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."<sup>11</sup>

Cotton Oil Co. v. Whitesboro Cotton Oil Co. (Tex. Civ. App.), 146 S. W. 225; Cocks v. Big Muddy Coal & Iron Co. (Tex. Civ. App.), 155 S. W. 1019. Cf. Easton v. Dosier (Tex. Civ. App.), 148 S. W. 603.

<sup>7</sup> Munford v. Kevil, 109 Ky. 246, 58 S. W. 703; Holloway v. Jacoby, 120 Pa. St. 583, 15 Atl. 487, 6 Am. St. Rep. 737. But if after the price has been paid, and inspection later had and defects learned the buyer keeps the goods it was held that he was remediless in *Corey's Wholesale Fruit Co. v. Fuller*, 62 Fla. 146, 56 So. 800.

<sup>8</sup> *Burr v. Atlanta Paper Co.*, 2 Ga. App. 52, 58 S. E. 373; *Wallace v.*

*Knoxville Mills*, 25 Ky. L. Rep. 1445, 78 S. W. 192; *Osborne v. Carpenter*, 37 Minn. 331, 34 N. W. 163; *Fitzpatrick v. Osborne*, 50 Minn. 261, 52 N. W. 861.

<sup>9</sup> See *infra*, § 1855.

<sup>10</sup> The States which have enacted this statute, are enumerated, *supra*, § 506.

<sup>11</sup> This section is not contained in the English Sale of Goods Act, but section 11 (1) (a) of that act authorizes the buyer to take title to goods which do not comply with the contract and, thereafter, hold the seller liable in damages. The latter part of the American section imposes a qualification of

It amounts to this, that the seller's tender of the goods is treated as an offer of them in full satisfaction, but the buyer is allowed a reasonable time for accepting the offer. Moreover, if he declines to take the goods in full satisfaction he need not return them. The practical advantages of the statutory rule, and its ease and certainty of application commend it.<sup>12</sup>

**§ 715. Damages recoverable by the buyer.**

If it be admitted that the acceptance of the goods does not debar the buyer from complaining of the inferior quality of the goods, it is none the less true that the seller has a right of action for the price. The inferior quality of the goods is not an absolute defence.<sup>13</sup> Where a rescission of an executed sale is allowed as a remedy for breach of warranty, the buyer may return the goods and thereby defeat all right on the part of the buyer to recover any part of the price.<sup>14</sup> But where the buyer retains the goods, his only redress, assuming that his acceptance of the goods is not a bar to all redress whatever, is an action or counterclaim for damages suffered because of the inferior quality, or a recoupment from the price. If, however, the goods received are worthless for any purpose whatever, it is obvious that the recoupment allowed the buyer would equal the agreed price. In such a case, therefore, and in such a case only, is defective quality of the goods an absolute de-

the buyer's rights which is justified by business practice and by some decisions as well as by the law on the Continent of Europe.

<sup>12</sup> This section changes the law of New York. *Peuser v. March*, 167 N. Y. App. D. 604, 607, 153 N. Y. S. 381, *aff'd* 218 N. Y. 505, 113 N. E. 494; *Marx v. Locomobile Co.*, 82 N. Y. Misc. 468, 144 N. Y. S. 937; *Regina Co. v. Gately Furniture Co.*, 171 N. Y. App. D. 817, 157 N. Y. S. 746; *Mastin v. Boland*, 178 N. Y. App. D. 421, 165 N. Y. S. 468; *Mason v. Valentine Souvenir Co.*, 180 N. Y. App. D. 823, 168 N. Y. S. 159; *Majestic Coal Co. v. Bush*, 171 N. Y. S. 662; *Altkrug v. Wm. Whitman Co.*, 185 N. Y. App. D. 744, 173 N. Y. S. 669. Other cases de-

cided under the section are: *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361; *Gascoigne v. Cary Brick Co.*, 217 Mass. 302, 104 N. E. 734; *M. & M. Co. v. Hood Rubber Co.*, 226 Mass. 181, 115 N. E. 234; *Trimount Lumber Co. v. Murdough*, 229 Mass. 254, 118 N. E. 280.

<sup>13</sup> *Dalton v. Bunn*, 137 Ala. 175, 34 So. 841; *Trippe v. McLain*, 87 Ga. 536, 13 S. E. 523; *American Theater Co. v. Siegel*, 221 Ill. 145, 77 N. E. 588, 4 L. R. A. (N. S.) 1167; *Barkalow v. Pfeiffer*, 38 Ind. 214; *Mackey v. Swartz*, 60 Iowa, 710, 15 N. W. 576; *Fossum v. Holland* (N. Dak.), 171 N. W. 870.

<sup>14</sup> See *infra* §§ 1461 *et seq.*

fense to action for the price.<sup>15</sup> Even in jurisdictions where the seller's acceptance of title does not bar subsequent action for inferiority of the goods or recoupment on account of such inferiority in an action for the price, it may be important to determine whether the buyer knew or ought to have known the defective quality of the goods before he used them. If he knew of the defect or ought to have known of it he cannot recover consequential damages caused by using the goods.<sup>16</sup>

### § 716. Express provisions of the contract.

Though the mere acceptance of title to the goods should not necessarily be regarded as an agreement to accept the goods in full satisfaction of the seller's obligations, by the express terms of the contract such a result may be brought about. It is not uncommon for contracts to provide for special inspection of the goods, not simply as a preliminary to the buyer's ownership of the goods, but as a final determination or arbitration of the question whether the seller has performed his contract.<sup>17</sup> Again, the contract may provide for a certain period of trial, and thereby imply that if after such trial the buyer

<sup>15</sup> *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Kerr v. Haymaker*, 20 Mo. App. 350; *McCormick Harvesting Mach. Co. v. Brady*, 67 Mo. App. 292; *Heimann v. Hatcher Mercantile Co.*, 106 Mo. App. 438, 80 S. W. 729; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554, 80 S. W. 857. See also *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591.

<sup>16</sup> *Day v. Mapes-Reeve Construction Co.*, 174 Mass. 412, 54 N. E. 878. In this case the contract called for "common hard brick." The buyer had an inspector who rejected some brick but the inspector permitted some soft brick to be accepted and used. The defects could have been detected and indeed the inspector knew that some soft brick was being used. The buyer claimed damages for the expense of substituting hard brick for the soft brick which had been used. The court

refused to allow this, and rightly, for the injury of which the plaintiff complained was due to his own fault in using the soft brick, knowing or having reason to know its character. The seller, however, was only entitled to the value of soft brick and this value was all that he obtained. See also *Henderson Elevator Co. v. North Ga. Milling Co.*, 126 Ga. 279, 55 S. E. 50; *Carson v. Bunting*, 154 N. C. 530, 70 S. E. 923; *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571. Cf. *Gascoigne v. Cary Brick Co.*, 217 Mass. 302, 104 N. E. 734.

<sup>17</sup> See for example, *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422. In *Victor Chemical Works v. Hill Clutch Co.*, 152 Fed. 393, 81 C. C. A. 519, a term in a contract that acceptance should be a waiver of any claim for delay was held binding.

concludes to take the goods he shall take them as full performance of the seller's obligation.<sup>18</sup> The obligation of the seller may also be made conditional upon certain performance by the buyer. A warranty may by its express terms be enforceable only by returning the goods,<sup>19</sup> or the right to sue on the warranty may be made conditional upon the prior payment of the purchase price.<sup>20</sup>

### § 717. Rule of the Civil Law.

In the Civil Law it seems to be the rule that acceptance of the goods does not involve a release of the seller's obligation—at least if the buyer expressly gives notice of his claim as soon as the defect is discovered. A French writer,<sup>21</sup> writing of the German law prior to the enactment of the German Civil Code and of the present Commercial Code says: "In the first place it is very certain that if the defendant not only has received delivery but has accepted and approved it as regular and perfect, he has thereby recognized that the performance is in conformity with the contract, and he is debarred, whatever happens, from testing its validity. But what is necessary to observe is that as a basic rule the simple receipt, and by receipt is not meant a delivery made without the knowledge or participation of the recipient, does not of itself imply approval of the performance and recognition of its validity. Therefore, the simple fact does not take away from the creditor the rights which belong to him because of inadequate performance. It may be, and it is an opinion which has been upheld, that if one sets up after ap-

<sup>18</sup> See Williston, *Sales*, § 272.

<sup>19</sup> This is a common provision in sales of machinery. *Davis v. Robinson*, 67 Iowa, 355, 25 N. W. 280; *McCormick Harvesting Machine Co. v. Brower*, 88 Iowa, 607, 55 N. W. 537; *Hefner v. Haynes*, 89 Iowa, 616, 57 N. W. 421; *Acker v. Kimmie*, 37 Kans. 276, 15 Pac. 248; *Champion Machine Co. v. Mann*, 42 Kans. 372, 22 Pac. 417; *Walters v. Akers*, 31 Ky. L. Rep. 259, 101 S. W. 1179; *Guhy v. Nichols & Shepherd Co.*, 33 Ky. L. Rep. 237, 109 S. W. 1190; *Jasper County Bank v. Barts*, 130 Mo.

App. 635, 109 S. W. 1057; *Sandwich Mfg. Co. v. Feary*, 34 Neb. 411, 51 N. W. 1026; *Davis v. Iverson*, 5 S. Dak. 295, 58 N. W. 796. As to waiver of a notice in the manner required by a condition in a warranty, see *Buchanan v. Minneapolis Threshing Machine Co.*, 17 N. Dak. 343, 116 N. W. 335.

<sup>20</sup> *Case Threshing Machine Co. v. Smith*, 16 Or. 381, 18 Pac. 641. *Cf.*, however, *Campbell v. Lodge*, 76 Kans. 400, 92 Pac. 53.

<sup>21</sup> *Raymond Saleilles*, 7 *Annales De Droit Commercial*, Pt. 2, 42 (1893).

parent performance of the contract a refusal to pay because of bad quality or defective performance, the fact that performance has been received must involve a change in the burden of proof, but this is an entirely different question. What is necessary to understand thoroughly now is that receipt of performance as a basic rule and by itself does not take away from the one who receives delivery the rights which belong to him at common law on account of nonperformance." In a note to this passage the author adds that the jurisprudence of France is settled to the same effect. By provision of the German Commercial Code <sup>22</sup> if goods are sent from another place prompt examination must be made and immediate notice of the defects given. Failure to do this is conclusive in regard to patent defects and notice of latent defects must be given as soon as the defects are discovered.

#### § 718. Rescission of acceptance.

Whether acceptance by the buyer is merely an assent to become owner or is also an agreement that the transfer of the property shall be a complete satisfaction of the seller's obligations, the acceptance is subject to the universal rule that assent procured by fraud or given under a mutual mistake of a sufficiently material fact of both parties may be rescinded.<sup>23</sup> The remedy of rescission for breach of warranty which is allowed by the Uniform Sales Act and by the law of many States also is important to consider in this connection.<sup>24</sup> But if the parties agree either at the time of making the original bargain, or subsequently, that specific goods with whatever qualities they may have shall be taken in full satisfaction of the seller's obligation, the transaction obviously cannot be rescinded in the absence of fraud or mistake.

#### § 719. Acceptance of part of goods tendered.

Where the buyer accepts delivery of part of a quantity of goods which are tendered to him, the case may present any of several different states of fact.

<sup>22</sup> Handelsgesetzbuch, Art. 377 (Art. 347 in old Handelsgesetzbuch).

<sup>23</sup> See *infra*, §§ 1486 *et seq.*, 1535 *et seq.*

<sup>24</sup> See *infra*, § 1461.



1. The contract may permit or require the delivery in instalments of the goods contracted for, and the part accepted may constitute performance of one instalment. As this is exact performance, so far as it goes, of the contractual obligations of the parties, the situation requires no comment. If the instalment is of inferior quality, the principles governing acceptance of goods under a contract for a single delivery, will be applicable. No inference will generally be justified from acceptance of an inferior instalment that others of the same kind will be accepted.<sup>25</sup>

2. The bargain though contemplating but a single delivery may contemplate several distinct sales, several dissociated things being ordered or contracted for, each for a distinct price. Here acceptance of part will not justify any implication of assent to become owner of the remainder, or of discharge of the seller from his legal duty with reference to the remainder. If some of the goods tendered are not in accordance with the contract, the buyer is generally held entitled to accept such of the articles tendered as fulfill the seller's obligation and reject those which do not;<sup>26</sup> and if the different things were separately bargained for this presents no difficulty.<sup>27</sup> Some courts have admitted evidence that a separate price was agreed for each article, and have then treated the transaction as several contracts, though the ultimate bargain was for a lump sum.<sup>28</sup> It is difficult to accept this result. If it be granted that the contract is divisible so that the delivery of one article would give rise to a debt, that does not enable the buyer to take some and reject others. To justify such a course there must be several contracts.<sup>29</sup>

<sup>25</sup> See *infra*, § 741.

<sup>26</sup> *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 51 U. S. App. 286, 26 C. C. A. 259; *Cohen v. Pemberton*, 53 Conn. 221, 2 Atl. 315, 5 Atl. 682, 55 Am. Rep. 101; *Spring v. Slayden-Kirksey Mills*, 106 Ill. App. 579; *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91; *Goldstandt-Powell Hat Co. v. Cuff*, 19 Okl. 243, 91 Pac. 862; *Schiller v. Blyth & Fargo Co.*, 15 Wyo. 304, 88 Pac. 648.

<sup>27</sup> See *infra*, § 863.

<sup>28</sup> *Field v. Austin*, 131 Cal. 379, 63 Pac. 692; *Aultman & Taylor Co. v. Lawson*, 100 Iowa, 569, 69 N. W. 865; *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077.

<sup>29</sup> See *infra*, §§ 861 *et seq.* If the buyer can accept some and reject others, the seller must equally be at liberty to make a valid tender of some and not others, unless the principle stated at the end of § 720 be accepted.

3. The delivery may not be full delivery of the whole or of any divisible portion of the goods contracted for; and the remainder of the goods though tendered may be refused or at least not accepted by the buyer. In such a case it is often said that acceptance of part is proof of acceptance of the whole.

**§ 720. Whether acceptance of part is acceptance of the whole.**

Certainly if the buyer does not clearly state that he refuses the remainder of the goods, his acceptance of part of the goods offered under an indivisible contract is some evidence that he assents to taking the entire quantity offered.<sup>30</sup> Even though he expressly refuses to take the remainder, nevertheless his conduct may amount to an acceptance, unless the seller assent to the partial acceptance, for the buyer had no right to take part, unless he was willing to take the whole. Where a person's action is legal on one supposition and illegal on any other, the law will conclusively attribute to the action its legal meaning.<sup>31</sup> On the ground that acceptance of part will diminish the damages and therefore will presumably meet with the assent of the seller, the buyer has been allowed to take that part of goods ordered or contracted for which fulfill the requirements of the order or contract, and reject the remainder, without any expression of assent by the seller to this course of conduct.<sup>32</sup>

<sup>30</sup> *Meyer v. Everett Pulp Co.*, 193 Fed. 857, 113 C. C. A. 643; *Maynard v. Render*, 95 Ga. 652, 23 S. E. 194; *Wolf v. Dietzsch*, 75 Ill. 205; *Telford v. Albro*, 60 Ill. App. 359; *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077.

<sup>31</sup> See *infra*, § 1856; and see cases cited *infra*, n. 33. But in *Teeter v. Cole Mfg. Co.*, 151 N. C. 602, 66 S. E. 582, where a buyer had taken from a carload of lumber property mentioned, and had refused the rest, the court held him not liable for the price of the whole carload, but only liable as a converter.

<sup>32</sup> In *Molling v. Dean*, 18 Times L. R. 217, the plaintiff had contracted to supply the defendants with a number of books, and supplied the de-

fendants under this contract with a parcel of 40,000 books. The defendants, finding some of the books not of the quality agreed, notified the plaintiffs that they intended to reject all which were not saleable. The defendant accordingly accepted 13,000 of the books and rejected the remainder. The chief justice said: "It was argued that the defendants, having picked out and sold 13,000 books, could not reject the rest of the parcel. In a contract of the nature of the one in question, where every one of the articles had to be up to standard, the purchaser was entitled to keep some and reject others, and thereby reduce the damages to be paid by the vendor in respect of the breach of contract." See also *Cohen*

The right of the seller to take this course would not, however, be universally admitted.<sup>33</sup>

§ 721. Effect of seller's assent to buyer's acceptance of part.

In the cases supposed in the two preceding sections the seller is not supposed to have assented to any variation of the buyer's original obligation. Of course such assent is possible, and a fourth situation then arises.

The seller though bound to make a single delivery, and though no separate price has been agreed upon for any portion of the total amount contracted for may, nevertheless, offer part, or may assent to a desire of the buyer to accept only part and that part may be given and accepted. It is here a question of fact whether that part is offered as a substitute for the whole. Such a case has previously been considered.<sup>34</sup> If the transaction is not properly construed as an agreement to substitute partial for full performance, the parties must have contemplated that the partial delivery should be accepted on account, and that the seller should later deliver the remainder of the goods. Such an understanding necessarily involves a waiver by the buyer of the condition qualifying his obligation to accept, that full performance should be made at one time. The buyer's conduct, therefore, would preclude him from refusing delivery of the remainder of the goods if made within a reasonable time. Whether such partial acceptance also excuses the seller from liability to pay damages on account of his delay depends upon the same principles previously considered in connection with the acceptance of goods of inferior quality.

*v. Pemberton*, 53 Conn. 221, 2 Atl. 315, 5 Atl. 682, 55 Am. Rep. 101; *Showalter v. Winchester Grocery Co.*, 148 Ky. 579, 147 S. W. 16; *Canton Lumber Co. v. Liller*, 107 Md. 146, 68 Atl. 500; *Stearns Salt & Lumber Co. v. Dennis Lumber Co.*, 188 Mich. 700, 154 N. W. 91, 2 A. L. R. 638; *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17; *Larrowe Mfg. Co. v. Lyons Beet Sugar Refining Co.*, 137 N. Y. App. Div. 732, 122 N. Y. S. 567. But see cases in the following note.

<sup>33</sup> See *Crane Co. v. Columbus Const.*

*Co.*, 73 Fed. 984, 46 U. S. App. 52, 20 C. C. A. 233; *Pacific Timber Co. v. Iowa Windmill, etc., Co.*, 135 Iowa, 308, 112 N. W. 771; *Morse v. Brackett*, 98 Mass. 205; *Simon v. Wood*, 17 N. Y. Misc. 607, 40 N. Y. S. 675; *J. E. DeVaughn's Son v. Ohio Pottery Co.*, 12 Ga. App. 50, 76 S. E. 793; *Mendets v. Wood*, 148 N. Y. S. 92, 86 N. Y. Misc. 52; *Levy v. J. C. Dettra Co., Inc.*, 154 N. Y. S. 176, 91 N. Y. Misc. 41; *Syer v. Lester*, 116 Va. 541, 82 S. E. 122.

<sup>34</sup> See *supra*, § 703.

### § 722. Sales on approval or with a right to return.

Goods may be delivered to a buyer with the express privilege of examining them and returning them if unsatisfactory. The title may by the terms of the bargain pass subject to a condition subsequent, allowing the buyer to revest title in the seller, or the approval of the buyer may be a condition precedent to the transfer of title.<sup>35</sup> The right thus secured to the buyer either of returning title or refusing to take title he may lose. An opportunity for election as distinguished from waiver is presented to him. Either choice offers advantages as well as disadvantages. It is not merely a case of the surrender of a right, though whichever choice he makes, the buyer will thereby surrender a right. Thus, if he retains the goods for more than a reasonable time, his right to return or refuse the goods is lost;<sup>36</sup> and at any time before the period fixed by the contract or a reasonable time has expired, doubtless the buyer may assent to become absolute owner of the goods, since the transaction implies a continuing offer to him on the part of the seller. Any conduct of the buyer making return of the goods impossible, as reselling them, necessarily indicates also an assent to become absolute owner since only in this way would his conduct be rightful.<sup>37</sup> An unsuccessful attempt to resell goods has,

<sup>35</sup> See Williston on Sales, §§ 270-273.

<sup>36</sup> *Buckstaff v. Russell*, 79 Fed. 611, 49 U. S. App. 253, 25 C. C. A. 129 (in this case machines were retained three and a half years); *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 (in this case goods were sold to a retail merchant subject to a right to return such goods as he was unable to sell. Failure to return the goods for three years was held to make absolute the buyer's liability to pay the price); *Greacen v. Poehlman*, 191 N. Y. 493, 84 N. E. 390 (in this case boots were retained six months, but the defects were latent and when the buyer first complained, the seller asked him to give the boots further trial. The question whether the delay was unreasonable was held properly left to the jury). And see *Roach v. Warren*,

151 Ala. 302, 44 So. 103 (in this case right to return goods if not satisfactory or saleable, could not be exercised after buyer had kept them and exposed them for sale for several months); *Idle v. Brody*, 156 Ill. App. 479.

<sup>37</sup> In the following cases a sale or return was held thus to become absolute. *Genn v. Winkel*, 28 T. L. Rep. 226 (decided under Sale of Goods Act); *Windsor v. Cruise*, 79 Ga. 635, 7 S. E. 141; *Re Ward's Estate*, 57 Minn. 377, 59 N. W. 311. See also *Kirkham v. Attenborough*, [1897] L. R. 1 Q. B. 201; *Byroe v. Ehrmann*, 42 Sc. L. Rep. 23. *Cf. Weiner v. Gill*, [1905] 2 K. B. 172.

In the following cases, a sale on approval was similarly held to become absolute. *Moss v. Sweet*, 16 Q. B. 493; *Re Downing Paper Co.*, 147 Fed. 858; *Mowbray v. Cady*, 40 Ia. 604, 606;

however, been held not to prevent the buyer from returning them.<sup>28</sup>

**§ 723. Acceptance of defective performance under a contract to sell real estate.**

After a contract for the purchase and sale of real estate has been made, it sometimes proves impossible for the seller to perform his contract because of an incumbrance on the property, or lack of title to a portion of it, or some other deficiency which prevents him from giving the marketable title for which the buyer has contracted. Under these circumstances the buyer may refuse to proceed—(unless the circumstances are such as to justify equity in compelling him to take the title with compensation), or he may if he chooses elect to take what the seller can give. This is merely a question of election. It is like any other case of contract where one party elects to continue performance in spite of a breach of condition by the other party. No consideration is necessary to make such an election binding, and no other element of estoppel than is afforded by the change of position involved in accepting inadequate performance.<sup>29</sup> Whether the purchaser by accepting a deed conveying an inadequate title thereby assents to taking

*Isaacs v. McDonald*, 214 Mass. 487, 102 N. E. 81; *Turner v. Machine Co.*, 97 Mich. 166, 56 N. W. 356; *Columbia Rolling Mill Co. v. Beckett Foundry Co.*, 55 N. J. L. 391, 26 Atl. 888; *Butler v. School District*, 149 Pa. St. 351, 24 Atl. 308; *Washington v. Johnson*, 7 Humph. 468. See also *Hickman v. Schimp*, 109 Pa. St. 16; *Keeler v. Jacobs*, 87 Wis. 545, 58 N. W. 1007. After an inclusive expression of disapproval, retention for the remainder of the period originally given for trial will not, however, operate as an acceptance of the property. *Ellis v. Mortimer*, 1 Bos. & P. N. R. 257.

<sup>28</sup> *Cohn-Goodman Co. v. Mandelson*, 94 Neb. 47, 142 N. W. 291.

<sup>29</sup> See 1 Dart on Vendors & Purchasers (7th ed.), 508; 1 Warvelle on Vendor & Purchaser (2d ed.), § 329; *McCloy v. Cox*, 12 Ind. App. 27, 39 N. E. 901.

In *Calcraft v. Roebuck*, 1 Ves. Jr. 221, a contract had been made for the purchase and sale of an estate described as freehold, though a small part of the estate was held at will. After execution of articles a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, the purchaser took possession forcibly; but proceeded in the treaty afterwards, till he finally refused to agree to the purchase. On a bill filed by the vendor the purchase-money was decreed to be paid with interest from the time the purchase should have been carried out; but an inquiry was directed as to what ought to have been the compensation at that time for the part of the estate not freehold, that amount to be deducted from the price.

the deed as full satisfaction of the vendor's obligation is another matter; but unlike the rule in regard to personalty, there is here as matter of law a discharge of the purchaser's rights in regard to the property which the deed purports to convey. The deed merges the contract and the purchaser has no redress except such as may be afforded under the covenants in the deed,<sup>40</sup> unless fraud or mistake enables him to rescind the transfer,<sup>41</sup> or have the deed reformed.<sup>42</sup> If the parties so agree there seems no difficulty of consideration even though the deed conveys something which is necessarily less than was contracted for. Presumably the deed would be regarded by the law as a thing or chattel, the value of which would not be inquired into.

**§ 724. Acceptance of defective performance under a contract for work or construction.**

Where work contracted for has been inadequately performed, there seems no difference in principle from the case presented where there has been defective performance of a contract for the purchase and sale of goods, except where the property upon which work has been done belongs to the employer and he is, therefore, obliged, in order to take or retain possession of his own property, to accept the work upon it. Subject to this exception if the defect in the work is or ought to be known, its acceptance will impose a duty to pay for it, and if no protest or complaint of the quality of the work is promptly made will also discharge any right of damages for defects in the performance.<sup>43</sup>

<sup>40</sup> *Earle v. DeWitt*, 6 Allen, 520; *Slocum v. Bracy*, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499; *Aird v. Alexander*, 72 Miss. 358, 18 So. 478; *Long v. Hartwell*, 34 N. J. L. 116; *Witbeck v. Waite*, 16 N. Y. 532; *Fisk v. Duncan*, 83 Pa. 196. But a deed for one parcel will not merge the whole of a previous contract which bound the grantor to transfer also another parcel or perform a collateral act. *Long v. Hartwell*, 34 N. J. L. 116; *Schoonmaker v. Hoyt*, 148 N. Y. 425, 429, 42 N. E. 1059; *Loring v. Oxford*, 18 Tex. Civ. App.

415. See also *Holdsworth v. Tucker*, 143 Mass. 369, 373, 9 N. E. 764. See also *infra*, § 926.

<sup>41</sup> *Spurr v. Benedict*, 99 Mass. 463; *Darlington v. Gates Lumber Co.*, 142 Wis. 198, 125 N. W. 456, 135 Am. St. Rep. 1070.

<sup>42</sup> See *infra*, §§ 1547 *et seq.*

<sup>43</sup> *Waters v. Harvey*, 3 Houst. (Del.) 441; *Fitts v. Reinhart*, 102 Ia. 311, 71 N. W. 227; *Mitchell Furniture Co. v. Monarch*, 19 Ky. Law. Rep. 239, 39 S. W. 823; *Adams v. Hill*, 16 Me. 215; *Taylor v. Butters, etc., Lumber Co.*,

But there is no legal presumption that the latter result follows from acceptance, unless a length of time unreasonable under the circumstances elapses without complaint. The question is one of fact.<sup>44</sup> Especially where the work in question results in attaching the property to the employer's real estate, as in case of a building contract, the law is clear that the occupancy and use of the building or other attached property does not of itself indicate assent to relieve the builder from liability or entitle him to sue upon the contract.<sup>45</sup> Though

103 Mich. 1, 61 N. W. 5; *Lackman v. Sinapson*, 46 Mont. 518, 129 Pac. 325; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685; *Goldsmith v. Hand*, 26 Ohio St. 101. See also *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Lincoln Electric Heating Appliances v. Schultz*, 203 Ill. App. 340; *Monroe Waterworks Co. v. City of Monroe*, 110 Wis. 11, 85 N. W. 685; *Katz v. Bedford*, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; *Johnson v. Gallatin Valley Milling Co.*, 38 Mont. 83, 98 Pac. 883.

<sup>44</sup> In *Bellevue Cemetery Co. v. Faulks*, 6 Ala. App. 137, 60 So. 461, 462, the court said:—"One for whom another contracts to do specified work within a certain time and in a designated manner does not, by allowing the work to proceed after the expiration of the time named and accepting the benefit of it, waive his claim to damages for the delay or for the contractor's failure to comply in other respects with his part of the contract, and, when sued on the contract, may recoup the damages sustained in consequence of such defaults on the part of the plaintiff. *Huntsville Elks' Club v. Garrity-Hahn Bld. Co.*, 176 Ala. 128, 57 So. 750; *Woodrow v. Hawving*, 105 Ala. 240, 16 So. 720; *Gazzam v. Kirby*, 8 Port. 253." See also *Cocker-Wheeler*

*Co. v. Varick Realty Co.*, 104 N. Y. App. Div. 568, 94 N. Y. S. 23.

<sup>45</sup> *Forman v. The Liddlesdale*, [1900] A. C. 190, 204; *United States v. Walsh*, 115 Fed. 697, 52 C. C. A. 419 (dry dock); *Fitzgerald v. LaPorte*, 64 Ark. 34, 40 S. W. 261; *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36; *Burr v. Ellis*, 91 Conn. 657, 101 Atl. 17; *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734; *Cummings v. Pence*, 1 Ind. App. 317, 27 N. E. 631 (a drain); *Kilbourne v. Jennings*, 40 Ia. 473; *Ludlow Lumber Co. v. Kuhling*, 119 Ky. 251, 83 S. W. 634; *Payne v. Amos Kent Brick Co.*, 110 La. 750, 34 So. 763 (machinery); *Pope v. King*, 108 Md. 37, 69 Atl. 417, 16 L. R. A. (N. S.) 489; *Curtis v. Ogden*, 217 Mass. 83, 104 N. E. 558; *Japes v. Harmon*, 176 Mich. 1, 141 N. W. 595; *Stewart v. Fulton*, 31 Mo. 59; *Yeats v. Ballentine*, 56 Mo. 530; *Franklin v. Schultz*, 23 Mont. 165, 57 Pac. 1037; *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373; *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443; *MacKnight Flintic Stone Co. v. City of New York*, 13 N. Y. App. D. 231, 43 N. Y. S. 139, 52 N. Y. S. 747, 31 N. Y. App. D. 232; *Faulkner v. Cornell*, 80 N. Y. App. D. 161, 80 N. Y. S. 526; *Anderson v. Todd*, 8 N. Dak. 158, 77 N. W. 599; *Wiebener v. Peoples*, 44 Okl. 32, 142 Pac. 1036; *Otis Elevator Co. v. Flanders Realty Co.*, 244 Pa. 186, 90 Atl. 624 (elevator). But if the employer directs the work

in many cases of defective performance the builder is permitted to recover on the contract or on principles of quasi-contract,<sup>46</sup> his right to do so is not enlarged by the owner's occupancy of the building.<sup>47</sup> But it also seems generally assumed, if not decided, that if the owner does assent to accept a defective building as full performance, the acceptance though in effect amounting to a surrender of a possible defence or right of action for no consideration, precludes subsequent objection.<sup>48</sup>

to be done in a certain way or expresses satisfaction with that way, he cannot complain of work subsequently done in that way. *Barnes v. Bradford* (Iowa), 165 N. W. 306.

\* See *infra*, §§ 805, 1475.

<sup>a</sup> In *Walter v. Huggins*, 164 Mo. App. 69, 148 S. W. 148, 151, 152, the court said: "The Supreme Court of the United States had before it a case where the plaintiff sued to recover the remainder of the purchase price of certain machinery installed in defendant's mill in a manner to make the machinery a part of the mill, and therefore a part of the land. The defence was that the machinery which was being used by the defendant did not comply with the contract. Held: 'In such a case, it would be most unreasonable to compel the defendant, in order to entitle him to avoid paying the whole contract price, or to recover damages for the plaintiff's breach of contract, to undergo the expense of taking out the machinery, and the prolonged interruption of his business during the time requisite to obtain new machinery elsewhere. *Stillwell Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035. . . .

"There was no acceptance of the work, and the use of the building by the owner without having the work torn out and replaced did not alter its right to recover direct damages. Such use, of itself, cannot be construed as a waiver or acceptance. An owner has a right to occupy his house at any time he chooses, and it takes more than

mere occupation to constitute an acceptance of work not done by the contractor in accordance with the contract."

\* *Aarnes v. Windham*, 137 Ala. 513, 34 So. 816; *Allen v. Mayers*, 184 Mass. 486, 69 N. E. 220; *Hanley v. Walker*, 79 Mich. 807, 45 N. W. 57, 8 L. R. A. 207; *Yeats v. Ballentine*, 56 Mo. 530; *Fuller v. Brown*, 67 N. H. 188, 34 Atl. 463; *McKenzie v. Decker*, 94 N. Y. 650. In *Hooper v. Cuneo*, 227 Mass. 37, 116 N. E. 237, 238, the court said: "The defendant undoubtedly could recoup damages for defects from incompleting work, and for any loss as provided in the contract which he suffered by the delay, yet he could waive not only full performance, but whatever loss had been sustained, and accept the building as and when it was left by the plaintiffs. *Norcross Bros. v. Vose*, 199 Mass. 81, 85 N. E. 468; *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 419, 420, 89 N. E. 138. The question of waiver and of acceptance were issues of fact. *Wood v. Blanchard*, 212 Mass. 53, 56, 98 N. E. 616." See also *Rogue River &c. Assoc. v. Gillen-Chambers Co.*, 85 Oreg. 113, 165 Pac. 1183, and cases in this section *passim* and *supra*, § 704. Under the English law there can be no doubt that such acceptance renders the owner liable for the price but it may be questioned whether he can thus deprive himself without consideration of his right of action. See 1 *Hudson, Building Cont.* (4th Ed.), 332.



§ 725. Continuance of contract of employment after cause for discharge is known.

In the law of Master and Servant, if the master has cause justifying the discharge of the servant, and nevertheless continues, with knowledge of the facts, to receive the benefit of the servant's services, he cannot afterwards make the breach ground for discharge.<sup>49</sup> It is true that a number of authorities lay down the rule that the question whether the servant's breach of duty is excused as a ground for dismissal, by retaining him in his employment is a question of fact for the jury.<sup>50</sup> These authorities are based to some extent on the theory that waiver must be intentional,<sup>51</sup> and fail to observe that the question here presented is one of election and not of a form of waiver where even apparent intention is important. The employer has no right whether he desires it or not, and whatever intention he manifests, to continue the employment and yet retain the right to assert a breach of condition.<sup>52</sup> It is true that an employee may consent to be retained on such terms, but his clearly expressed assent is necessary, for it cannot be presumed. What amounts to a continuance of services may involve a more troublesome question than what amounts to receipt of rent or the doing of any other single act. Employment is a continuing matter and to say that if the employer knowingly lets the employee continue to work a minute, an hour or perhaps a day

<sup>49</sup> *Horton v. McMurtry*, 5 H. & N. 667, per Bramwell, B.; *Jones v. Vestry of Trinity Parish*, 19 Fed. 59; *Roberts v. Brownrigg*, 9 Ala. 106; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28 (cf. *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46); *Daniell v. Boston & Maine R. Co.*, 184 Mass. 337, 68 N. E. 337; *Tickler v. Andrus Mfg. Co.*, 95 Wis. 352, 70 N. W. 292; *Moody v. Strenguth Clothing Co.*, 96 Wis. 202, 71 N. W. 99.

<sup>50</sup> *Boston, etc., Co. v. Ansell*, 39 Ch. Div. 339, 358; *Newman v. Reagan*, 63 Ga. 755; *Atlantic Compress Co. v. Young*, 118 Ga. 868, 45 S. E. 677; *Murray v. O'Donohue*, 109 N. Y. App. Div. 696, 96 N. Y. S. 335; *Atkinson v. Heine*, 134 N. Y. App. Div. 406, 119

N. Y. S. 122; *Batchelder v. Standard Plunger Elevator Co.*, 227 Pa. 201, 75 Atl. 1090; *G. A. Kelly Plow Co. v. London* (Tex. Civ. App.), 125 S. W. 974; *Moynahan v. Interstate, etc., Co.*, 31 Wash. 417, 72 Pac. 81.

<sup>51</sup> See *supra*, § 678.

<sup>52</sup> The situation is in principle identical with that involved where a landlord receives rent after knowledge of breach of condition. See *Davenport v. Queen*, 3 App. Cas. 115. "Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such a receipt."

after he discovers the breach he has lost the right of discharge, is going too far. But prompt action should be required so that the master does not put himself in the inconsistent position of receiving benefit from the continuance of the contract while it suits his convenience so to do and at the same time reserving the right of ending it when that suits his convenience. Condonation of one breach of contract which would afford ground for the employee's discharge does not prevent the employer from considering the whole record of the employee when a further breach has been committed.<sup>53</sup>

### § 726. Waiver of conditions in subscriptions to stock.

Conditions in a subscription to stock which have not been complied with cannot be asserted if the subscriber with knowledge of the facts indicates his desire to proceed with his contract. This is a case of election. The subscriber may choose the advantage of escaping from liability under his contract, or the advantage of becoming a stockholder in the corporation. Any act which is only explicable as rightful on the theory that the subscriber has elected to become a stockholder is conclusive. Thus acting as a director or other officer by performing duties incidental to that office,<sup>54</sup> or acting as a stockholder is

<sup>53</sup> *Daniell v. Boston & Maine Railroad*, 184 Mass. 337, 340, 68 N. E. 337; *Jerome v. Queen City Cycle Co.*, 163 N. Y. 351, 57 N. E. 485; *Johnson v. Van Winkle, etc., Co.*, 130 N. C. 441, 41 S. E. 882; *Hunter v. Gibson*, 3 Rich. L. 161; *Cook v. School Commissioners*, 35 Nova Scotia, 405; *McIntyre v. Hokin*, 16 Ont. App. 498, 502.

In *Daniell v. Boston & Maine Railroad*, 184 Mass. 337, 340, 68 N. E. 337, Loring, J., speaking for the court said: "By continuing to employ the plaintiff after knowledge of his delinquencies, whether before or after the use of discipline marks, the defendant elected not to discharge the plaintiff for those shortcomings but, as matters to be taken into account in case of a subsequent breach of duty, they were not

waived. By continuing to employ the plaintiff after knowledge of a breach of duty the defendant waived its right to discharge him for that, but it did not waive the breach of duty, and in case of a subsequent shortcoming on the plaintiff's part the defendant had a right to take the plaintiff's whole record into account."

In *Hunter v. Gibson*, 3 Rich. L. 161, an overseer had been guilty of repeated acts of intoxication in violation of an express provision in his contract of employment. The fact that the employer excused a number of instances of intoxication was held not to prevent him from subsequently discharging the overseer on the occurrence of further instances.

<sup>54</sup> *Auburn, etc., Association v. Hill*,

an election.<sup>55</sup> Mere attendance at a meeting, however, is not so necessarily, as it is explicable as merely an endeavor to get information, or to recover a subscription which has been paid;<sup>56</sup> but taking part as a stockholder in such a meeting seems not thus explicable,<sup>57</sup> and paying calls or assessments is also conclusive.<sup>58</sup> Knowledge of the facts justifying a subscriber to refuse to complete his subscription is essential to a binding election;<sup>59</sup> and it has been held that intent to waive the condition is also necessary;<sup>60</sup> but such a decision is due to the failure to observe that the situation involves an election between inconsistent benefits.

**§ 727. Surrender of rights accompanied by delivery of tangible property.**

It is only for the creation or discharge of intangible rights that consideration or a seal is required by the common law. Tangible property may be given away, though delivery is es-

113 Cal. 382, 45 Pac. 695; *Corwith v. Culver*, 69 Ill. 502; *Hager v. Cleveland*, 36 Md. 476.

<sup>55</sup> *Sharpley v. Louth, etc., Ry. Co.*, 2 Ch. D. 663. See also *Butler v. Aspinwall*, 33 Fed. 217, *affd.* in 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417; *Dallmand v. Odd Fellows' Savings Bank*, 74 Cal. 598, 16 Pac. 497; *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536.

<sup>56</sup> *Wontner v. Shairp*, 4 C. B. 404; *New Hampshire v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Orynski v. Loustaunan* (Tex.), 15 S. W. 674. *Cf. Tredwen v. Bourne*, 6 M. & W. 461.

<sup>57</sup> *Cabot, etc., Bridge v. Chapin*, 6 Cush. 50, 53; *International, etc., Assn. v. Walker*, 88 Mich. 62, 49 N. W. 1086, 97 Mich. 159, 56 N. W. 344; *Portland and Fairview R. Co. v. Spillman*, 23 Oreg. 587, 32 Pac. 688.

<sup>58</sup> *California S. H. Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; *Callahan v. Chilcott Ditch Co.*, 37 Col. 331, 86 Pac. 123; *Myers v. Sturgis*, 123 N. Y. App. Div. 470,

108 N. Y. S. 528, *affd.* 197 N. Y. 526, 90 N. E. 1162.

<sup>59</sup> *Strong v. Southwestern, etc., Co.* (Tex.), 38 S. W. 546; *Denny Hotel Co. v. Gilmore*, 6 Wash. 152, 32 Pac. 1004.

<sup>60</sup> *Wright v. Agelasto*, 104 Va. 159, 161, 51 S. E. 191. "The instruction should have stated that 'if the jury believe from the evidence that the defendant . . . was named as one of the incorporators, participated in the proceedings of its stockholders, and acted as a director of the company, and at the time of such action and participation in said meetings he did not know that *bona fide*, valid subscriptions to the amount of \$15,000 had not been obtained, and *did not intend by such acts to waive the benefit of the condition*, such action and participation cannot be construed as a waiver of the condition on which his subscription was made, and they must find for the defendant.'" The instruction actually given was held erroneous for omitting the italicized words.

sential to complete the gift; and where tangible property is delivered, intangible rights connected with it may be at the same time be surrendered. On strict logic this is inconsistent with the rules of consideration generally recognized in the discharge of contracts, but at this point the law of contracts yields to the law of property. Thus it is well settled that where property is in the possession of a bailee, an effectual gift may be made by the bailor to the bailee without any retransfer of possession.<sup>61</sup> This involves the conclusion that the bailee's contract or obligation to return the property may be discharged without a seal, and without consideration. If this intangible right may be thus surrendered, it seems logically to follow that other intangible rights may similarly be surrendered in connection with the transfer of tangible property. Thus it may be supposed that parties agree to buy and sell goods for a fixed price, but afterwards agree that no price shall be paid, and that the property shall be transferred as a gift. Until delivery of the goods this agreement is ineffectual. It cannot impose a binding obligation to give, since there is neither consideration nor delivery. It cannot, it seems, even rescind the earlier agreement since the buyer's assent to surrender his rights under the original contract must be regarded as conditional on the performance of the promise to give. Where, however, delivery is actually made, the ownership is transferred and the donee will not be liable for the price agreed upon in the original bargain. If the logic of the doctrine of consideration were applied to the situation, it would have to be said that even after delivery, the transferee remained liable for the price under the original contract, since the transferor has received no consideration for the surrender of that right. Though it would be possible for the parties first to rescind the original bargain, and then to make an effectual gift, they have not taken this course. It cannot be assumed that the transferee would have been willing to rescind except as part of the total agreement

<sup>61</sup> *Re Alderson*, 64 L. T. R. (N. S.) 645; *Re Stoneham*, [1919] 1 Ch. 149; *Eden v. Bohling*, 69 Ill. App. 307; *Tenbrook v. Brown*, 17 Ind. 410; *Wing v. Merchant*, 57 Me. 383; *Allen v. Cowan*,

23 N. Y. 502, 80 Am. Dec. 316; *Miller v. Neff*, 33 W. Va. 197, 207, 10 S. E. 378. See also *Kilpin v. Ratley*, [1892] 1 Q. B. 582.

which provided for the gift of the property. Taking the agreement as a single and indivisible transaction, as it has been stated, it is evident that the seller agrees to give up a right originally secured to him under the contract, and the other party to the contract agrees to give up nothing.<sup>62</sup> It cannot be successfully maintained that the mere acceptance of the gift is sufficient consideration without admitting the indefensible consequence that the promise to give was enforceable prior to delivery, being supported by a promise to accept. That an intangible right may be surrendered, however, as part of a transaction involving the delivery of tangible property, seems not only the legal, but the desirable result. The principle finds application in a variety of cases where a seller surrenders a title or lien, or right of action, to which he previously had been entitled under a bargain. In this connection should also be considered cases, whether all of them defensible or not, where a buyer on acquiring property,<sup>63</sup> or a seller on transferring property,<sup>64</sup> surrenders a right.<sup>65</sup> The case must be sharply distinguished where an attempt is made not to discharge an obligation, but to create one, by means of the transfer of property, greater than that for which the obligor would be bound under the terms of a previous contract. This cannot be done without satisfying the requirements of the law concerning consideration.<sup>66</sup>

<sup>62</sup> See *supra*, § 130.

<sup>63</sup> See cases where the contract is for the sale of goods (§§ 700 *et seq.*) or of land (§ 723) or for the construction of a building (§ 724).

<sup>64</sup> See *infra*, § 730.

<sup>65</sup> Cf. cases where paying an insufficient sum of money is held not to discharge a debt, *supra*, § 120.

<sup>66</sup> In *W. E. Caldwell Co. v. Steckel*, 143 Ia. 564, 121 N. W. 376, a contract had been made for the sale and purchase of tanks. The contract stated a lump sum for them. The seller, however, contended that the price named was for each of the tanks. The buyer with knowledge that such was the seller's claim, took the tanks. It was

held that he might thereafter assert the true construction of the contract.

In *Napier Iron Works v. Caldwell, etc., Iron Works*, 60 Ind. App. 317, 110 N. E. 714, 716, the court said: "We are satisfied that, as the iron was not delivered to appellee during the first half of the year 1910, the title and possession thereof were both in appellant, relieved from any of the agreements contained in the contract, and to again bring it within the provisions of the original contract, and extend the time for delivery, such agreement as to extension, under the facts of this case, to be valid, would have to be supported by a new consideration." See also *supra*, § 130.

### § 728. Discharge of seller's lien in sales of chattels.

The law governing the sale of goods gives an unpaid seller in possession a lien for the price in the absence of an agreement to the contrary. This lien may be lost in various ways. Primarily it may be lost by surrendering possession voluntarily without an agreement for continuance of the lien.<sup>67</sup> Here though neither consideration nor a seal supports the discharge of the vendor's right, the surrender of possession like the delivery of a gift, puts the transaction in the category of dealings with tangible property, rather than intangible choses in action. The lien may also be lost by agreement or by conduct. Generally where the vendor is still in possession, and his right is held to be destroyed, there is what amounts to an agreement supported either by consideration, or by a promissory estoppel. Such an estoppel precludes an assertion of the lien against a third person who has bought the goods from the original buyer, being induced thereto by an attornment of the seller to the sub-buyer, or by any circumstances indicating deception of the sub-buyer as to the relations between the seller and the original buyer.<sup>68</sup> Permitting the buyer greatly to increase the value of the goods, has been held to destroy the lien.<sup>69</sup> It is sometimes laid down broadly that one having a lien waives it by asserting mistakenly a greater right than the law allows him. The true doctrine, however, is doubtless that stated by the Supreme Court of Minnesota: "An examination of the authorities on the subject, from the early case of *Boardman v. Sill*,<sup>70</sup> down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods,

<sup>67</sup> As to the effect of surrender of the goods under an agreement that the lien shall continue, see Williston on Sales, § 515.

<sup>68</sup> Williston on Sales, § 558.

<sup>69</sup> *Douglas v. Shumway*, 13 Gray,

498. Timber had been cut into firewood on the seller's premises in pursuance of the contract with the seller. There is in such a case an element of promissory estoppel.

<sup>70</sup> 1 Campb. 410, note.

without specifying the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so."<sup>71</sup>

There will rarely be a case of surrender of a lien by mere election because even judgment in an action for the price does not destroy the lien.<sup>72</sup> But if the buyer becomes bankrupt, a seller with a lien is a secured creditor, and like any secured creditor he has the election of surrendering his security and proving for his full claim or of realizing on his security and proving for the balance. Proof of the full price as an unsecured creditor would be a waiver of the lien,<sup>73</sup> though doubtless if proof was made under a misapprehension the court would allow it to be withdrawn.

It seems probable, however, that even without consideration or estoppel a lien holder's right may be surrendered. It has indeed been said that an agreement without consideration to give up an existing lien is ineffectual;<sup>74</sup> but both the English Sale of Goods Act<sup>75</sup> and the American Uniform Sales Act<sup>76</sup> provide that an unpaid seller loses his lien by "waiver thereof." The meaning of waiver is not defined, but presumably is intended to include any express intention to surrender. It is also stated in both Acts<sup>77</sup> that

<sup>71</sup> *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113. See also *Loewenberg v. Railway Co.*, 56 Ark. 439, 19 S. W. 1051; *Fowler v. Parsons*, 143 Mass. 401, 9 N. E. 799; *Folsom v. Barrett*, 180 Mass. 439, 62 N. E. 723, 91 Am. St. Rep. 320. Compare *Bean v. Bolton*, 3 Phila. 87; *Stephenson v. Lichtenstein*, 72 N. J. L. 113, 59 Atl. 1033.

<sup>72</sup> *Houlditch v. Desanges*, 2 Stark. 337; *Scrivener v. Great Northern Ry. Co.*, 19 W. R. 388; *Rhodes v. Mooney*, 43 Ohio St. 421, 4 N. E. 233. See also *Wade v. Moffett*, 21 Ill. 110, 74 Am. Dec. 79.

<sup>73</sup> In *Rhodes v. Mooney*, 43 Ohio St.

421, 4 N. E. 233, the contrary was held in a case arising under a common-law assignment, but under the bankruptcy rule as to secured creditors the result stated in the text would seem law.

<sup>74</sup> *Danforth v. Pratt*, 42 Me. 50. This case related to an agister's lien, and there were other reasons justifying the decisions besides the gratuitous character of the agreement.

<sup>75</sup> Sec. 43 (1) c.

<sup>76</sup> Sec. 56 (1) c.

<sup>77</sup> Eng. Sale of Goods Act, Sec. 42; Amer. Uniform Sales Act, Sec. 55.

delivery of part of the goods is not a discharge of a lien unless made under such circumstances as to show an intent to waive the lien. The implication is necessary that an intent to waive the lien if manifested will be effectual, without consideration.<sup>78</sup> So it seems that an attornment to a subpurchaser even after he has bought the goods and paid the original buyer for them is a surrender of the lien.<sup>79</sup> Yet in such a case also the seller is surrendering something for nothing. By his attornment he acquired no new right, retaining only his contractual claim against the original buyer for the price, and losing the hold upon the goods which he had prior to the attornment.

The fact that a lien may be surrendered without consideration is not inconsistent with the revival of the lien, if the buyer subsequently becomes insolvent. Without question a sale on credit excludes a lien; yet if the seller is in possession when the buyer becomes insolvent or the period of credit expires, the lien will revive.<sup>80</sup> So after a voluntary agreement to surrender a lien and hold as bailee for the buyer, his supervening insolvency will revive the lien.<sup>81</sup>

#### § 729. Waiver of vendor's lien on real estate.

In England and some of the United States an unpaid vendor is allowed an equitable lien on real estate though he has parted with title and possession. This lien is held not to arise or to be waived if the buyer at the time of the bargain manifests an intent not to rely upon the security of the land. If subsequently, by taking security, or otherwise, a similar intent is manifested, it is held that the lien then also is destroyed. In most of the cases so holding the vendor at the time he manifested an intent to forego a lien received some payment, security, or promise,

<sup>78</sup> So it is said in *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 316, 37 U. S. App. 266, 16 C. C. A. 232, that if delivery of the part is "intended as a symbolical delivery of the whole, and as a waiver as to any right of retention as to remainder, the lien is lost."

<sup>79</sup> *Hurry v. Mangles*, 1 Camp. 452; *McElwee v. Metropolitan Lumber Co.*,

69 Fed. 302, 316, 37 U. S. App. 266, 16 C. C. A. 232.

<sup>80</sup> *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232, and cases cited.

<sup>81</sup> *Grice v. Richardson*, 3 App. Cas. 319; *Miles v. Gorton*, 2 Cr. & M. 504; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232.



which would serve as consideration, but at least in one case it has been held that a mere manifestation of intent by the vendor to give up a lien which he already had acquired, terminated the lien.<sup>82</sup>

**§ 730. Waiver of the condition of payment in a cash sale.**

Whether a sale is complete with a lien retained by the seller, or whether the property has not passed, and will not pass until the buyer pays the price, is a question that has some importance when merely the rights of the buyer and the seller are concerned; for if the property has passed, the risk has been transferred, the seller may sue for the price,<sup>83</sup> and, on the other hand, the buyer may bring trover or replevin for the goods if the seller wrongfully refuses to carry out the bargain. The greatest importance of the question arises, however, when the rights of third persons are concerned. If the property does not pass till payment, a purchaser from the buyer gets no title. Even though the buyer has the goods in his possession and delivers them to the subpurchaser, this result is necessarily reached unless, as in England, a statute otherwise provides.<sup>84</sup>

If the condition protecting the seller has been surrendered by him,<sup>85</sup> the buyer's title becomes absolute and may be transferred to a subpurchaser. The majority of the litigated cases

<sup>82</sup> In *Moshier v. Meek*, 80 Ill. 79, 81, the court said: "Without passing upon or in anywise determining the effect of the declarations made by Daniel Meek in his lifetime, that he did not intend to collect the notes of William on his legal liability for their payment, they clearly and unmistakably manifest a determination not to rely upon or to enforce the lien. This is as manifest from these declarations, as if he had formally said, when the conveyance was made, that he waived the right to insist upon a vendor's lien, or had subsequently said the same thing." See also *Dart on Vendors & Purchasers* (7th ed.), p. 733. *Warvelle on Vendor & Purchaser*, §§ 698, 699.

<sup>83</sup> Even though the property has not passed, in some instances, the seller

may sue for the price and is not limited to a recovery of the difference between the value of the goods and the agreed price. *Infra*, § 1365.

<sup>84</sup> In England, by statute, the Factors' Act of 1889 enables a buyer in possession to give a good title to a purchaser from him. See *Williston, Sales*, § 319. In *Starnes v. Roberts*, 128 Ga. 718, 720, 58 S. E. 348, the court upheld the seller's right to regain the goods from the buyer, but said had the action been against a subpurchaser "a very different case would have been presented." But except where conditional sales are invalid at common law or for lack of record a cash sale must also be valid against third persons.

<sup>85</sup> See *supra*, § 727.

in regard to cash sales involve the question how far the delivery of the goods by the seller to the buyer or their continued possession by the buyer without objection on the part of the seller excuses the condition requiring payment of the price before title is transferred. There can be here no surrender of the seller's right without his assent. The mere acquisition of possession by the buyer, therefore, irrespective of the seller's assent, will have no such effect. Nor will temporary manual possession by the buyer, even with the seller's assent. As a shopkeeper may allow a prospective purchaser to take goods into his hands and examine them before payment, though he does not assent to the removal of them, it is evident that a delivery to the buyer may be itself conditional; that is, merely for a special temporary purpose, such as examination, testing, weighing, or the like. No assent in such a case to the transfer of the property by the seller can be found when the original bargain required payment of the price as a condition precedent to such transfer.<sup>85</sup> The cases which present difficulty are where the seller has voluntarily parted with possession and for a purpose other than the temporary one of examination or the like. It is universally admitted in the decisions that delivery is at least evidence of assent to transfer title, but it is also generally said that it is only evidence and that the seller's intent to retain the benefit of his condition may be shown.<sup>86</sup>

<sup>85</sup> In *Whitney v. Eaton*, 15 Gray, 225, goods were delivered to the buyer for the purpose of computing tare. In *Osborn v. Gantz*, 60 N. Y. 540, and *Hart v. Boston & Maine R. R.*, 72 N. H. 410, 56 Atl. 920, to test the accuracy of weighing. In *Silsby v. Boston & Albany R. R. Co.*, 176 Mass. 158, 57 N. E. 376, to verify the quality and count of the merchandise. In *Wabash Elevator Co. v. First National Bank*, 23 Ohio St. 311, delivery of warehouse receipts for grain was made in expectation of immediate payment, to which the seller was entitled by the bargain, but the buyer, having a claim on another account against the seller, retained the receipts and told the seller that he would credit him on

account with the price. In *Harris v. Smith*, 3 S. & R. 20, delivery was secured by a trick. See also *Susong v. McKenna*, 126 Ga. 433, 55 S. E. 236; *Evansville, etc., Ry. Co. v. Erwin*, 84 Ind. 457; *Ewing v. Musser*, 42 Pa. Sup. 177. In all these cases it was held that title did not pass. See also *Bainbridge v. Caldwell*, 4 Dana, 211.

<sup>86</sup> See *Guarantee Title &c. Co. v. First Nat. Bank*, 185 Fed. 373, 107 C. C. A. 429; *Cheatle v. MacVeagh*, 83 Ill. App. 336; *Gibson v. Chicago Packing Co.*, 108 Ill. App. 100; *Dougherty v. Fowler*, 44 Kans. 628, 25 Pac. 40, 10 L. R. A. 314; *Seed v. Lord*, 66 Me. 580; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630; *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712; *Scudder v.*

An analysis of the situation upon principle makes it evident that the real question is, Does the seller assent to give the buyer the incidents of ownership?

Bradbury, 106 Mass. 422; Upton v. Sturbridge Cotton Mills, 111 Mass. 446; Haskins v. Warren, 115 Mass. 514; Globe Milling Co. v. Minneapolis Elevator Co., 44 Minn. 153, 46 N. W. 306; Carter, Rice & Co. v. Cream of Wheat Co., 73 Minn. 315, 76 N. W. 55; Johnson-Brinkman v. Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Ferguson v. Clifford, 37 N. H. 86, 103; Leatherbury v. Connor, 54 N. J. L. 172, 23 Atl. 684, 33 Am. St. Rep. 672; Morris v. Rexford, 18 N. Y. 552; Hammett v. Linneman, 48 N. Y. 399; Adams v. Roscoe Lumber Co., 159 N. Y. 176, 53 N. E. 805; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527; McIver v. Williamson-Halsell Frasier Co., 19 Okl. 454, 92 Pac. 170; Johnson v. Iankovetz, 57 Ore. 24, 110 Pac. 398; Frech v. Lewis, 32 Pa. St. 279, 67 Atl. 45; Victor Safe Co. v. Texas Trust Co. (Tex.), 104 S. W. 1040; Paulson v. Lyon, 26 Utah, 438, 73 Pac. 510. In Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712, the seller brought replevin for two settees, manufactured for one Coburn, and delivered to him something more than a year before. The defendant had bought the settees from Coburn some months after they had been delivered to the latter. A witness for the plaintiff testified that the settees were made and delivered and "considered cash payment." A week or ten days afterward the bill was sent. About three weeks afterward the money had not come in and a boy was sent over once or twice to collect the bill. A month after the delivery the witness saw the buyer who said he could not pay the bill that day and to come in again in about a week. The witness replied, "all right," and went in about a week but could not get pay then. The witness then said he

thought the best way was to give a lease and the buyer to pay \$10 down and \$10 every month thereafter; to which Coburn assented, and \$20 was paid on account during the next few months. Subsequently the defendant purchased the settees. The court in banc held that if the property passed by delivery, the unrecorded conditional sale substituted for the original bargain was ineffectual to give the plaintiffs a claim against the defendant; but that if the property did not pass originally the parties merely substituted one conditional contract for another, as they might with propriety have done. The court, therefore, sustained the exceptions and directed that the case should be submitted to the jury. It seems perfectly clear, however, that the property had passed to the defendant. The sale was made on credit at the outset, and further credit allowed. From the moment of delivery the buyer used the settees as his own, and was permitted to do so. This permission was inconsistent with a conditional delivery. It was not inconsistent with a conditional sale, but such a bargain should never be implied. Moreover, if such was the nature of the transaction, the lack of record made it invalid against the defendant. Similarly in Brownville Slate Co. v. Hill, 175 Mass. 532, 56 N. E. 706, the question was held properly left to the jury whether delivery of goods was conditional, and whether the condition had been waived, and the title passed to the buyer; though if the goods had been used immediately upon their delivery it would not have been inconsistent with any condition imposed by the seller. The seller, though originally demanding an order on the defendant before he would deliver,

**§ 731. Giving the buyer a right to use the goods as his own, indicates transfer of title.**

In order to answer the question whether the seller assents to transfer the title, the original bargain and what is subsequently done must both be considered. If the original bargain was for a cash sale, as distinguished from what is ordinarily called a conditional sale, that must mean that the buyer was to have neither the title nor the use and enjoyment of the goods until the price was paid. If the buyer was to have the use and enjoyment of the property, though not the title, before payment of the price, the transaction is a conditional sale, not a cash sale. Accordingly, if after bargaining for a cash sale the seller subsequently, voluntarily, delivers to the buyer the goods with the intent that the buyer may immediately use them as his own, and without insisting upon contemporaneous payment, this action is absolutely inconsistent with the original bargain. Such a delivery is not only evidence of a surrender of the condition of cash payment, it should be conclusive evidence. Even though the case warrants the conclusion that the buyer and seller agreed or understood that the seller should not part with his title until the price was paid, it is still true that the delivery and permission to the buyer to use the goods as his own are inconsistent with the theory of a cash sale. Instead, a conditional sale has been substituted and the transaction should be dealt with according to the rules governing conditional sales.<sup>87</sup> The importance of the point is chiefly due to

seems subsequently to have been satisfied with a promise to give the order in the immediate future. In *Hammett v. Linneman*, 48 N. Y. 399, the plaintiff sold coal to the defendant, and allowed the defendant to take the coal from the boat to his yard and mix it with other coal; but the court found that the sale was for cash, and the seller demanded payment in a short time, and the court, therefore, held, Earle, J., dissenting, that the evidence supported a verdict for the plaintiff. In *Adams v. Roscoe Lumber Co.*, 159 N. Y. 176, 53 N. E. 805, lumber was delivered under a contract to one Mack-

intosh, who agreed to buy the lumber and pay for it by note at sixty days. The lumber was delivered, and as soon as delivered the bill was sent with a written statement that the terms of payment was a note payable in sixty days, together with a letter requesting that the note be sent in accordance with these terms, but the note was never delivered and the plaintiff's agent, on calling for it, failed to get it. It was held that a verdict for the plaintiff based on the theory that title had never passed should be sustained.

<sup>87</sup> This passage is quoted and the argument admitted to be logical; but

the fact that record or filing is often required in the case of conditional sales, while it is not in the case of cash sales.<sup>88</sup> Moreover, since a conditional sale where the buyer is given power to resell the goods is often held invalid,<sup>89</sup> it follows that where a buyer delivers goods under such circumstances that it is not a violation of duty to the seller for the buyer immediately to resell the goods the seller's title can rarely be upheld, either on the theory of a cash sale or a conditional sale, at least as against subpurchasers or creditors of the buyer.<sup>90</sup>

in view of earlier Kansas cases not followed in *People's State Bank v. Brown*, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824. An instance of such a transaction is reported in *Sprague Canning Co. v. Fuller*, 158 Fed. 588, 86 C. C. A. 46.

\* The referee in bankruptcy in *Re King Motor Car Co.*, 31 A. B. R. 172, 180, relying on *Mishawaka Woolen Mfg. Co. v. Westveer*, 191 Fed. 465, 112 C. C. A. 109, said: "My conclusions are that under the decision in the *Mishawaka Case*, it was, and is, the intent and purpose of the Circuit Court of Appeals of this circuit to hold any contract, whatever may be its particular wording, form or terms, providing for the sale of goods which are, or are to be, delivered to the buyer for the purposes of resale, and without any limitation as to the buyer's right to sell the same, unless such sale is made by the buyer for the seller, a contract of sale with a reservation retaining a lien as security; that such contracts are invalid as against creditors unless they are recorded and all of the provisions of the recording laws of the State of Michigan complied with.

\* Williston, Sales, § 329.

\* The doctrine contended for in the text is well expressed by Judge Wells in *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446, 453: "A waiver is the result of a voluntary unequivocal act of delivery. To say that a party does not thereby intend a waiver is to say

that he does not intend the legal effect of his voluntary act. . . . If unaccompanied by any word or act or circumstance to indicate that [delivery] is qualified or made subject to a condition, the vendee has a right to understand it to be absolute. To hold him accountable, as the custodian of property belonging to another, requires his assent to the obligation, either express or by implication. . . .

"The purchaser may be presumed to assent to a waiver; but he cannot be presumed, by accepting a delivery apparently unrestricted, to assent to a condition which lies in the undisclosed intent of the other party." So in *Blackshear v. Burke*, 74 Ala. 239, 242: "The title vested in the purchaser, and from the moment of delivery of possession the relation of buyer and seller was changed into that of debtor and creditor. This is true, even where there is a sale of goods for cash. If the seller, without demanding the purchase money, not being induced by the fraud of the buyer, delivers the goods to him unconditionally, the title vests in the buyer, and he becomes the absolute owner." In *Frech v. Lewis*, 218 Pa. St. 141, 67 Atl. 45, 11 L. R. A. (N. S.) 948, 120 Am. St. Rep. 864, the plaintiff furnished the defendant with carriages which were to be paid for on delivery. The carriages were used, however, and two and one-half months elapsed, during which time frequent

### § 732. Effect of giving a worthless check.

Sometimes after a bargain for a cash sale the buyer gives in payment of the price a worthless check, and it has been held that such a false check is no payment; and that not only does no title pass to the fraudulent buyer, but that the seller may assert his title against an innocent purchaser from the buyer.<sup>91</sup> It is submitted that such decisions are unsound. The reasoning upon which they rest is that a worthless check is no payment of

demands for payment were made; then the plaintiff began an action for replevin for the carriages. The lower court permitted the case to go to the jury, who found in favor of the plaintiff. This decision was affirmed by a divided bench in the Superior Court, but was reversed by the Supreme Court, which held that there was no evidence which could justify a verdict for the plaintiff. The court said: "Our cases proceed on the theory that until payment has been made, or waived, the contract remains executory, and that delivery in such case is not a completion of the contract, except as an intention to so regard it is expressly declared or can fairly be inferred from the circumstances attending. Possession, however, having passed, and the buyer, by the act of the seller, having been invested with the indicia of ownership, the policy of our law requires that this situation—the possession in one and the right of property in another—shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right in such case to reclaim his goods, but he must do so promptly, otherwise he will be held to have waived his right, and he can only thereafter look to the buyer for the price. . . . Except when delayed by trick or artifice, the assertion of the right to reclaim the property must follow immediately upon the buyer's default." This decision was followed in *E. I. Dupont Co. v. John*

*Shields Const. Co.*, 162 Fed. 198. See also *Northwestern State Bank v. Silbeman*, 154 Fed. 809, 83 C. C. A. 525; *In re O'Callaghan*, 225 Fed. 133; *Kloak v. Joseph*, 150 Ky. 508, 150 S. W. 651; *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630; *Hirsch Lumber Co. v. Hubbell*, 128 N. Y. S. 85, 143 N. Y. App. Div. 317.

<sup>91</sup> *National Bank of Commerce v. Chicago, etc., Ry. Co.*, 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Johnson v. Iankovetz*, 57 Or. 24, 110 Pac. 398. In these cases it was held that the seller might maintain an action for conversion against a *bona fide* purchaser of the goods from the original fraudulent buyer. In *Hodgson v. Barrett*, 33 Ohio St. 63, the seller, under similar circumstances, was allowed to reclaim the goods from a voluntary assignee in insolvency, and it is not improbable that the court would have reached the same result as against an innocent purchaser from the buyer. In *People's State Bank v. Brown*, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824, the seller recovered against attacking creditors of the buyer. In *Sims v. Bolton*, 138 Ga. 73, 74 S. E. 770; *Mathews v. Cowan*, 59 Ill. 341, the seller was allowed to recover from the original buyer. See also *Dosbaugh Nat. Bank v. Jelf*, 86 Kans. 41, 119 Pac. 538.

the price, and the condition has not happened upon which the property was to pass. But the real question is, Did the seller assent to transfer the ownership in the goods? and it can hardly be doubted that he did.<sup>92</sup> If a seller should say "you must not deal with these goods, though I have put them in your hands, until I collect the check," that would show an intent not to transfer the property to the buyer. But where the goods are put into the buyer's hands without more, it can hardly be doubted that the seller means to allow him to deal with them as his own; to resell them immediately if he feels inclined. It is true that this assent to the transfer of the property to the buyer has been procured by fraud; therefore, the seller may reclaim the goods or their proceeds from the fraudulent buyer.<sup>93</sup> But, as in other cases where the seller is induced to part with his property by fraud, the voidable title of the fraudulent buyer becomes an indefeasible title upon a *bona fide* purchase from the fraudulent buyer.

**§ 733. Summary of principles governing transfer of property without performance of conditions in cash sales.**

The matter may be thus summarized: If the goods are delivered without any permission, express or implied, to the buyer to deal with them as his own until the price is paid, the condition that payment shall be simultaneous with the transfer of title may still be asserted; but if the seller on delivering the goods does so without restriction, so that the buyer is violating no duty if he uses the goods as his own, it is a conclusion of law that the transaction is not properly a cash sale. At most, it is what has been commonly called a conditional sale; and the natural inference is that the transaction is not even a condi-

<sup>92</sup> *White v. Garden*, 10 C. B. 919; *Whitehorn v. Davison*, [1911] 1 K. B. 463 (C. A.). In these cases to be sure, time bills were given, but the evidence warranted the conclusion that when they were given there was no expectation or intent of paying them. The Court of Appeals reversed the decisions below (which sustained the seller's right against a *bona fide* pledgor)

holding it immaterial even if the original acquisition of goods had been by larceny, since the seller ultimately agreed to take bills.

<sup>93</sup> Or from any one who has no greater equities. *First Nat. Bank v. Griffin*, 31 Okla. 382, 120 Pac. 595; *Boyd v. Bank of Mercer County*, 174 Mo. App. 431, 160 S. W. 587.

tional sale. A delivery to the buyer with authority to use the goods immediately should be a conclusive evidence of transfer of the property in the absence of pretty clear evidence showing an intention to reserve the title. Even though a delivery to the buyer is not inconsistent with a cash sale, because the delivery was for some purpose other than to transfer the property, the seller may lose his right to insist on the condition by a failure to reclaim the goods for an unusual time. Such failure shows an assent to the permanent retention by the buyer of goods which were delivered to him for a temporary purpose only.<sup>94</sup> Evidence of usage is admissible to explain the nature of a delivery and, therefore, whether it was absolute or conditional.<sup>95</sup> Finally, if the goods were obtained by fraud, even though all conditions in the sale were excused, the defrauded seller may, nevertheless, reclaim title if he acts within a reasonable time after discovery of the fraud.

<sup>94</sup> *Carter, Rice & Co. v. Cream of Wheat Co.*, 73 Minn. 315, 318, 76 N. W. 55 ("Where payment of the purchase price, or giving security for its payment, and the delivery of goods, are expressly or impliedly agreed to be simultaneous, and, upon getting possession, the payment or giving security is omitted, evaded, or refused by the purchaser, the seller may immediately reclaim the goods"); *Leatherbury v. Connor*, 54 N. J. L. 172, 174, 23 Atl. 684, 33 Am. St. Rep. 672 ("The agreement did not contemplate an absolute sale without condition; it considered that the vendee would act honestly and presently furnish the mortgage, which was the condition of the sale. The delivery did not make the sale absolute [2 Kent Comm. 497, *Smith v. Dennie*, 6 Pick. 262, 17 Am. Dec. 368; *Smith v. Lynes*, 5 N. Y. 41; *Farlow v. Ellis*, 15 Gray, 229; *Parker v. Baxter*, 86 N. Y. 586], but as the indicia of title raised a presumption that it was absolute [Schouler, *Per. Prop.*, § 304; *Smith v. Lynes*, *supra*;

*Parker v. Baxter*, *supra*; *Farlow v. Ellis*, *supra*; *Whitney v. Eaton*, 15 Gray, 225; *Scudder v. Bradbury*, 106 Mass. 422], when the mortgage was not forthcoming, it became the duty of the vendors to pursue their right to recover possession of the chattels with all the reasonable diligence that the circumstances surrounding them would permit. . . . Failure to thus pursue their right, while others bought their chattels as the property of the corporation which they had clothed with apparent title, constituted a waiver of the concurrent condition that they should have the mortgage and of any right they had to retake the property in the hands of an innocent third person"). See also *Goldsmith v. Bryant*, 26 Wis. 34; *Ewing v. Sylvester* (Tex. Civ. App.), 94 S. W. 405; *Victor Safe Co. v. Texas State Trust Co.* (Tex. Civ. App.), 99 S. W. 1049.

<sup>95</sup> *Scudder v. Bradbury*, 106 Mass. 422.



**§ 734. Waiver in conditional sales—nature of such sales.**

Conditional sales, so called, present the only class of cases where it is at all usual for the buyer to agree to pay the price before he acquires title to the property. In such sales the practice is for the buyer to be given possession of the thing purchased, the seller retaining title, however, until the price is paid. Sometimes none of the price is paid at the time the goods are delivered; more frequently an instalment of the price is payable then and the balance of the price is payable either in instalments or as a whole at a later time. Such a transaction is in its essence analogous to a transfer of title to the buyer, and a mortgage back by the buyer to the seller in order to secure the price. If the bargain related to real estate, it would probably take that form. When it relates to chattels, largely, perhaps because the value of the subject-matter of the bargain is not great enough to make desirable formalities usual with real estate, the parties, as a short cut to reach the same result, generally provide that the seller shall retain title. He retains it, however, merely as security. The beneficial interest in the property, so far as is not inconsistent with the security of the seller, is vested in the buyer.<sup>96</sup>

**§ 735. A conditional seller may recover the price though title has not passed.**

In conditional sales the buyer, relying on his possession of the goods as sufficient to secure him for such portion of the price as he may pay before the property passes to him, is content to pay part of the price in advance. He does not, however, in any common case pay any part of the price until delivery. For this reason the wording of the English Sales of Goods Act is unfortunate. The act apparently fails to provide for the case which it is intended to cover.<sup>97</sup> In the United States there

<sup>96</sup> See Williston, Sales, §§ 330-337.

<sup>97</sup> Section 49 (2) allows a recovery of the price where it "is payable on a day certain, irrespective of delivery . . . although the property in the goods has not passed." The insertion of the words "irrespective of delivery" gives the subsection an inadequate ef-

fect, and these words seem somewhat inconsistent with the end of the sentence quoted. In conditional sales the seller who has delivered possession should certainly be allowed to recover the full price, because by the terms of the bargain the price is to be paid irrespective of the transfer of title; but

seems to be no reason to doubt that the seller, if he has delivered the goods to the buyer, may recover the full price.<sup>88</sup> In most jurisdictions the seller is allowed to recover the price, even though the subject-matter of the sale has been accidentally destroyed.<sup>89</sup> Such decisions necessarily involve the seller's right to recover the price irrespective of transfer of the property. The contrary decisions contain, however, no implication that if the goods had not been destroyed the seller could not recover the instalments of the price payable before the time for transferring the property. Of course it is entirely possible to make the price payable irrespective of delivery as well as of transfer of the property,<sup>1</sup> but such a contract must be unusual.<sup>2</sup> It is generally provided in contracts of conditional sale that on default of the buyer the seller may reclaim possession of the goods, and even in the absence of such a provision it has been held to be implied.<sup>3</sup>

### § 736. Conditional seller's election of remedies.

If the seller exercises his right to reclaim the goods, it is generally held an election to rescind the contract, and thereafter an action for the price or any unsatisfied balance of it, is not allowed.<sup>4</sup>

the price is not to be paid irrespective of delivery, and under the English statute it is hard to see how the seller could recover more than the difference between the contract price and the market price for the goods.

<sup>88</sup> *Bierce v. Hutchins*, 205 U. S. 340, 348, 51 L. Ed. 828, 834; *McRae v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Morris v. Cohn*, 55 Ark. 401, 18 S. W. 384, 385; *Vinegar Bend Lumber Co. v. Soule Steam Feed Works*, 182 Ala. 146, 62 So. 279; *Bond v. Bourk*, 54 Colo. 17, 129 Pac. 223; *Smith v. Aldrich*, 180 Mass. 367, 62 N. E. 381; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Haynes v. Temple*, 198 Mass. 372, 84 N. E. 467; *R. C. Bartley Co. v. Lee*, 87 N. J. L. 19, 93 Atl. 78; *McDaniel v. Chiaramonte*, 61 Oreg. 403, 122 Pac. 33; *Sioux Falls Adjustment*

*Co. v. Aikens*, 32 S. Dak. 154, 142 N. W. 651. Even though the goods are not delivered—only tendered. *Port Huron Machinery Co. v. Hurto*, 154 Ia. 435, 135 N. W. 31. As Massachusetts does not permit the seller, generally, to recover the full price until title has passed, the decisions of that State have peculiar force. See also *Tufts v. Poness*, 32 Ont. 51.

<sup>89</sup> See *infra*, § 965.

<sup>1</sup> See *Gray v. Booth*, 64 N. Y. App. Div. 231, 71 N. Y. S. 1015.

<sup>2</sup> See *Morris v. Cohn*, 55 Ark. 401, 18 S. W. 384.

<sup>3</sup> *Ryan v. Wayson*, 108 Mich. 519, 66 N. W. 370.

<sup>4</sup> *Lamond v. Davall*, 9 Q. B. 1030; *Manson v. Dayton*, 153 Fed. 258, 82 C. C. A. 588; *Dowdell v. Empire Furniture Co.*, 84 Ala. 316, 318, 4 So. 31;

It is obviously possible, however, for the seller to resume possession of the goods without thereby rescinding the contract. He may, it would seem, resume possession without forfeiting or claiming to forfeit the buyer's right to pay any unsatisfied portion of the price and thereby perfect his ownership, but merely to increase his own security.<sup>5</sup> But the mere reclaiming of possession seems generally regarded as an election to rescind the sale; and it seems rightly, for it is generally a correct inference from the reclaiming of possession by the seller that the buyer's interest in the property is to be terminated. But that this involves a termination of the buyer's contractual obligation does not follow. The consideration for the promise to pay was the conditional right given the buyer, and "when a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of considera-

*Aultman v. Fletcher*, 110 Ala. 452, 18 So. 215; *Nashville Lumber Co. v. Robinson*, 91 Ark. 319, 121 S. W. 350; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448; *Green v. Sinker*, 135 Ind. 434, 35 N. E. 262; *Reeves v. Miller* (Ind. App.), 91 N. E. 812; *Perkins v. Grobman*, 116 Mich. 172, 74 N. W. 469, 72 Am. St. Rep. 512; *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 89 N. W. 683; *Minneapolis Works v. Hally*, 27 Minn. 495, 8 N. W. 597; *Aultman v. Olsen*, 43 Minn. 409, 45 N. W. 852 (compare *Third Bank v. Armstrong*, 25 Minn. 530); *Fredrickson v. Schmittroth*, 77 Neb. 724, 112 N. W. 564; *Madison Live Stock Co. v. Oaler*, 39 Mont. 269, 102 Pac. 325; *Earle v. Robinson*, 91 Hun. 363; *affd.*, without opinion, 157 N. Y. 683, 51 N. E. 1090; *Ratchford v. Cayuga &c. Co.*, 217 N. Y. 565, 112 N. E. 447, L. R. A. 1916 E. 615; *White v. Gray's Sons*, 96 N. Y. App. Div. 154, 89 N. Y. S. 154; *Edmead v. Anderson*, 118 N. Y. App. Div. 16, 103 N. Y. S. 369; *Ohl v. Standard Steel Section, Inc.*, 179 N. Y. App. Div. 637, 167 N. Y. S.

184; *Campbell Press Co. v. Hickok*, 140 Pa. St. 290, 21 Atl. 362; *Seanor v. McLaughlin*, 165 Pa. St. 150, 30 Atl. 717; *Kelley Springfield Roller Co. v. Schlimme*, 220 Pa. St. 413, 69 Atl. 867; *Stewart & Holmes Drug Co. v. Ross*, 74 Wash. 401, 133 Pac. 577; *Tufts v. Brace*, 103 Wis. 341, 79 N. W. 414; *Sawyer v. Pringle*, 18 Ont. App. 218.

<sup>5</sup> *Hollenberg Music Co. v. Barron*, 100 Ark. 403, 140 S. W. 582, 36 L. R. A. (N. S.) 594; *Hollenberg Music Co. v. Bankston*, 107 Ark. 337, 154 S. W. 1139; *Muncy v. Brain*, 158 Cal. 300, 110 Pac. 945; *Pease v. Teller Corporation*, 22 Ida. 807, 128 Pac. 981; *Westinghouse Elec. Co. v. Auburn, etc., R. Co.*, 106 Me. 349, 76 Atl. 897 (statutory); *Tufts v. D'Arcambal*, 85 Mich. 185, 48 N. W. 497, 12 L. R. A. 446, 24 Am. St. Rep. 79. See also *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79; *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098; *White v. Gray's Sons*, 96 N. Y. App. Div. 154, 89 N. Y. S. 481; *McDaniel v. Chiaramonte*, 61 Oreg. 403, 122 Pac. 33.

tion.”<sup>6</sup> The only reason for qualifying this principle is the equitable principle which forbids a forfeiture. If this equitable principle were applied the seller would be compelled to credit against the balance of the price, the value of the goods when retaken, as shown by a subsequent resale or otherwise, or to return the goods on tender of the balance of the principal.<sup>7</sup> Some courts have further held that as the seller has reclaimed the goods there is failure of consideration, not simply for the buyer's promise to pay the remainder of the price, but also for any portion of the price that may have been already paid, and that, therefore, at least if the contract does not provide for the forfeiture of such payments, they may be recovered with only such deduction as is fair compensation for the use of the goods.<sup>8</sup> And a few courts have also held that in an action brought to reclaim possession the seller must either tender the portion of the price which has been paid subject to proper reduction for temporary use, or that a money judgment will be rendered in which an equitable reduction is made from the value of the goods.<sup>9</sup> But there is force in the statement of the California court “that there is little equity and no policy in allowing a buyer under such circumstances to be at pleasure quit of his contract with no other liability than such as the law would have implied had there been no contract at all.”<sup>10</sup> A seller should be allowed all the means that he has contracted for in order to get the price of the goods, and most courts do not compel the seller to account for any payment which he has received if he reclaims the goods because of the buyer's default.<sup>11</sup>

<sup>6</sup> *Gutlon v. Marcus*, 165 Mass. 335, 336, 43 N. E. 125. See also *Dyrenforth v. Palmer, etc., Tire Co.*, 145 Ill. App. 62, aff'd., 240 Ill. 25, 88 N. E. 290, and *supra*, § 112.

<sup>7</sup> See decisions, *infra*, § 738.

<sup>8</sup> *Hill v. Townsend*, 69 Ala. 286; *Pierce v. Staub*, 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N. S.) 785; *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79.

<sup>9</sup> *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *National Cash Register Co. v. Cervone*, 76 Ohio St. 12, 80 N. E. 1033 (statutory). See

also *Hamilton v. Singer Mfg. Co.*, 54 Ill. 370. If the fair value of the goods for the period during which the buyer has had them exceeds the portion of the price paid, no deduction may be made in an action of trover by the seller. *Commercial Publishing Co. v. Campbell Printing Co.*, 111 Ga. 388, 36 S. E. 756.

<sup>10</sup> *Rayfield v. Van Meter*, 119 Cal. 416, 52 Pac. 666. See also *Mader v. Guest Piano Co. (Iowa)*, 172 N. W. 302.

<sup>11</sup> *Richards v. Hellen*, 153 Ia. 133, 133 N. W. 393; *Mohler v. Guest Piano Co.*

§ 737. Analogy of mortgage.

In some States stress is laid upon the existence of an express term in the contract that the payments shall be forfeited.<sup>12</sup> But it seems that little importance should be attached to this provision,<sup>13</sup> for even when not expressed it must always be a fair implication. The right given expressly or impliedly to retake possession cannot fairly be considered as meaning a right to rescind the transaction by putting the buyer *in statu quo*. So long as courts treat the question as one to be determined solely by the provisions of the contract, the conclusion can rarely be avoided that the seller may resume possession and hold all that he has received. No satisfactory solution of the rights of the parties in such a transaction can be found without observing that the essential character of the transaction is the same as that of an absolute sale with a mortgage back.<sup>14</sup> A failure to observe and apply this analogy has led to injustice both against the seller and against the buyer. The seller is by

(Iowa), 172 N. W. 302; *Fleck v. Warner*, 25 Kans. 492; *Hawkins v. Hersey*, 88 Me. 394, 30 Atl. 14; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Angier v. Manufacturing Co.*, 1 Gray, 621, 61 Am. Dec. 436; *Lorain Steel Co. v. Norfolk & Bristol Street Ry. Co.*, 187 Mass. 500, 73 N. E. 646; *Haynes v. Temple*, 198 Mass. 372, 84 N. E. 467; *Hoe v. Rex Mfg. Co.*, 205 Mass. 214, 91 N. E. 154; *Knudson v. General Motorcycle Co.*, 230 Mass. 54, *sub nom.*, *Raymond v. Motorcycle Co.*, 119 N. E. 359; *Thirlby v. Rainbow*, 93 Mich. 164, 53 N. W. 159; *Ryan v. Wayson*, 108 Mich. 519, 66 N. W. 370; *Perkins v. Grobбен*, 118 Mich. 172, 74 N. W. 469, 39 L. R. A. 815, 72 Am. St. Rep. 512; *Van Den Bosch v. Bouwman*, 138 Mich. 624; *Duke v. Shackelford*, 56 Miss. 552 (overruling on this point a *dictum* in *Ketchum v. Brennan*, 53 Miss. 596); *Haynes v. Hart*, 42 Barb. 58; *Pfeiffer v. Norman*, 22 N. Dak. 168, 133 N. W. 97, 38 L. R. A. (N. S.) 891; *Morgan v. Kidder*, 55 Vt. 367. As to land, see *Davis v. Wilson*, 55 Oreg. 403, 106 Pac. 795. In two cases above cited

(*Fleck v. Warner* and *Thirlby v. Rainbow*), though it was decided that the seller might regain possession without accounting for payments received, the question was left open whether subsequently the buyer would have a right to redeem the property or to recover payments made. See also *Ratchford v. Cayuga &c. Co.*, 159 N. Y. App. Div. 525, 145 N. Y. S. 83. But a seller who reclaims possession and retains payment was held not entitled to any further damages for the buyer's use of the property or breach of contract. *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023.

<sup>12</sup> See *Singer Mfg. Co. v. Treadway*, 4 Ill. App. 57 (compare *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 517); *Van Den Bosch v. Bouwman*, 138 Mich. 624. See also *Pierce v. Staub*, 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N. S.) 785.

<sup>13</sup> *Mohler v. Guest Piano Co. (Iowa)*, 172 N. W. 302, 306.

<sup>14</sup> *Swayze, J.*, in *R. C. Bartley Co. v. Lee*, 87 N. J. L. 19, 93 Atl. 78.

a majority of courts denied the two remedies for which his contract provides; namely, the personal obligation of the debtor and the security of the goods, and compelled to choose between them, though both may be necessary for his protection. The buyer is also by the majority of courts denied the protection which courts of equity long ago gave to mortgagors. The opportunity and danger of a forfeiture are the same in the case of a conditional sale as in a mortgage; yet though it is abundantly established everywhere that whatever the terms of a mortgage, the mortgagee is only entitled to obtain his debt and interest, and that terms of the bargain by which a forfeiture is contracted for will not be enforced, it seems to be generally supposed that in a conditional sale the terms of the bargain are to be enforced whatever they may be.<sup>15</sup>

**§ 738. Invalidity of reasons for distinguishing conditional sales from mortgages.**

This difference is doubtless partly due to the fact that courts of equity have established the fundamental principles of the law of mortgages, whereas the rights of the parties in conditional sales have generally been determined at law. But in view of the general adoption of equitable principles by courts of law to-day, either under statutes or without their aid, there seems no reason why such principles should not be applied now whatever the form of action. Some courts have so determined and have given the parties rights analogous to those of mortgagor and mortgagee.<sup>16</sup> In some other jurisdictions

<sup>15</sup> See cases cited in the preceding sections, also *Bierce v. Hutchins*, 205 U. S. 340, 347, 51 L. Ed. 828, 834, 27 S. Ct. 524.

<sup>16</sup> *In Re Blanchard*, 8 Ch. D. 601, 605 ("This stipulation for forfeiture is simply in the nature of a penalty against which on due cause being shown, relief might be obtained"; *Dederick v. Wolfe*, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283 (in this case payments had been made but the last payment was over-due. The seller replevied the goods and sold them. The price realized was

not sufficient, added to what had already been received, to pay the buyer the full price of the goods. It was held that he might sue for the balance); *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 So. 857 (the seller received notes for the price and subsequently indorsed them. In spite of this indorsement, and in spite of the fact that suit was pending on the notes by the indorsee, it was held that the seller might bring replevin for the goods, but that he would hold the property in trust); *Ratchford v. Cayuga Co.*, 145 N. Y. S. 83 ("Such contracts

where the courts have failed to recognize or felt unable to enforce equities analogous to those of the mortgage relation, the defect has been remedied by a statute. Especially the injustice to the buyer of permitting a forfeiture when most of the price has been paid has been guarded against in these statutes.<sup>17</sup> But

now stand practically upon the same basis as chattel mortgages. Equitably the conditional vendee is the owner, and the vendor holds the property merely as security for the purchase price, although the legal title does not pass to the vendee until payment"); *Puffer v. Lucas*, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682 (in this case although there was an express provision for forfeiting payments made before default, the court held that a foreclosure sale should be ordered if the buyer did not complete payment within a reasonable time); *McCormick Machinery Co. v. Koch*, 8 Okla. 374, 58 Pac. 626 (this case was similar to *Dedrick v. Wolfe*, *supra*, except that there was in this case an express power authorising the sale and application of the proceeds). See also *In re National Cash Register Co.*, 174 Fed. 579, 98 C. C. A. 425; *Matteson v. Milling Co.*, 143 Cal. 436, 77 Pac. 144; *Ross-Meehan Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 18 So. 364; *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098; *Shafer v. Russell*, 28 Utah, 444, 79 Pac. 559.

<sup>17</sup> Mass. Rev. Laws, c. 198, §§ 11-13 (the seller is required to give notice to the buyer before retaking possession, and the buyer is allowed for a limited period a right to redeem the goods if possession has been reclaimed). The statute in Me. Rev. St. c. 113, § 5, provides for redemption and for foreclosure "in the same manner as is provided for mortgages of personal property." This makes the seller's rights practically those of a chattel mortgagee. *Westinghouse Elec. Co. v. Auburn & Turner R. R. Co.*, 106 Me. 349, 76 Atl. 897;

*Roach v. Curtis*, 191 N. Y. 387, 84 N. E. 283 (applying the New York statute which requires the seller to hold the goods for thirty days after reclaiming possession, within which time the buyer may redeem; and requiring the buyer thereafter to sell the goods and apply the price. A failure on the part of a seller who has reclaimed possession to follow the provisions of the statute enables a buyer to recover all payments that he has made. See for collection and discussion of authorities in New York: *Plumiera v. Baicka*, 79 N. Y. Misc. 468, 140 N. Y. S. 171; *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643; *National Cash Register Co. v. Cervone*, 76 Ohio St. 12, 80 N. E. 1033 (construing the Ohio statute which provides that the seller cannot retake possession without refunding what he has been paid, less a reasonable amount for the use of the goods); *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376, 21 S. W. 663 (construing a statute similar to the New York statute and allowing the buyer to recover instalments paid where the seller had reclaimed possession, but had not dealt with the goods as the statute required); *Lieberman v. Puckett*, 94 Tenn. 273, 29 S. W. 6 (denying the buyer the right to recover instalments where he had controverted the seller's claim to regain possession of the goods); *Whitelaw Furniture Co. v. Boon*, 102 Tenn. 719, 52 S. W. 155 (holding the burden on the seller, when sued after the recovery of possession for instalments previously paid, to prove strict compliance with the statute); *French v. Osmer*, 67 Vt. 427, 32 Atl. 254 (construing a statute which provides that

no result can be regarded as satisfactory which does not fully protect the seller in his right to the full price, and to his remedy against the buyer both on the debt and against the goods as security, in order to realize that price, and which does not also protect the buyer against any forfeiture or penalty beyond the amount of the price. Such protection should be afforded the buyer in spite of any attempt made in the contract to surrender it.<sup>18</sup>

### § 739. Surrender of title by estoppel.

Not only in the case where a seller has no title at the time of an attempted sale with warranty, and afterwards acquires title, is he estopped to assert his ownership. It is an old exercise of equity jurisdiction not only to deny relief to one who has by his acts or even by his silence encouraged another to purchase an estate, or to spend money on its improvement, knowing of an interest which he himself has in the property, and failing to disclose it, but even to compel a transfer of the title to the injured person.<sup>19</sup> A distinction is taken between

after thirty days from the time of condition broken the seller may cause the goods to be taken and sold at public auction; and holding that this statute does not preclude an action against the purchaser's bailee for injuring the goods after thirty days from the time of condition broken).

<sup>18</sup> The protection given by the Massachusetts statute to conditional buyers of household furniture cannot be waived in advance. *Dessau v. Holmes*, 187 Mass. 486, 73 N. E. 656, 105 Am. St. Rep. 417. And so in New York as to household furniture, *Roach v. Curtis*, 191 N. Y. 387, 84 N. E. 283. As to other goods sold conditionally the waiver has been held effectual. *Adler v. Weis & Fisher Co.*, 119 N. Y. S. 634, 66 N. Y. Misc. 20, but *quære* whether this is correct. See *Butler v. People's Furniture Co.*, 124 N. Y. S. 645; *Montague v. Wanamaker*, 67 N. Y. Misc. 650, 124 N. Y. S. 805.

<sup>19</sup> In 1682, in *Hibbs v. Norton*, 1

Vern. 136, relief was given against the owner of land who answered an inquiry as to an annuity, supposed to be charged upon the land, that he believed it was so charged, and encouraged the applicant to proceed in his purchase of the annuity. The landowner was compelled to pay the annuity, though he had since discovered that he was entitled to the land free from any such charge.

In 1699, in *Draper v. Borlace*, 2 Vern. 369, one who had encouraged another to lend money on mortgage, concealing a prior charge of his own, was postponed. These decisions are still followed. *Sharpe v. Foy*, 4 Ch. App. 35; *Snodgrass v. Ricketts*, 13 Cal. 359; *Wright v. Stice*, 173 Ill. 571, 51 N. E. 71; *Rogers v. Portland & Co. St. Ry.*, 100 Me. 86, 60 Atl. 713, 70 L. R. A. 574; *Hilton v. Sloan*, 37 Utah, 359, 108 Pac. 689. In *Marshall v. Foltz*, 221 Pa. 570, 575, 70 Atl. 857, the court quoted with approval the language of Mit-



cases where by reasonable diligence a purchaser might have guarded against loss, as where the title is fully recorded,<sup>20</sup> and cases where the facts relating to his title are peculiarly within the knowledge of the one against whom an estoppel is claimed. In the latter case mere silence is enough to work an estoppel,<sup>21</sup> while in the former case something in the way of encouragement beyond mere silence is requisite.<sup>22</sup> These cases rest upon an actual estoppel since they go upon the ground that the owner's conduct amounts to a misrepresentation of an existing fact. Cases, however, are not wanting where a mere promissory es-

chell, C. J., in *Logan v. Gardner*, 136 Pa. 588, 20 Atl. 625: "The doctrine of estoppel *in pais* has been very much extended in modern times, particularly in Pennsylvania, where equitable principles are applied in actions at law. The cases are very numerous, but it is not necessary to refer to more than a few of them. In *Woods v. Wilson*, 37 Pa. 379, the subject was discussed by Chief Justice Thompson, and it was held that silence, in ignorance of one's own right or of another's expenditures will not estop, but that mere silence, with knowledge, is evidence from which a jury may find an estoppel. See also *Hill v. Epley*, 31 Pa. 331; and *Miranville v. Silverthorn*, 48 Pa. 147. These decisions rest on the ground that the circumstances were such as to raise a duty to speak, and that failure to do so is either a fraud or would work such an injury as would be equivalent to a fraud, if the party should not be estopped. On the other hand, it was held as early as *Buchanan v. Moore*, 13 S. & R. 304, 15 Am. Dec. 601, and *Robinson v. Justice*, 2 P. & W. 19, 21 Am. Dec. 407, that positive acts of encouragement or which help to mislead, will raise an estoppel, without any fraud and irrespective of the party's knowledge of his own rights. See also *Chapman v. Chapman*, 59 Pa. 214; *Miller's Appeal*, 84 Pa. 391, and *Putnam v. Tyler*,

117 Pa. 570, 12 Atl. 43. The distinction, therefore, between the cases where acts or declarations of encouragement are necessary to create an estoppel and those where mere silence or acquiescence will be sufficient, is one of principle, and each case as it arises must be assigned to one or the other class, according to its circumstances, the chief of which is knowledge or ignorance of the party's own rights and the other's actions. Encouragement is necessary where the party is ignorant; but knowledge creates the duty to speak, and, where that exists, silence is enough to estop." So in *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129, it was held that a title could not be asserted by one who had encouraged another to expend money on land, though he was ignorant of his right at the time.

<sup>20</sup> *Shapley v. Rangeley*, 1 Woodb. & Min. 217; *Simpson v. Biffle*, 63 Ark. 289, 38 S. W. 345; *Hill v. Meyers*, 43 Pa. 170, 175.

<sup>21</sup> *Gray v. Bartlett*, 20 Pick. 186, 32 Am. Dec. 208; *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129; *Hill v. Epley*, 31 Pa. 331.

<sup>22</sup> *Patterson v. Esterling*, 27 Ga. 205; *Fisher v. Mossman*, 11 Oh. St. 42, 47; *Bigelow v. Topliff*, 25 Vt. 273, 287, 60 Am. Dec. 264, and see extract from *Marshal v. Foltz*, 221 Pa. 570, 575, 70 Atl. 857, quoted *supra*, note.

toppel has been held effective in producing a transfer of title. Thus where the owner of land promises to give it to another and the donee takes possession and makes improvements.<sup>23</sup> And again in many jurisdictions an agreement between the parties in settlement of a boundary dispute is enforced on the theory of estoppel.<sup>24</sup> In both these instances the reliance is wholly on a promise and not upon a misstatement of fact.

**§ 740. Discharge of covenants restricting the use of real estate by promissory estoppel or laches.**

One in whose favor a covenant restricting the use of land has been made may lose his right not simply to complain of past breaches of the covenant, but also to enforce the covenant as to the future, by his conduct. In an Irish decision<sup>25</sup> the result of the English authorities was thus summarized: "The principle to be deduced from these authorities seems to me to be that in order to defeat the right of a person with whom a covenant has been entered into restricting the mode of user of lands sold or demised, it must be clearly established that there is a personal equity against him arising from his acts or conduct in sanctioning or knowingly permitting such a change in the character of the neighborhood as to render it unjust in him to seek to enforce his covenant by injunction; a change resulting from causes independent of him will not have such an operation." And this statement would probably be accepted in the United States.<sup>26</sup>

<sup>23</sup> See *supra*, § 139.

<sup>24</sup> See *supra*, § 490.

<sup>25</sup> *Craig v. Greer*, [1899] L. R. 1 Ir. 258, 278.

<sup>26</sup> In *Star Brewery Co. v. Primas*, 163 Ill. 652, 661, 45 N. E. 145, the court said: "It is contended by appellant, that appellee has acquiesced in the use of the premises by his grantees for saloon purposes, and is estopped by his acts from denying their right to so use such premises. Acquiescence cannot be inferred from delay in the taking of steps to prevent the violation of the covenant, because the facts do not show any very great delay.

"Where a party, seeking to enforce a covenant not to carry on a trade in a house, which had been violated by the use of the house for a beer shop, knew for a period of three years, that the house was used for a beer shop and had himself bought beer at the shop, it was held that he had acquiesced in such violation of the covenant, and had lost the right to enforce it by injunction or by suit for damages. (*Sayers v. Collyer*, L. R. 28 Ch. D. 103.) But, here, there was not only no delay, with knowledge of the violation, for any such period as three years, but proceedings were instituted to restrain

**§ 741. Whether consent to breach of condition on one occasion excuses similar future breaches.**

An early decision <sup>27</sup> held that conditions in leases were indivisible so that when a license to alienate a term had once been given, a subsequent alienation was no ground for forfeiture though the lease contained a general condition not to alienate without license. The effect of the decision has been abrogated by statute in England,<sup>28</sup> and the doctrine has been judicially characterized as "extraordinary."<sup>29</sup> In the United States it has been not infrequently recognized,<sup>30</sup> but is generally regarded as a technical and undesirable rule pertaining to real property. Certainly there is no reason to suppose that it has any application to conditional contracts other than leases.<sup>31</sup> On the other hand, it should be observed that if a promisor has by his conduct of whatever kind justified the promisee in believing that the promise will be kept in spite of failure of the promisee to fulfil a condition, and relying thereon the promisee fails to fulfil it, performance of the condition is excused. And continued acceptance of a series of defective perform-

such violation within a very short time after the forbidden use was resorted to."

<sup>27</sup> *Dumpro's Case*, 4 Coke, 119 b.

<sup>28</sup> 23 and 24 Vict. c. 38.

<sup>29</sup> *Brummell v. Macpherson*, 14 Ves. 173.

<sup>30</sup> *Dakin v. Williams*, 17 Wend. 447; *McKildoe v. Darracott*, 13 Gratt. 278, 282; *Lynde v. Hough*, 27 Barb. 415, 422; *Murray v. Harway*, 56 N. Y. 337; *Pennock v. Lyons*, 118 Mass. 92; and *The Sharon Iron Company v. The City of Erie*, 41 Pa. St. 341.

<sup>31</sup> In *Panoutsos v. Raymond Hadley Corp.* [1917] 1 K. B. 767, 2 K. B. 473, assent to non-compliance with a provision for a "confirmed bankers credit" for several shipments under a contract was held not to preclude insisting thereon for future shipments, after reasonable notice. In *Eddy v. Tennessee, etc., Fire Ins. Co.*, 21 Mo. 587, assent of an insurer to an assignment of the policy was held not to ex-

tinguish a condition that assignment should not be made without the consent of the insurer. In *Gail v. Gail*, 127 N. Y. App. Div. 892, 899, 112 N. Y. S. 96, the court said: "It is also urged that defendant by paying the monthly instalments, as he did, without requiring of plaintiff the transfer of her interest in the California real estate, as well as that in New York, operated as a waiver of his right afterwards to insist on such transfer as a condition of further payments. It may be that it was such waiver as to each payment actually made by him; but to hold that it also operated as a waiver of this right as to all future payments would result in manifest injustice to him, it appearing that he at all times insisted that he was entitled to a transfer of plaintiff's interest in all the real estate. A waiver as to future payments by defendants cannot be constructed from facts like these." See also *In re Tyrer*, 6 Comm. Cas. 143, 7 Comm. Cas. 166.

ances,<sup>32</sup> especially if they are all defective in the same respect, may justify belief not only that performance of that character has been satisfactory to the promisor in the past but that it will be satisfactory as a performance of future conditions. Thus, where the exact time of performance is made of the essence by the contract between the parties, continued acceptance of late performance without objection, operates as a permission to make similarly late performance in the future. This principle finds frequent application in insurance law,<sup>33</sup> and in the law of landlord and tenant.<sup>34</sup> And where the provision in a building

<sup>32</sup> Conduct in previous dealings as well as in the contract in question may be important. See *Phillips Sheet & Tin Plate Co. v. Boyer* (Md.), 105 Atl. 166, where, however, there was held to be insufficient evidence of waiver.

<sup>33</sup> In *Fenn v. Northwestern Nat. Life Ins. Co.*, 90 Kans. 34, 133 Pac. 159, the court said:—"While it is true that by the terms of the policy a notice of default was not required, the silence of the officers of this company through the long period covering more than 75 alleged lapses, inducing reliance upon the acceptance of payments made after the appointed day, is a course of conduct calling for some note of warning before it is summarily abandoned and a forfeiture claimed. A forfeiture will not be permitted where, by the adoption of a custom or the course of its conduct, the insurer has led the insured member honestly to believe that the assessments may be paid and will be received at times other than those specified in the contract. *Forsters of America v. Hollis*, 70 Kans. 71, 78 Pac. 160, 3 Ann. Cas. 535; *Triple Tie Benefit Association v. Wood*, 78 Kan. 812, 98 Pac. 219; *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439, 12 S. Ct. 671, 38 L. Ed. 496; *Home Protection of North Alabama v. Avery*, 85 Ala. 348, 5 So. 143, 7 Am. St. Rep. 54; *Insurance Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443." See also *Painter v. Industrial Life Assoc.*, 131 Ind. 68,

30 N. E. 876; *Moore v. General Accident &c. Ins. Co.*, 173 N. C. 532, 92 S. E. 362.

<sup>34</sup> In *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751, 753, the court said: "Where time is made of the essence of the contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of the rent or other moneys after they are due, and with knowledge of the facts, such conduct will be regarded as creating 'such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it.' Such is the language of *Monson v. Bragdon*, 159 Ill. 61, 66, 42 N. E. 383, quoted with approval by this court after an extensive review of the authorities in *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126. So in *Standard Brewing Co. v. Anderson*, 121 La. 935, 46 So. 928, the Supreme Court of Louisiana declares that where month after month the lessor has been receiving payment of the rent a few days late, without objection, if he desires in the future to hold the lessee strictly to payment on the day the rent falls due, he must give him notice to that effect; otherwise, the lessee will not be in legal default from delaying the usual time. In *Barnett v. Sussman*, 116 N. Y. App. Div. 859, 102 N. Y. S. 287, the same principle is declared in a case where

contract that payments should be made only on certificate of the architect had been repeatedly disregarded, and the architect was satisfied with the work, deviations having been made at his direction, a verdict for the contractor for a balance due was held warranted, the owner having almost daily supervised the work, and made no complaint as to the deviations.<sup>35</sup>

It has been said where performance on the exact date fixed by an executory contract has once been excused, neither party can rescind on account of delay, without first giving notice requiring performance within a reasonable time specified,<sup>36</sup> but as a broad proposition even this goes too far.<sup>37</sup> Neither party can deceive the other into a belief that prompt performance will not be required and then demand it, but what may amount to such deception depends on the circumstances of each case.

In contracts to buy and sell if the buyer receives and accepts some instalments of inferior goods, this is not ordinarily equivalent to an assent to receive subsequent instalments of similarly inferior goods.<sup>38</sup> It is obvious that if such a contract required numerous deliveries, the continued acceptance without objection of instalments, all defective in the same particular, would justify belief that such instalments might properly be given

realty was sold in monthly instalments at regular stated periods. It was held that the acceptance by the vendor from the beginning of payments not made according to the contract but irregularly as to time and amount, the purchaser being at all times in arrears, was a waiver of the forfeiture clause, which could not be revived, except on notice to the purchasers that if they did not pay the balance due within a reasonable time specified the forfeiture would then be exercised."

<sup>35</sup> *McKenna v. Vernon*, 258 Pa. 18, 101 Atl. 919. Cf. *Fort Orange Barbering Co. v. New Haven Hotel Co.*, 92 Conn. 144, 101 Atl. 505.

<sup>36</sup> *Taylor v. Goelet*, 208 N. Y. 253, 258, 101 N. E. 867, Ann. Cas. 1914 D. 284. See also *Pipe & Contractors' Supply Co. v. Mason & Hanger Co.*,

181 N. Y. App. Div. 317, 168 N. Y. S. 740; *Miller v. Ungerer* (N. Y. App. Div.), 176 N. Y. S. 850. If such notice is given and not complied with it makes a final breach of contract. *Schultz v. Glickstein*, 168 N. Y. S. 490.

<sup>37</sup> *General Electric Co. v. Chattanooga Coal & I. Corp.*, 241 Fed. 38, 41, 154 C. C. A. 38.

<sup>38</sup> *Consolidated Nat. Bank v. Giroux*, 18 Ariz. 253, 158 Pac. 451; *Barnette Sawmill Co. v. Fort Harrison Lumber Co.*, 126 La. 75, 52 So. 222; *American Pail Co. v. Oakes*, 64 Mo. App. 235. See also *Van Valkenburgh v. Gregg*, 45 Neb. 654, 63 N. W. 949; *Bradley Currier Co. v. Bernz*, 55 N. J. Eq. 10, 35 Atl. 832; *Gardner v. Clark*, 21 N. Y. 399; *Gibney & Co. v. Arlington Brewery Co.*, 112 Va. 117, 70 S. E. 485.

and would be accepted in the future. Even so, however, if the refusal of a subsequent tender of defective goods and demand of strict performance imposed no additional hardship on the seller in procuring appropriate goods or in disposing of the defective ones already procured, the buyer might take this course, for it must be remembered that the permission implied from conduct like that expressed in words, may be withdrawn at any time before the permission has been acted upon.<sup>39</sup> It should also be observed that assent to continue performance of the contract does not necessarily include an agreement to accept the deficient performance of the other party as a complete discharge of his obligation.<sup>40</sup>

**§ 742. Whether stating one ground of defence discharges other grounds.**

Where a promisor has two or more reasons which may perhaps entitle him to refuse to perform his promise, and these reasons are based on facts or defaults which it is no longer possible to change or correct, if he bases a refusal to perform when demand is made upon him on one of the reasons he is often said to have waived the other. It is obvious this is not a case of election. If the promisor gives up either of his defences he is making a present to that extent to the other party, for he might perfectly well have insisted upon both defences. Though some courts hold that a defence may be effectively surrendered even if the surrender is supported neither by promissory estoppel nor consideration, and all courts on one theory or another give effect to some promises which bring about this result,<sup>41</sup> yet surely such a promise if not expressed in words, should at least be clearly implied in fact, if such a consequence is to follow.

When an insurer knowing that the insured in violation of two conditions in his policy has encumbered the premises and has taken other insurance, says "I wont pay the insurance because

<sup>39</sup> See extract from opinion in *Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751, *supra*, n. 51. Also *Panoutsos v. Raymond Hadley Corp.*, [1917] 1 K. B. 767, 2 K. B. 473, and paragraph 8 of the opinion in *Scott v. Hubbard*, 67

Oreg. 498, 136 Pac. 653, and *supra*, § 689.

<sup>40</sup> See *supra*, § 700.

<sup>41</sup> *E. g.*, promises to pay debts barred by the Statute of Limitations or by a discharge in bankruptcy.

you have encumbered the property," it seems almost grotesque to suggest that he implies in fact thereby the added promise, "I promise to pay the policy if you have not encumbered the property or, if such encumbrance is not a legal defence." It is also to be observed that even if a promise can be implied in fact to give up other defences than the one specified, such a promise unsupported by consideration or promissory estoppel can certainly have no validity unless the promisor was aware of all the facts. It is not enough that he might have known had he not been careless.<sup>42</sup> On the other hand, there is frequently a promissory estoppel precluding the assertion of other defences after refusal has been made for a specific reason. It is due to a confusion, under the general term of waiver, of cases of this sort with cases where neither consideration nor estoppel exists which has led to the general statement frequently made that refusal to perform on one ground waives all other objection.<sup>43</sup> The fact that litigation has been begun may have a bearing on the existence of an estoppel.<sup>44</sup>

<sup>42</sup> See *supra*, § 697.

<sup>43</sup> Estoppel, however inadequately established in some cases, is recognised as the essential basis of the doctrine. *Towle v. Ionia F. Ins. Co.*, 91 Mich. 219, 51 N. W. 987; *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 108, 113; *McCormick v. Royal Ins. Co.*, 163 Pa. 184, 29 Atl. 747. In *Bates v. Cashman*, 230 Mass. 167, 119 N. E. 663, 664, the court said: "While of course one cannot fail in good faith in presenting his reasons as to his conduct touching a controversy he is not prevented from relying upon one good defence among others urged simply because he has not always put it forward, when it does not appear that he has acted dishonestly or that the other party has been misled to his harm, or that he is estopped on any other ground. See in this connection *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 376, 99 N. E. 221."

<sup>44</sup> In *Re McCarthy*, 96 U. S. 258, 24 L. Ed. 693, Swayne, J., said:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of the law." This passage has been quoted with approval or similar statements made in *Polson Logging Co. v. Neumeyer*, 229 Fed. 705, 708, 144 C. C. A. 115; *Ward v. Queen City Fire Ins. Co.*, 69 Ore. 347, 138 Pac. 1067, 1068; *Haney v. Hatfield*, 241 Pa. 413, 88 Atl. 680, and in *Banco De Sonora v. Bankers' Mutual Casualty Co. (Ia.)*, 95 N. W. 232, 236, citing in further support of the proposition, *Power v. Monitor Ins. Co.*, 121 Mich. 364, 80 N. W. 111; *Continental Ins. Co. v. Waugh*, 60 Neb. 348, 83 N. W. 81; *Gould v. Banks*, 8 Wend. 562, 24 Am. Dec. 90, and other decisions.

**§ 743. When refusing tender or demand on one ground precludes setting up other reasons.**

The situation must be sharply distinguished where, at the time refusal to perform is made, whatever reasons there may be which justify refusal, they are remediable. In such a case the promisee if apprized of the reasons justifying refusal would perhaps remedy them. The assertion by the promisor of only one ground of refusal may naturally lead the promisor to infer either that his tender is in other respects satisfactory, or that if not, it is useless to perfect the performance in other respects than that which has been specified. If, therefore, relying on these natural inferences the promisee fails to perfect his tender until it has become too late to do so, he may nevertheless recover if the objection specified is unfounded. On principle, however, it is always a question of fact whether the specification of a single reason operated as a deception which being relied on prevented the promisee from performing fully, as he would otherwise have done. Thus where under a contract to convey real estate, a conveyance is tendered on the law day, which is insufficient because of a remediable matter, a refusal to receive it on one ground precludes setting up another objection in a suit based on the refusal to accept the deed.<sup>45</sup> The principle is the same where money which is not legal tender is tendered in the fulfilment of an obligation. In a leading case it is said: "If you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money and making a good and valid tender; but by not doing so and claiming a larger sum, you delude him."<sup>46</sup> Similarly if a condition is attached to a tender but

<sup>45</sup> *Flint v. Woodin*, 9 Hare, 618, 622; *Lathrop v. O'Brien*, 57 Minn. 175, 58 N. W. 987; *Higgins v. Eagleton*, 155 N. Y. 466, 50 N. E. 287. See also *Hoover v. Wolfe*, 167 Cal. 337, 139 Pac. 794; *Paisley v. Wills*, 18 Ont. App. 210. But see *Holdsworth v. Tucker*, 143 Mass. 369, 9 N. E. 764. In *Lathrop v. O'Brien*, *supra*, the court stated as an essential feature of the case that the objection "if made at the time, could have been easily remedied by the

plaintiff." So in *Higgins v. Eagleton*, *supra*, the court said the defendant could not raise a new objection "where, as in this case, it was one which could have been obviated by the defendant;" and this is repeated in *Miller v. Ungerer* (N. Y. App. D.), 176 N. Y. S. 850.

<sup>46</sup> *Polglass v. Oliver*, 2 C. & J. 15. And see *infra*, § 1819. In Iowa, it has been said: "Under the provision of our statute in relation to tender, the party to whom it is made must make



refusal is made on account of the insufficiency of the amount or for other reasons, an objection on account of the condition cannot afterwards be raised.<sup>47</sup> But here, as always, where waiver is based on estoppel, it is essential that had there been no deception, the performance would have conformed to the requirements of the law. It is vital that "the objections if stated could easily have been obviated."<sup>48</sup> Otherwise "It is clear . . . that [parties] are not, by their rejection of the tender on an insufficient ground, precluded from supporting the rejection on other and valid grounds."<sup>49</sup>

**§ 744. Application of the principle to contracts of sale, insurance and employment.**

Similar decisions have been made where goods have been tendered under a contract to sell. An objection to them on one ground has been said to preclude later objection on other grounds; and sometimes courts have failed to observe the importance of the objection later asserted having been remediable at the time when prior objection was taken.<sup>50</sup> The matter is

any objection which he may have to the instrument, money or property tendered, or he will be deemed to have waived it. If the objection is to the terms of an instrument, he must specify the kind and the terms which he requires, or be precluded from objection afterwards." *Gilbert v. Mosier*, 11 Ia. 498, 500.

\* *Richardson v. Jackson*, 8 M. & W. 298; *Moynaham v. Moore*, 9 Mich. 9, 77 Am. Dec. 468. So by statute in California, *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115, and see *infra*, § 1819.

\* *Board of Trustees v. Spitzer*, 255 Fed. 136; *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115; *Leask v. Dew*, 102 N. Y. App. D. 529.

\* *McCardie, J.*, in *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198, 204, citing statements of Brett, J., in *Sanders v. Maclean*, 11 Q. B. D. 327, 333, and of Bailhache, J., in *Furness v. Rederiaktiebolaget Banco*, [1917] 2 K. B. 873, 876.

<sup>49</sup> *Ginn v. W. C. Clark Co.*, 143 Mich. 84, 106 N. W. 867, 107 N. W. 904; *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810; *Hess v. Kaufherr*, 128 N. Y. App. D. 526, 112 N. Y. S. 832; *De Hoff v. Aspegren*, 96 N. Y. Misc. 681, 161 N. Y. S. 53. [Cf. *International Cheese Co. v. Garra*, 176 N. Y. S. 523; *Miller v. Ungerer* (N. Y. App. D.), 176 N. Y. S. 850]; *Howe Grain Co. v. Taylor* (Tex. Civ. App.), 147 S. W. 656; *Wright v. C. S. Graves Land Co.*, 100 Wis. 269, 274, 75 N. W. 1000. See also *Goodman v. Purnell*, 187 Fed. 90, 109 C. C. A. 408; *Noble v. Pirson* (Mich.), 169 N. W. 860; *Honesdale Ice Co. v. Lake Lodore Imp. Co.*, 232 Pa. 293, 81 Atl. 306. In *Linger v. Wilson*, 73 W. Va. 669, 80 S. E. 1108, 1109, the court said:—"It must be conceded that objection on the part of defendant to receiving the grain because plaintiffs had not complied with a former contract is no ground upon which defendant can excuse himself from complying with this

correctly put in an Ohio decision.<sup>51</sup> "We do not deny that under some circumstances a refusal to accept goods for a stated reason may operate as a waiver of other objections, which might have been properly made. This may be so in cases where the silence of the purchaser and his conduct operate to mislead the seller and prevent him from protecting himself; in other words, where the conduct of the buyer would raise an estoppel against him."<sup>52</sup> But when the buyer has absolutely rejected the goods, for whatever reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor, cannot be construed as a waiver of the buyer's right to insist on his plea of non-performance on those grounds."<sup>53</sup>

In insurance law the same principle finds application. Where the insurer takes a particular objection to proofs of loss or puts a refusal to pay upon a particular ground, this will operate as a waiver of objections to the proof which could have been remedied if they had been specified.<sup>54</sup> Even silence after receipt of proof may have this effect,<sup>55</sup> or a non-committal an-

latter distinct contract of purchase. And it is quite apparent in the case that the matter of quantity was a remote and secondary consideration by defendant. He deliberately stated a single objection to receiving the shipment. That single objection was the alleged failure of plaintiffs to comply with a former contract. He expressed a willingness, however, to take the full shipment if his claim made under the alleged former contract was considered in settlement. Thus he inferentially waived objection to the excess of quantity."

<sup>51</sup> *List v. Chase*, 80 Ohio St. 42, 50, 88 N. E. 120.

<sup>52</sup> Citing *Johnson v. Oppenheim*, 55 N. Y. 280, 281; *Smith v. Pettee*, 70 N. Y. 13, 16-17.

<sup>53</sup> To the same effect are *Mente v. De Witt Rice Mill Co.*, 251 Fed. 252, 163 C. C. A. 408; *Petersburg Fire Brick & Tile Co. v. American Clay M. Co.*,

89 Ohio, 365, 106 N. E. 33, 36. See also *Tufts v. McClure*, 40 Ia. 317; *International Cheese Co. v. Garra*, 176 N. Y. S. 523; *Miller v. Ungerer* (N. Y. App. D.), 176 N. Y. S. 850.

<sup>54</sup> *Globe & Rutgers Ins. Co. v. Prairie &c. Co.*, 248 Fed. 452, 160 C. C. A. 462; *Brock v. Des Moines Ins. Co.*, 106 Ia. 30, 75 N. W. 683; *Faulkner v. Manchester Assur. Co.*, 171 Mass. 349, 50 N. E. 529; *First Nat. Bank v. American Cent. Ins. Co.*, 58 Minn. 492, 60 N. W. 345; *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50; *Weed v. Hamburg-Bremen Fire Ins. Co.*, 133 N. Y. 394, 31 N. E. 231; *Kiernan v. Insurance Co.*, 150 N. Y. 190, 44 N. E. 698; *Cummer Lumber Co. v. Manufacturers', etc., Co.*, 67 N. Y. App. Div. 151, 73 N. Y. S. 668; *Sutton v. Am. Ins. Co.*, 188 Pa. St. 380, 41 Atl. 537; *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. 370.

<sup>55</sup> *Great Western Ins. Co. v. Staaden*,

swer.<sup>56</sup> But a refusal after loss to pay a policy for an untenable reason, does not preclude the insurer from defending on other grounds which could not have been remedied had the refusal originally stated them.<sup>57</sup> So, "If when [a servant] was discharged there existed an uncondoned justification therefor, regardless of whether it was then known to [the master] or whether the reason assigned for such discharge was sufficient, [the master

26 Ill. 360; *Aleunas v. Granite Fire Ins. Co.*, 111 Me. 171, 174, 88 Atl. 413 *Dwelling House Ins. Co. v. Snyder*, 59 N. J. L. 18, 22, 54 Atl. 931; *Susquehanna Mut. F. Ins. Co. v. Cusiok*, 109 Pa. 157; *Morotook Ins. Co. v. Cheek*, 93 Va. 8, 24 S. E. 464; *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29. See also *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 403, 27 Am. St. Rep. 60; *Kiernan v. Dutchess, etc., Ins. Co.*, 150 N. Y. 190, 44 N. E. 698.

<sup>56</sup> *Works v. Farmers' Mut. F. Ins. Co.*, 57 Me. 281.

<sup>57</sup> *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593; *Cassimus v. Scottish Union & N. Ins. Co.*, 135 Ala. 25, 269, 33 So. 163; *Lackmann v. Kearney*, 142 Cal. 112, 115, 75 Pac. 668; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621, 80 Am. Dec. 197; *Devens v. Mechanics, etc., Ins. Co.*, 83 N. Y. 168; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991; *National Ins. Co. v. Brown*, 128 Pa. St. 386, 18 Atl. 389; *Welsh v. London Assur. Corp.*, 151 Pa. St. 607, 619, 25 Atl. 142, 31 Am. St. Rep. 786; *Freedman v. Providence, etc., Ins. Co.*, 175 Pa. 350, 34 Atl. 730; *Findlay v. Union Mut. F. Ins. Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885. See, however, *contra*, *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Taylor v. Supreme Lodge*, 135 Mich. 231, 97 N. W. 680; *Continental Ins. Co. v. Waugh*, 60 Neb. 348, 83 N. W. 81; *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389, 5 N. W. 845. In *Cook v. North British, etc., Insurance Co.*, 181 Mass.

101, 104, 62 N. E. 1049, the court said: "When 'one is stating objections, a failure to disclose a ground of objection in a particular which easily could be remedied tends to mislead the other party to his detriment; and is so contrary to justice and good morals as to work an estoppel against doing it afterwards.' Knowlton, J., in *Brown v. Henry*, 172 Mass. 559, 567, 52 N. E. 1073. In this present case the reason that the notice was not in conformity with the contract was, not that it was defective in form, but that, although correct in form, it was not given in time. A failure to give the notice within the time required stands upon different ground from a failure to give the notice in due form. The latter defect may be remedied, but the former, if insisted upon, is fatal to the assured. The silence of the insurer even upon a mere defect of form might be very injurious to the assured, since if he were notified of the defect he might save himself by a new notice timely given; but a failure to notify in time leaves him at the mercy of the insurer, and to point out to him the fact will not aid him in the least to remedy the defect. The omission to point out to him the defect is therefore no wrong or want of good faith to him, nor is the insurer under any legal obligation to do so. *Patrick v. Farmers' Insurance Co.*, 43 N. H. 621, 80 Am. Dec. 197; *Edwards v. Baltimore Insurance Co.*, 3 Gill (Md.), 176; *May, Ins.*, § 464, and cases cited."

is not] precluded by the first or any notice of discharge from proving an existing ground not therein referred to." <sup>58</sup>

In general it must be true that upon tender of performance by the promisee, the promisor may refuse to perform "without specifying any ground, and insist upon any available ground." <sup>59</sup> But where the objection is purely technical, such as tendering a certified check instead of legal tender,<sup>60</sup> or making proof of loss under an insurance policy in a somewhat informal manner, even the general refusal of the promisor may be deceptive and, therefore, justify the court in regarding the objection as waived when the promisee in ignorance of the ground of objection allows so much time to elapse that it cannot be remedied.<sup>61</sup>

#### § 745. Conditions in insurance policies.

An insurance policy is a typical conditional contract. The insurer is seeking nothing from the insured except the premium,

<sup>58</sup> *Thomas v. Beaver Dam Mfg. Co.*, 157 Wis. 427, 147 N. W. 364, 365, citing: *Loos v. Geo. Walter Brewing Co.*, 145 Wis. 1, 6, 129 N. W. 645, 140 Am. St. Rep. 1052; *Independent L. Ins. Co. v. Williamson*, 152 Ky. 818, 154 S. W. 409; *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524; *Crescent Horse Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. 935. See further, *infra*, § 839.

<sup>59</sup> *Devens v. Mechanics' & Traders' Ins. Co.*, 83 N. Y. 168, 173.

<sup>60</sup> See *infra*, § 1819.

<sup>61</sup> In *Findeisen v. Insurance Co.*, 57 Vt. 520, 524, 527, the court said:—"An unqualified refusal by the company to pay the loss upon other specified grounds, made before the expiration of the time within which it was the duty of the assured, by the terms of the policy, to file his proofs of loss, is an act from which the triers may find a waiver of such proofs. See authorities cited in—*Lyon v. Travellers' Ins. Co.*, 31 Alb. L. J. 59, 55 Mich. 141,

20 N. W. Rep. 829; and in *Mosley v. Vt. M. F. I. Co.*, 55 Vt. 142. . . .

"We think the refusal of the company to return it [proof of loss] upon request, for the purposes named, Findeisen offering to remedy the only objection to it which was specifically pointed out, and its further refusal to point out the other defects which it purposed insisting upon on request, and in such manner as to give the plaintiffs opportunity to seasonably furnish a proof of loss which *should* satisfy the company and the requirements of the policy, as they offered to do, ought to be held a waiver by the defendant of the objections now sought to be insisted on, or else to estop the defendant from now urging any of said objections. It was such conduct as might well have had a tendency to prevent the plaintiffs from furnishing a proof of loss to which the company could not have made objection, either on the score of seasonableness, or upon some other ground, technical or substantial." See also *infra*, § 833.

which is generally paid in advance for the whole or a portion of the term. For the rest, the interest of the insurer is merely to avoid performance on his own part except under exactly defined circumstances. His normal and usual method of protecting himself, therefore, is by providing that the policy shall not be paid except on certain conditions. In policies of life insurance such conditions are no longer numerous; but in insurance of other kinds, especially fire insurance, the conditions are many. A full discussion of these is impossible, but the principles governing their construction and excuse can be shown. They relate to the character of the property insured, its condition and occupancy: the keeping of dangerous articles; changes in title or possession; incumbrances; methods of doing business; precautions against loss; the taking of additional insurance; the non-payment of premiums or assessments.

In marine insurance, the sea-worthiness of the vessel insured; the nature of the voyage and deviation therefrom are usual conditions.

In life insurance, truthful answers to inquiries concerning age and physical condition, and other circumstances affecting probability of life; change of residence, or occupation, as well as payment of premiums are usual.

In policies of insurance of other sorts, such as accidents to the insured, liability for accidents caused by the insured; the fidelity of employees, and the solvency of debtors, appropriate conditions are inserted.

#### § 746. Meaning of void and voidable.

It is not uncommon in many conditional contracts, and is especially common in insurance policies, to provide that unless a certain condition or conditions are complied with, the contract shall be void. If the condition in question is clearly for the advantage of one party only, it is usual to construe the word void as meaning voidable by that party.<sup>62</sup> Where the

<sup>62</sup> See for instances of this construction in insurance policies,—*Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Palatine Ins. Co. v. Whitfield*, 73 Fla. 716, 74 So. 869; *Insurance Co. of Pa. v. Indiana Reduction Co.* (Ind.

App.), 117 N. E. 273; *German Insurance Co. v. Shader*, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918; *Oakes v. Manufacturers' Ins. Co.*, 135 Mass. 248; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 419; *Horton v. Home Ins.*

stipulation is for the benefit of both parties, "void" is given its literal meaning, though if the situation upon which the contract was to become void was brought about by the fault of one of the parties, he might be precluded from taking advantage of the provision.<sup>63</sup> Where any possible benefit can accrue to the party for whose benefit the provision is made, by keeping the contract in force, there seems no doubt of the propriety of this construction, for it cannot have been the intention of the parties that by failing to perform a condition, one who should perform it can free himself from liability.<sup>64</sup> But where the only possible consequence of giving void its literal meaning, is that the party for whose advantage the stipulation was inserted will be freed from liability, there is no reason why its literal meaning should not be given to the word. In any event,

Co., 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717; *Kalmuts v. Northern Mutual Ins. Co.*, 186 Pa. 571, 40 Atl. 816; *Kingman v. Lancashire Ins. Co.*, 54 S. Car. 599, 32 S. E. 762.

In construction of other kinds of contracts, *Rede v. Farr*, 6 Maule & Sel., 121; *Hyde v. Watts*, 12 M. & W. 254; *Stewart v. Griffith*, 217 U. S. 323; *Haggart v. Wilczinski*, 143 Fed. 22, 74 C. C. A. 176; *Jones v. Pullen*, 66 Ala. 306; *Jersey City v. Davis*, 80 N. J. L. 609, 76 Atl. 969; *Born v. Schrenkeisen*, 110 N. Y. 55, 59, 17 N. E. 339.

In construction of statutes against fraudulent conveyances, *Hyman v. Landry*, 135 Wis. 598, 116 N. W. 236, 128 Am. St. Rep. 1044.

<sup>63</sup> *New Zealand Shipping Co. v. Société des Ateliers*, [1917] 2 K. B. 717, [1919] A. C. 1. See quotation in the following note.

<sup>64</sup> Another reason for the results reached, but one which perhaps would not cover every case, is given in *New Zealand Shipping Co. v. Société des Ateliers*, [1917] 2 K. B. 717, 723 (aff'd [1919] A. C. 1). "In every contract where the word is used, 'void,' according to its natural and ordinary meaning, means void to all intents and

purposes. Nevertheless there may be a case where the party who is alleging that the contract is void may have to rely upon his own default or wrong in order to bring into operation the clause making the contract void. Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong. In *Malins v. Freeman*, 4 Bing. N. C. 399, Coltman, J., said: 'It is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favorable to such a purpose.' That appears to me to be the true underlying principle of the cases in which the word 'void' has been construed as if it meant voidable. Unless there are clear words to the contrary, a clause making a contract void must be read subject to the condition that the party who is seeking to set up the invalidity is not himself in default." It may certainly be doubted whether a third person could treat the contract as void when the injured party did not wish to avoid it.

however, if void is to be given the meaning of voidable, what does voidable mean? Must the party seeking to avoid take the initiative, or may he wait until he is attacked? The law gives the privilege of avoiding contracts for several causes, for example, fraud, breach of contract; and in such cases the rule seems to be that if the party desiring to avoid the transaction has received a benefit which he must return, as a condition of the avoidance of liability, he must act promptly, but if he has received nothing, and merely wishes to escape liability, he need do nothing. He may wait until sued, and then set up his defence.<sup>65</sup> A provision in a contract that it shall be voidable by one party on a certain contingency cannot give him inferior rights. When it is provided in an insurance policy that it shall be void, or null and void, for breach of condition, the construction of voidable is given to the word void because the provision is for the benefit of the insurer; but the word certainly should be construed to give him the benefit he was obviously seeking. It cannot have been the intent that the transaction might be avoided for breach of condition only by restoring the insured to his original status. It is the insurer's promise which is voidable, not the whole transaction of taking out the policy. The insurer when taking advantage of a breach of condition is "not seeking to rescind the contract sued upon; it is standing upon the contract, and insisting that under its terms there is no liability."<sup>66</sup> It seems equally unreasonable, as matter of construction, to suppose that the insurer's right depends on the return of a portion of the premium called unearned. In fact the premium is earned in a fire insurance policy when the contract is issued and the risk attaches; and in any policy the issue of the policy and the attachment of the risk creates a debt for at least the amount of the first premium unless the premium is actually paid; and this premium or debt is earned by the conditional promise of the insurer and does not cease to be earned if the insured breaks the condition.<sup>67</sup>

<sup>65</sup> See *infra*, §§ 1469, 1526; as to mistake, see *infra*, § 1596 *ad fin.* An infant's privilege is even more extensive. See *supra*, §§ 231 *et seq.*

<sup>66</sup> *Goorberg v. Western Assurance*

*Co.*, 150 Cal. 510, 517, 89 Pac. 130, 10 L. R. A. (N. S.) 878.

<sup>67</sup> See *infra*, §§ 757, 883. The provision here in question should not be confused with that, also common in

And if it is granted the insured need not return the premium or any part of it, surely the contract cannot mean if fairly construed, that the insurer has merely the right to seek out the insured promptly and declare the policy cancelled, but that otherwise it remains in force though the contract says it is void on the happening of the condition. There is no analogy in the law of voidable contracts for such a construction. The rule is general that where no restoration of a previous status is necessary, no action is necessary by the party having the right of avoidance until he is attacked.<sup>68</sup> The proper effect, therefore, of regarding the policy as voidable is that when a claim is made upon it, the insurer may then, for the first time, set up a breach of condition. Whether the insurer's words or conduct after the breach of condition has already occurred can impose liability upon him afresh, or preclude him from asserting the breach of condition, is hereafter considered.

**§ 747. Classification of cases where insurer's conduct has been thought to preclude insistence on a condition or excuse.**

In the numerous American cases that have arisen involving the excuse or waiver of conditions by insurers,<sup>69</sup> there is a marked division into several classes; the differences between

insurance policies, giving a right of cancellation at any time on return of a *pro rata* portion of the premium. See, *e. g.*, *Camden Fire Ins. Assoc. v. Grubbs*, 133 Ark. 202, 202 S. W. 82.

<sup>68</sup> In *Bartlesville Oil, etc., Co. v. Hill*, 30 Okl. 829, 121 Pac. 208, 212, the court held that mere delay in declaring a forfeiture of an instalment contract for the sale of real estate did not preclude the seller, even after suit had been brought by the buyer, from asserting the rights reserved under the contract, which provided that for non-payment of instalments the company "should have the right to declare the contract void." In support of its position the court said: "In *Kerns v. McKean*, 65 Cal. 411, 4 Pac. 404, it

was held that indulgence or nonaction was not a waiver; neither was delay in filing a notice. In *Wood v. Planters' Oil Mill*, 76 Ark. 570, 90 S. W. 18, it was held that silence did not constitute a waiver of a breach of the contract; that it was only where a party was silent *when he ought to speak* that he would thereafter be estopped to speak; and that the silence of appellant therein in no manner changed the status of appellee after the alleged breach occurred. *Williamson Tr. v. Paxton*, 59 Va. 475; *Nelson v. Sanders*, 123 Ala. 615, 26 So. 518."

<sup>69</sup> The exaggerated application of the doctrine of waiver to insurance policies has been due to American courts exclusively. See *Richards, Insurance* (3d ed.), 165.



which may be essential. Cases should be divided somewhat as follows:

1. Where the insured and insurer make a substituted contract supported by sufficient consideration, doing away with one or more conditions of the original contract.

2. Where, prior to or simultaneously with the breach of condition, the insurer justified the insured in believing that the breach of condition would not be insisted upon.

3. Where prior to the loss, but after the breach of condition, the insurer justified the insured in believing the breach would not be insisted upon.

4. Where not only after breach of condition, but after loss under the policy, the insurer justified such belief on the part of the insured.

As insurance cases generally involve only the right of the insured to recover, and as so-called waivers if made at all are generally made by the insurer, there is little occasion for discussing here the effect of agreements to discharge from liability on an obligation, as distinguished from agreements to excuse from the operation of conditions and defences to an obligation. An insurance policy is ordinarily written on a form prepared for general use, and for this reason cases are of frequent occurrence where it is contended that the insurer's conduct at the very time when the policy was issued precludes insistence on some of its conditions, either because there is a parol contract substituted for or collateral with the policy, or because there is a waiver supported by the reliance of the insured. If the contract were an ordinary informal contract, the parties would probably express their whole agreement in the writing, rather than execute a writing in some degree contradictory of their actual intention and supplement the policy with an oral or implied agreement.

**§ 748. The insurer's conduct when the policy is issued.**

Conduct of the insurer at the time when the policy is issued, which may be relied upon as excusing the condition in the policy, may be of several kinds. The insurer may expressly agree that breach of a particular affirmative warranty in the policy shall not invalidate it. Thus when the policy provides

that the insured warrants that he has absolute and unencumbered title to the property, or that there is no other insurance, or that any other supposedly existing fact is true, the insurer may agree that some lack of correspondence of the facts with the warranty shall be immaterial. The insurer may impliedly make such an agreement by issuing the policy when he is aware that an affirmative warranty therein is not true in some respect, and is therefore broken as soon as made. Finally, the insurer may expressly or impliedly agree that a promissory warranty need not be kept. In any of these cases if the insured enters into the transaction in good faith and on the assumption that he is securing a valid policy, it is a great hardship, if loss afterwards occurs, to refuse him relief and to hold the policy invalidated by the breach of warranty. To avoid such a hardship courts will use every rule of law which can fairly be invoked. To give the contract such a construction as will make recovery possible is the simplest course where this is available. Language does not always bear its literal meaning, nor do the same words always have the same meaning. If a horse is warranted sound doubtless the meaning of this warranty ordinarily would include an undertaking that he had both eyes, but if the buyer and seller were before an obviously one-eyed horse and the buyer had had his attention called to the defect, a warranty of soundness then made would be properly construed as meaning "sound in every respect except the missing eye." So an insurance policy the validity of which was made conditional on payment of the premium, has been held valid where the Insurance Company gave credit to the agent and the agent gave credit to the insured, on the ground that the meaning of "payment" included accepting such credit.<sup>70</sup>

<sup>70</sup> In *White v. Connecticut Fire Ins. Co.*, 120 Mass. 330, the court said: "It is a fair inference from all this, that the duly authorized agent of the company had accepted the individual credit of Hunt as a payment of the required premium. It is not a question of waiver, by parol agreement, of an express stipulation in a written contract within the cases cited by the defendant. It is rather a compliance

with the condition required to give validity to the policy, within a large class of cases in which it is held sufficient." To similar effect are—*Talloe v. Merchants' Ins. Co.*, 9 How. 390, 402, 13 L. Ed. 187; *Miller v. Life Ins. Co.*, 12 Wall. 285, 303, 20 L. Ed. 398; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451, 53 Pac. 922; *Sheldon v. Con-*

But in many cases it is impossible by any reasonable construction to give the policy a meaning consistent with the intention of the parties as indicated by their oral agreement and the circumstances surrounding the making of the contract; and if the insured is to be protected, it must be on the ground that though the terms of the policy excuse the insurer, his conduct has been such as to preclude him from taking advantage of the excuse.

**§ 749. Decisions holding that the parol evidence rule forbids enforcement of a parol waiver contemporaneous with the creation of a written contract.**

In the cases supposed in the previous section, it seems at first sight that the parol evidence rule forbids the insured to deny to the policy the meaning of its language when properly construed. When the policy provides that it shall be invalid if the insured is not the owner of the insured property a collateral agreement which provides that the policy shall be just as valid as if he were the owner though he is not, directly contradicts the writing, and if it is to be enforced as an admissible collateral agreement, it must be on the theory suggested in regard to bills and notes and deeds,<sup>71</sup> that a policy of insurance is ordinarily made in a fixed form and that it is an entirely natural and probable thing for parties to make a separate oral agreement of the kind suggested rather than to revise the terms of the policy. Knowledge of existing facts by the insurer, or assent or permission in any form that such facts may exist, can amount to no more than ground for implying a parol collateral agreement and ordinarily the fact that a party to a writing has relied on an oral agreement will not make the latter binding. Such reliance is common where the parol evidence rule is invoked. The operation of that rule is not merely to exclude an oral agreement made before or contemporaneously with the

*Connecticut Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565; *Bouton v. American Life Ins. Co.*, 25 Conn. 542; *Jones v. N. Y. Life Ins. Co.*, 168 Mass. 245, 47 N. E. 92; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460, 84 Am. Dec. 213; *Washoe*

*Tool Mfg. Co. v. Hibernia F. Ins. Co.*, 66 N. Y. 613; *Stewart v. Union Mutual Life Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147.

<sup>71</sup> See *supra*, §§ 644, 645.

written contract when the oral agreement has not been relied on. It must be assumed that generally it has been relied on. The injustice thus worked is endured in order to secure the advantage which the parol evidence rule gives of added certainty in the enforcement of writings. Much authority of the highest character supports the conclusion that the oral agreement is ineffectual to vary the provisions of an insurance policy in such a case as has been supposed.<sup>72</sup>

### § 750. Contrary decisions.

Many decisions, however, support the right of the insured to recover,<sup>73</sup> and to most minds these decisions will seem pref-

<sup>72</sup> In *Lumber Underwriters v. Rife*, 237 U. S. 605, 609, 35 S. Ct. 717, 59 L. Ed. 1140, Holmes, J., for the court said:—"When by its written stipulation the document gave notice that a certain term was insisted upon, it would be contrary to the fundamental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived. It is the established doctrine of this court that such proof cannot be received. *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 46 L. Ed. 213, 22 S. Ct. 133; *Northern Assurance Co. v. Grand View Building Association*, 203 U. S. 106, 107, 51 L. Ed. 109, 27 S. Ct. 27; *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. Rep. 877, 883, 73 C. C. A. 111. See *Penman v. St. Paul Fire & Marine Ins. Co.*, 216 U. S. 311, 54 L. Ed. 493, 30 S. Ct. 312; *Ætna Life Ins. Co. v. Moore*, 231 U. S. 543, 550, 58 L. Ed. 356, 34 S. Ct. 186. There is no hardship in this rule. No rational theory of contract can be made that does not hold the assured to the contents of the instrument to which he seeks to hold the other party." (Cf. *American F. Ins. Co. v. King Lumber Mfg. Co.*, [U. S. Oct. Term, 1918], 39 S. Ct. Rep. 431.

To the same effect are—*Barrett v. Union Mutual Fire Ins. Co.*, 7 Cush. 175; *Batchelder v. Queen Ins. Co.*, 135 Mass. 449; *Thomas v. Commercial Union Assur. Co.*, 162 Mass. 29, 37 N. E. 672, 44 Am. St. Rep. 323; *Franklin Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271; *Bennett v. St. Paul, etc., Ins. Co.*, 55 N. J. L. 377, 27 Atl. 641; *Jennings v. Chenango County Mutual Ins. Co.*, 2 Denio, 75. But see *Robbins v. Springfield Ins. Co.*, 149 N. Y. 477, 44 N. E. 159.

<sup>73</sup> *Insurance Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016; *Queen Ins. Co. v. Patterson Drug Co.*, 73 Fla. 665, 74 So. 807, L. R. A. 1917 D. 1091; *Rhode Island Underwriters' Assoc. v. Monarch*, 98 Ky. 305, 32 S. W. 959; *Germania Fire Ins. Co. v. Hick*, 125 Ill. 361, 17 N. E. 792, 8 Am. St. Rep. 384; *Cech v. Firemen's Ins. Co.*, 201 Ill. App. 321; *St. Onge v. Springfield F. & M. Ins. Co.*, 204 Ill. App. 139; *Murray v. Capital Ins. Co.*, 87 Ia. 453, 54 N. W. 354; *Maxwell v. York Mut. F. Ins. Co.*, 114 Me. 170, 95 Atl. 877; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Michigan Shingle Co. v. State Investment & Ins. Co.*, 94 Mich. 389, 53 N. W. 945, 22 L. R. A. 319; *Dahrooge v. Sovereign F. Assur. Co.*, 175 Mich. 248, 141 N. W. 572; *Simpson v.*

erable, if their result can be reached without wrenching legal principles. Most of the cases so deciding speak of estoppel, but it is hard to see how a promissory estoppel can be more efficacious to avoid the application of the parol evidence rule than positive contract with consideration; and certainly a contemporaneous oral modification of a written contract is not generally effectual though it was both supported by consideration and relied upon. Two other principles have been invoked to explain at least partially the conclusion of the majority of the decisions: fraud and reformation of contract. The conduct of the insurer is not generally intentionally fraudulent, but to take money as premium in return for a promise which the in-

Ohio Farmers' Ins. Co., 184 Mich. 547, 151 N. W. 610; *Gordon v. St. Paul F. & M. Ins. Co.*, 197 Mich. 226, 163 N. W. 956; *Liverpool and London and Globe Ins. Co. v. Farnsworth Lumber Co.*, 72 Miss. 555, 17 So. 445; *Big Creek Drug Co. v. Stuyvesant Ins. Co.*, 115 Miss. 561, 76 So. 768; *Rissler v. American Central Ins. Co.*, 150 Mo. 366, 51 S. W. 755; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745; *Pechner v. Phoenix Fire Ins. Co.*, 65 N. Y. 195; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12 N. E. 609; *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Robbins v. Springfield F. & M. Ins. Co.*, 149 N. Y. 477, 44 N. E. 159; *McClelland v. Mutual L. Ins. Co.*, 217 N. Y. 336, 111 N. E. 1062; *Blass v. Agricultural Ins. Co.*, 162 N. Y. 639, 57 N. E. 1104; *Clapp v. Farmers' Mut. Fire Ins. Co.*, 126 N. C. 388, 35 S. E. 617; *Union Insurance Co. v. McGookey*, 33 Oh. St. 555; *Springfield Fire &c. Ins. Co. v. Halsey*, 52 Okl. 469, 153 Pac. 145; *State Mut. Ins. Co. v. Green (Okl.)*, 166 Pac. 105, L. R. A. 1917 F. 663; *Insurance Co. v. Hancock*, 106 Tenn. 513, 62 S. W. 145; *Life & Casualty Co. v. King*, 137 Tenn. 685, 195 S. W. 585; *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473; Na-

tional Fire Ins. Co. *v. Carter* (Tex. Civ. App.), 199 S. W. 507; *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Meesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458; *Workman v. Royal Exchange Assurance*, 96 Wash. 559, 165 Pac. 488; *Schultz v. Caledonia Ins. Co.*, 94 Wis. 42, 68 N. W. 414; *St. Clara Academy v. North Western Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. 767. See also *Weir v. Aberdeen*, 2 B. & Ald. 320; *Quebec M. Ins. Co. v. Commercial Bank*, L. R. 3 P. C. 234, 244; *Western Assur. Co. v. Southern Cotton Oil Co.*, 68 Fed. 924, 16 C. C. A. 67; *Supreme Lodge v. Few*, 142 Ga. 240, 82 S. E. 627; *Illinois Life Ins. Co. v. Kennedy*, 191 Ill. App. 29; *Reserve L. I. Co. v. Boreing*, 157 Ky. 730, 163 S. W. 1085; *Bemis v. Pacific Coast Casualty Co.*, 125 Minn. 54, 145 N. W. 622; *Yount v. Prudential L. Ins. Co.* (Mo. App.), 179 S. W. 749; *Bidwell v. N. W. Insurance Co.*, 24 N. Y. 302; *Robbins v. Springfield Ins. Co.*, 149 N. Y. 477, 44 N. E. 159; *Thebaud v. Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284; *Central Market Co. v. North British, etc., Ins. Co.*, 245 Pa. 272, 91 Atl. 662; *Curran v. National L. Ins. Co.*, 251 Pa. 420, 96 Atl. 1041; *Powell v. Continental Ins. Co.*, 97 S. Car. 375, 81 S. E. 654.

suror must be held to know is invalid, may fairly be regarded as a fraud in law by a court which does not require as an invariable requisite of fraud or deceit that an actual wrongful intent should exist.<sup>74</sup> If the transaction is fraudulent the question then arises as to the remedy of the defrauded party. He could of course rescind the transaction and recover his premium; he could do this in any event on the ground of failure of consideration, if the policy were unenforceable, since the risk has never attached.<sup>75</sup> By the weight of authority, however, one who claims damages for fraud is entitled not merely to be put in as good a position as he would have been had the fraud not been perpetrated, but in as good a position as he would have been had the deceitful representations been true.<sup>76</sup> This explanation would of course not support an action on the policy as such, but it would support an action of deceit in which the face of the policy might be recoverable in a jurisdiction which admits that wrongful thought honest misrepresentation may be the basis for an action of deceit, and that the damages in such an action are not confined to such as will restore the plaintiff to his original status. The other explanation suggested for allowing the plaintiff to recover, is that the contract should be reformed in equity to express the real intention of the parties and that as a short cut an action at law on the policy is permitted on evidence being given that would warrant reformation. Undoubtedly such short cuts are sometimes taken,<sup>77</sup> whatever doubt there may be as to their propriety. A court of equity requires a degree of proof before reforming a writing which is not required of a plaintiff in an action at law. In an action on the policy the question of reforming it by allowing effect to the parol evidence is necessarily left to the jury with all the other evidence in the case, and they will probably give a verdict for the plaintiff if they conceive a mere preponderance of the evidence justifies recovery. If this procedure may be allowed in an action at law where a policy of insurance is involved, why may it not equally be allowed wherever the parol evidence rule is invoked? Moreover, if, as not infrequently happens, the agent who writes the

<sup>74</sup> See *infra*, § 1509.

<sup>75</sup> See *infra*, § 757.

<sup>76</sup> See *infra*, §§ 1392, 1524.

<sup>77</sup> See *infra*, § 1599.

insurance having knowledge of the breach of affirmative warranty and expressly or impliedly assenting thereto has no authority to make a contract on different terms from those provided in the policy, no suit for reformation could well be brought. Some courts which allow recovery in spite of a known breach of affirmative warranty, existing when the policy was issued, distinguish the case where a promissory warranty is broken on the assurance of the insurer or his agent that breach of the warranty will not be insisted upon.<sup>78</sup> One who believes that even a known breach of an affirmative warranty necessarily avoids the policy and that proof of orally expressed intention to the contrary is a violation of the parol evidence rule, will not see much distinction if the warranty is promissory in character. So far as hardship upon the insured is concerned, there is not much to choose between the cases. The only satisfactory way, then, of avoiding the hardship is by limiting the parol evidence rule in accordance with the suggestion made in the preceding section. Where, however, as is often the case, the policy provides that no waiver or change of the terms of the policy shall be valid unless indorsed thereon,<sup>79</sup> no possible reasoning will permit recovery.

**§ 751. Presumption of knowledge on the part of the insurer of invalidating facts at the time of issuing the policy.**

So far have some courts gone in enforcing policies of insurance in spite of a breach of affirmative warranty at the time of issuing the policy, that they have held that the insurer must be presumed to know and to assent to the state of affairs existing at the time when the policy was issued unless particular inquiry has been made of the insured.<sup>80</sup> Such a view is ob-

<sup>78</sup> *Gray v. Germania Fire Ins. Co.*, 155 N. Y. 180, 49 N. E. 675. See also *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Connecticut Fire Ins. Co. v. Tilley*, 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770; *England v. Westchester Fire Ins. Co.*, 81 Wis. 583, 51 N. W. 954.

<sup>79</sup> See *infra*, § 759.

<sup>80</sup> This view was alluded to by the court in *Parsons v. Lane*, 97 Minn. 98,

108, 106 N. W. 485; the court said: "A strong statement of this view is found in *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 932, 32 C. C. A. 426, where it is said: 'Where the insured has an insurable interest in the property, and in good faith applies for insurance upon the same, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from mak-



viously artificial. If the insured reads his policy he will be aware of the conditions contained in it. The decisions above alluded to are in their spirit inconsistent with the well-settled rule that one who accepts a written contract must be assumed to assent to the terms of the writing;<sup>81</sup> and many courts accordingly hold that no inquiry by the insurance company is necessary

ing inquiry concerning his interest, and issues a policy to him, and accepts and retains his premium, the company must be presumed to have knowledge of the condition of his title and to assure the property with such knowledge.' So, in *Philadelphia Tool Co. v. British, etc., Assur. Co.*, 132 Pa. St. 236, 19 Atl. 77, 19 Am. St. Rep. 596, it was said that 'We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and was intended to cover in good faith the interest which the insured had in the buildings.'

"This general proposition is supported to a greater or less extent by the decision or by general language used in *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497; *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. 463; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26; *Union Assur. Society v. Nalls*, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364; *Morrison v. Tennessee M. & F. Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719; *German Ins. & Sav. Inst. v. Kline*, 44 Neb. 395, 62 N. W. 857; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, 74 N. W. 269, 40 L. R. A. 408, 68 Am. St. Rep. 637; *Farmers' &*

*Merchants' Ins. Co. v. Mickel*, 72 Neb. 122, 100 N. W. 130; *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; *Sharp v. Scottish Union & Nat. Ins. Co.*, 136 Cal. 542, 69 Pac. 253, 615; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434, 19 Ky. L. Rep. 204; *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. 534; *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905; *Allesina v. London Ins. Co.*, 45 Ore. 441, 78 Pac. 392; *Pelze Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *Arthur v. Palatine Ins. Co.*, 35 Ore. 27, 57 Pac. 62, 76 Am. St. Rep. 450; *Commonwealth v. Hide & Leather Co.*, 112 Mass. 136, 17 Am. Rep. 72; *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 23 So. 183, 65 Am. St. Rep. 611; *Pest v. Dakota Fire & M. Ins. Co.*, 1 S. Dak. 462, 47 N. W. 532; *German Ins. Co. v. Davis*, 6 Kan. App. 268, 51 Pac. 60; *New Jersey Rubber Co. v. Commercial Union Ins. Co.*, 64 N. J. L. 580, 46 Atl. 777, 779.

"A careful examination of many of these cases will show that they are not in point. In some of them it appears that the company, through its agent, had actual knowledge of the condition of the title before the policy was issued, and this, of course, distinguishes them from the present case. Others rest upon the general doctrine of concealment, which has no application when the defence rests upon a breach of a condition precedent contained in the policy."

<sup>81</sup> See *supra*, § 90a.



in order to enable it to avoid any implication of consenting to a breach of affirmative warranty where the facts which constitute such breach, existing at the time when the policy is issued, are unknown to it.<sup>82</sup>

§ 752. Waiver of condition after the issue of the policy.

If, after the policy has been issued, the insurer indicates by words or conduct, that he will not enforce or require performance of a condition which has not then been broken, and relying thereon the insured fails to perform the condition, he will not be debarred thereby from recovering on the policy. Thus where a condition requires payment of the first premium as a condition of the policy, accepting a note or giving credit to the insured excuses the condition.<sup>83</sup> If, however, there is a further condition that any note accepted for the premium shall be paid at maturity or the policy shall be avoided, such non payment at maturity is not waived by the mere taking of the note

<sup>82</sup> The court so held in *Parsons v. Lane*, 97 Minn. 98, 106 N. W. 485, following earlier decisions of the Minnesota court, adding that this rule "is approved and applied in *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614; *Continental Ins. Co. v. Cummings*, 98 Tex. 115, 81 S. W. 705; *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674, 35 So. 309; *Orient Ins. Co. v. Williamson*, 98 Ga. 464, 25 S. E. 560; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. 915; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *Hebner v. Palatine Ins. Co.*, 55 Ill. App. 275; *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *Barnard v. National Fire Ins. Co.*, 27 Mo. App. 26; *Mers v. Franklin Insurance Co.*, 68 Mo. 127; *Fitchburg Savings Bank v. Amazon Insurance Co.*, 125 Mass. 431; *Waller v. Northern Assur. Co.*, 10 Fed. 232; *Duda v. Home*

*Insurance Co.*, 20 Pa. Super. Ct. 244 ('The question is not whether the insured had an insurable interest, but whether he had the interest described in the policy'), distinguishing *Philadelphia Tool Co. v. British-American Assur. Co.*, 132 Pa. St. 236, 19 Atl. 77, 19 Am. St. Rep. 596; *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189, 5 So. 500; *Liberty Ins. Co. v. Boulden*, 96 Ala. 508, 11 So. 771; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324; *Allesina v. London Ins. Co.*, 45 Ore. 441, 78 Pac. 392; *Weed v. London & Lancashire Fire Ins. Co.*, 116 N. Y. 106, 22 N. E. 229." See also *Pettijohn v. St. Paul F. & M. Ins. Co.*, 100 Kans. 482, 164 Pac. 1096.

<sup>83</sup> *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *New York Life Ins. Co. v. McGowan*, 18 Kans. 300; *German Ins. Co. v. Shader*, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918; *Little v. Eureka Ins. Co.*, 38 Ohio St. 110.

as a premium.<sup>84</sup> This is a typical case of waiver. The authorities uniformly support the rule here stated and the only difficulty is to determine what conduct on the part of the insurer will amount to a representation that performance of the condition will not be required. There can be no doubt where the insurer gives express permission to the insurer to break or fail to perform a condition, he cannot afterwards refuse to perform on account of its breach;<sup>85</sup> and any conduct sufficient to justify a reasonable man in believing that his breach was permitted will produce the same effect.<sup>86</sup> A condition may be waived altogether or only in part.<sup>87</sup>

**§ 753. Whether inaction by an insurer after knowledge of a breach of condition waives the breach.**

One of the most common grounds upon which the insured rests his assertion that a breach of condition cannot be insisted upon is that the insurer knew of the breach and yet took no action; that because of this conduct the insured supposed his policy was enforceable; and, only after a loss had incurred did he learn the contention of the insurer that the policy had been rendered invalid. The force of this contention can best be determined by first considering whether the situation presents a possible case of election, or whether it is necessary to establish what is more properly called waiver.<sup>88</sup>

It is not a mere election unless the insurer will acquire or retain rights by virtue of keeping the policy in force, which he could not acquire or retain by its termination. As the only benefit the insurer derives from the insurance contract is pay-

<sup>84</sup> *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 S. Ct. 126, 47 L. Ed. 204; *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240.

<sup>85</sup> *Viele v. Germania Ins. Co.*, 26 Ia. 9, 96 Am. Dec. 83; *Mudd v. German Ins. Co.*, 22 Ky. L. Rep. 308, 56 S. W. 977; *Ætna L. Ins. Co. v. Hartley*, 24 Ky. L. Rep. 57, 67 S. W. 19, 68 S. W. 1081; *Tighe v. Maryland Casualty Co.*, 218 Mass. 463, 106 N. E. 135; *Pindar v. Kings County Ins. Co.*, 36 N. Y. 648, 93 Am. Dec. 544; *Farmers', etc., Assoc.*

*v. Williams*, 95 Va. 248, 28 S. E. 214.

<sup>86</sup> *Lusk v. American Cent. Ins. Co. (W. Va.)*, 91 S. E. 1078.

<sup>87</sup> In *Jaqua v. Shewalter*, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072, the plaintiff executed a bond on condition not to enter a competing business. Subsequently the defendant authorized him to enter into a particular competitive business, and he did so. To this extent the condition of the bond was held waived.

<sup>88</sup> See *supra*, § 679.

ment of the premium or premiums, the inquiry resolves itself into this—will the insurer acquire or retain payments of premiums by continuing the policy in force, to which he would not otherwise be entitled?

**§ 754. Insurer's right to premiums after a breach avoiding a policy.**

It may be supposed under the contract of insurance:

(1) That the premium is payable in instalments, as is usual under a life insurance policy;

(2) That it has already been paid in full for the entire term of the policy, as ordinarily happens under fire insurance policies; or,

(3) That a note has been given or a debt incurred for a premium already due.

**§ 755. Life insurance.**

In the first case it is evident that it may be for the advantage of the insurer to continue the policy. He will not thereby acquire a legal right to further premiums since the insured may drop the insurance at any time, but there is a chance that continued payments will be made, and the insurer profit thereby. There is here, therefore, an opportunity for election, and any conduct manifesting an unmistakable choice by the insurer to continue the insurance in force, should be binding upon him without any consideration or estoppel.<sup>90</sup> Whether mere inaction amounts to such a manifestation of election is akin to the question whether silence may amount to an acceptance of an offer.<sup>90</sup> If under the circumstances a reasonable person in the position of the insured would be justified in believing that the insurer had chosen to continue the policy having knowledge of the facts, there is an election; otherwise not.<sup>91</sup>

**§ 756. Cases where the premium has been already paid.**

If a premium already paid can be retained by the insurer,

<sup>90</sup> See *National Life Ins. Co. v. Clayton* (Okla.), 173 Pac. 356, and cases cited.

<sup>90</sup> See *supra*, § 91.

<sup>91</sup> See also *supra*, § 739, as to the effect of silence in estopping the owner of land.

even though the policy is forfeited, and no further premiums will accrue, the insurer is obviously giving something up and getting no advantage if the policy is continued in force. Unless, therefore, the insurer must surrender all or part of the premium on avoiding the policy, even his express statement to the insured that the policy would not be avoided, can impose liability only if there are circumstances of promissory estoppel or if it is assumed that the promise is one of the exceptional class which is binding without either consideration or such estoppel. It is important therefore to determine what are the insurer's rights in reference to retention of the premium, or the collection of a note given therefor.

**§ 757. Right of insurer to retain the premium when the policy is avoided.**

"When a man acts in consideration of a conditional promise, if he gets the promise he gets all that he is entitled to by his act, and, if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration."<sup>92</sup> If, therefore, the risk once attaches, the insured has received consideration for his premium, and if by his own fault, or by chance, the conditional promise of the insurer calls for no performance, no part of the premium can be recovered.<sup>93</sup>

Where the risk never attaches, there is more apparent reason for requiring a surrender of the premium by the insurer in order to prevent his retention of it (when the consideration for it has failed if the conditions of the policy are enforced) operating as a waiver of those conditions. But though the premium is recoverable, the rule is still that surrender of it is not essential to avoiding the policy. In an elaborate opinion,<sup>94</sup> the Supreme Court of Minnesota has said: "The facts which prevented it [the risk] from attaching were at all times known to the insured, and when they became known to the insurer it was not called upon to do anything to invalidate the policy. The only duty which then

<sup>92</sup> Holmes, J., in *Gutlon v. Marcus*, 165 Mass. 335, 336, 43 N. E. 125; and see *supra*, § 112.

<sup>93</sup> See cases cited *infra*, n. 17.

<sup>94</sup> *Parsons v. Lane*, 97 Minn. 98, 106 N. W. 485.

rested upon the insurer was to do nothing, actively or otherwise, which would mislead the other party to the contract to his material injury. Whether it is the duty of the insurer to return the premiums is determined by various considerations. If the policy is wrongfully terminated by the insurer, it must return the premiums.<sup>96</sup> So, when the company becomes insolvent, unearned premiums are a claim against the insolvent estate.<sup>98</sup> If the policy is illegal the premiums cannot be recovered,<sup>97</sup> unless the parties are not '*in pari delicto*.'<sup>98</sup> If the policy is not illegal, and once attaches and the risk is assumed, the entire premium is earned, and if a forfeiture results from a breach of a promissory warranty or of a condition subsequent, the insurer cannot be required to return any part of the premium. It is all earned when the risk attaches.<sup>99</sup> But if the policy never attaches because of a breach of a condition precedent, the insurer never assumes any risk of loss, and never earns any part of the premium.<sup>1</sup> While there is some conflict of authority, we think that under such conditions the proper rule is that the insured, if he has not been guilty of fraud, is

\* *Ibid.*, citing *McCall v. Phoenix Mutual Life Ins. Co.*, 9 W. Va. 237, 27 Am. Rep. 558.

\* Citing *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511; *In re Minneapolis Mutual Fire Ins. Co.*, 49 Minn. 291, 51 N. W. 921; *Clark v. Manufacturers' Ins. Co.*, 130 Ind. 332, 30 N. E. 212.

\* Citing *Howard v. Refuge Friendly Society*, 54 L. T. (N. S.) 644; *Lowry v. Bourdieu*, 2 Douglas, 468, 14 English Rul. Cas. 533.

\* *Harse v. Pearl Life Assur. Co.*, 73 L. J. K. B. 373; *American Mutual Life Ins. Co. v. Bertram*, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935.

\* Citing *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111; *U. S. Life Ins. Co. v. Smith*, 92 Fed. 503, 34 C. C. A. 506; *Todd Co. v. Farmers' Mutual Fire Ins. Co.*, 137 Mich. 188, 100 N. W. 442; *Alabama Mutual Assur. Co. v. Long*, 123 Ala. 667, 26 So. 655;

*Fulton v. Lancaster*, 7 Ohio St. 5, pt. 2; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; *Mutual Life Ins. Co. v. Kelly*, 114 Fed. 268, 52 C. C. A. 154; *Dickerson v. Northwestern Mutual Life Ins. Co.*, 200 Ill. 270, 65 N. E. 694; *Home Insurance Co. v. Daubenspeck*, 115 Ind. 306, 17 N. E. 601; *Pearlstone v. Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4; *Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101; *Harris v. Scrivener* (Tex. Civ. App.), 78 S. W. 705. To these cases may be added *Elder v. Federal Ins. Co.*, 213 Mass. 389, 100 N. E. 655. In *Kentucky Live Stock Ins. Co. v. Stout*, 175 Ky. 343, 194 S. W. 318, the court implied that a note given for the premium could not be retained and collected if the insurer insisted upon a breach of condition.

<sup>1</sup> See *infra*, § 1568.

entitled to recover back what he has paid to the insurance company.<sup>2</sup>

"In the case at bar the court ordered the receivers to return the premiums which had been paid, and the plaintiff thus received the full benefit of the rule. But it does not follow that it is the duty of the insurer to take affirmative action to find the insured and tender back the amount of the premiums which have been paid voluntarily before the insurer had knowledge of the breach of condition.<sup>3</sup> In some States statutes have been enacted which require an insurance company to return all premiums which it has received, as a condition precedent to interposing a defence on the ground that the policy was obtained by misrepresentations.<sup>4</sup> In this case the insurer is not asking

<sup>2</sup> Citing *Tyrie v. Fletcher*, Cowp. 666; *Feise v. Parkinson*, 4 Taunt. 640, 14 Eng. Rul. Cas. 530; *Stevenson v. Snow*, 3 Burr. 1237; *Foster v. United States Ins. Co.*, 11 Pick. 85; *Clark v. Manufacturers' Ins. Co.*, 2 Woodb. & M. 472, Fed. Cas. No. 2,829; *Insurance Company v. Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. St. Rep. 781; *Jones v. Insurance Co.*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. Rep. 706; *Mulvey v. Gore Ins. Co.*, 25 U. Can. Q. B. 424; *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *Fowler v. Scottish Life Ins. Society*, 28 L. J. Ch. 225; *Delavigne v. United Ins. Co.*, 1 Johns. Cas. 310. See *Rochester Ins. Co. v. Martin*, 13 Minn. 59, and authorities cited in *Taylor v. Grand Lodge A. O. U. W.*, 96 Minn. 441, 105 N. W. 408.

<sup>3</sup> Citing *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *Austin v. Mutual R. F. L. Assn.*, 132 Fed. 555; *Houdeck v. Merchants' & Bankers' Ins. Co.*, 102 Iowa, 303, 71 N. W. 354. As noted in *Taylor v. Grand Lodge A. O. U. F.*, 96 Minn. 441, 105 N. W. 408, the case of *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367, 45 N. W. 708, is not an authority for the rule that the mere retention of the premium paid before

notice of a breach of a condition is conclusive evidence of an election to treat the policy as valid. Neither do the cases incidentally referred to by Chief Justice Gilfillan in that case sustain this proposition. In *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422, there was present every element of a technical estoppel. The point is not decided in *Harris v. Equitable Life, etc., Society*, 64 N. Y. 196. In *Baker v. New York Life Ins. Co.*, 77 Fed. 550, it appeared that the insurance company for a full year after knowledge of all the facts treated the policy as in force. *Jones v. Insurance Co.*, 90 Tenn. 604, 18 S. W. 260, 25 Ann. St. Rep. 706, was an action by the insured to recover the premiums. See comment upon these cases, and *Home Mutual Life Assoc. v. Riel*, 1 Monaghan, 615, 17 Atl. 36, in *Georgia Home Ins. Co. v. Rosenfield*, *supra*.

<sup>4</sup> Citing Rev. St. Mo. 1879, § 5977; *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934; *Civ. Code Cal.*, § 2617; and *Acts Va.* 1897, 1898, p. 636, c. 601 [Va. Code, 1904, 638]; *Vance, Ins.* 245. The court adds:—*Virginia Fire Ins. Co. v. Cummings* (Tex. Civ. App.), 78 S. W. 716, and *Metropolitan Life Ins. Co. v. Moore*, 117 Ky. 651, 79 S. W. 219, sus-

to have the contract rescinded. The premium came into its possession lawfully under color of what was assumed to be a valid contract, and it cannot properly be placed in a position of withholding it until repayment has been demanded. It seems to us that it would be as reasonable to require the insured, when he learns that the insurer claims that the policy is invalid, to either accept the situation and demand a return of his payments, or stand on what he assumes to be his rights and attempt to enforce them.<sup>5</sup> If he does not do this, it should not lie in his mouth to assert that the other party cannot be heard on its defence until it has tendered to him what he asserts that he has no right to receive, and will not or cannot accept without abandoning his entire claim for indemnity. The only logical course is to leave the parties where they are until their respective rights are determined. If the defendant prevails the plaintiff should have judgment for the return of his

tain the appellant's contention; but they rest upon what seems to us an erroneous theory. The rule there applied would be properly applicable in an action by an insurance company against the insured for the purpose of having the contract rescinded. [To these decisions may be added *Insurance Co. & Pa. v. Indiana Reduction Co.* (Ind. App.), 117 N. E. 273, and *Indiana cases cited; Thompson v. Insurance Co.*, 63 S. Car. 290, 41 S. E. 464; *Powell v. Insurance Co.*, 97 S. Car. 375, 81 S. E. 654.] Neither is appellant's contention sustained by *Mississippi Home Ins. Co. v. Dobbins*, 81 Miss. 623, 630, 33 So. 504, 506. In that case the premium was paid after the agent of the company had notice of the loss; and after notice of the additional insurance the company furnished blanks and allowed the insured to make proofs of loss. It was held that, under the circumstances and the terms of the policy with reference to the return of premiums upon cancellation of the policy, the company was estopped by its failure to return the unearned premium. *Commercial Assur. Co. v.*

*New Jersey Rubber Co.*, 61 N. J. Eq. 446, 49 Atl. 155, was a suit by the insurer to cancel the policy.

(In *Benanti v. Delaware Ins. Co.*, 86 Conn. 15, 19, however, the court said: "Had the defendant retained the premium prior to the loss and after it knew the breaches of these conditions, it would have waived the right to avoid the policy through them. The risk of the policy upon breach of this condition precedent never attached. It might have been given life by being adopted or ratified prior to the loss; after that event it could not be. A waiver or an estoppel predicated upon facts subsequent to the loss could not affect the rights of the plaintiff under the policy. Hence, if the knowledge of the breach came to the insurer after the loss, its retention of the premium after such knowledge did not affect the plaintiff's rights, and therefore can furnish no foundation for a waiver or estoppel.")

<sup>5</sup> The court here adds: "A somewhat similar principle was applied in *American Life Ins. Co. v. Bertram*, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935."



premiums. But the insurance company must be consistent. If it claims that the contract is not in force, it must not expressly nor impliedly recognize it as effective. If the insured demands the return of what he has paid as premiums, it must comply with the demand if it claims that the risk never attached. If it refuses to return the money it places itself in a position which is inconsistent with an honest intention to avail itself of the breach of condition, and recognizes the contract as in force just as effectively as it would by accepting and retaining assessments or premiums after it has acquired knowledge that there had been a forfeiture. Having thus made its election, it will be held to have subjected itself to all the liabilities which attach thereto. Even when knowledge of the breach of a condition is acquired before a loss occurs, the company is not, under our decisions, required to do any affirmative act.<sup>6</sup>

"There is even stronger reason for holding that this is the rule when the insured does not learn of the breach of conditions until after a loss. The rights of the parties have then been determined and fixed by the occurrence of the event insured against.<sup>7</sup> It is essentially a matter of intention; and when the only proof of that intention rests in what a party does or forbears to do his acts or omission to act relied upon should be so manifestly consistent with and indicative of an intention to voluntarily relinquish a then known particular right or benefit that no other reasonable explanation of his conduct is

<sup>6</sup> The court here adds: "In *Johnson v. American Ins. Co.*, 41 Minn. 396, 43 N. W. 59, where the insured procured other insurance in violation of a condition which provided that the policy should be void if other insurance was obtained 'without notice to and consent of this company in writing thereon,' the court, through Justice Dickinson, said: 'By the plain terms of the policy, other insurance without the consent of this company would *ipso facto* void the contract; and in the case of a contract thus avoided it would not be obligatory upon the insurer to repay any of the unearned premium, nor would he be required to

give notice that he should insist upon and avail himself of the proper legal effect of the agreement. It required no affirmative act of election on the part of the company to make operative the clause avoiding the contract whenever the specified conditions should occur. Its obligations ceased, unless, being informed of the fact, it consented to the additional insurance, or in some manner waived the forfeiture.' To the same effect is *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971."

<sup>7</sup> *Berman v. Accident Association*, 107 Me. 368, 373, 78 Atl. 462.



possible. Unless one is shown to have full knowledge of all the material facts that establish his right he cannot be held to have waived it."

**§ 758. No affirmative action on the part of the insurer is generally necessary in order to avoid a policy for breach of condition.**

Even though the insured has no right to recover any portion of the premium if the policy is avoided for breach of condition, it is, nevertheless, held or assumed by some courts that affirmative action on the part of the insurer is necessary in order to terminate the rights of the insured under the contract. The supposed analogy of a lease or other deed granting a conditional estate in land, has probably contributed to this idea. A lease either for life or for years creates an estate in land. When the estate has once been created, it cannot be terminated except by reentry.<sup>8</sup> This is an inheritance of the modern law illustrating the importance which possession of tangible property had, and still has in the law.

The obligation of an insurer, however, does not create an estate which exists until it is determined, nor a general obligation to "insure" which the insurer might on certain contingencies take away from the insured. From the outset there was merely a conditional promise imposing on the promisor only such liability as its conditional terms indicate.<sup>9</sup> It is true that a policy of insurance may give in terms to the insurer a right to cancel it in a certain event, or at the option of the company, and to take advantage of its right the insurer must take active steps;<sup>10</sup> but such a provision is not, strictly speaking, a condition qualifying the insurer's promise, and any attempt to give a similar construction to warranties and conditions generally is an error. It should be observed, however, that even after breach of condition, the contract still exists, but it exists as a conditional contract. Even though the condition can no longer be performed, the situation is not the same as if no contract

<sup>8</sup> Smith's L. Cas. (8th Am. ed.) 102.

<sup>9</sup> See *supra*, § 746.

<sup>10</sup> Patterson v. Equitable Life Assur. Soc., 112 Ark. 171, 165 S. W. 454, 457;

Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; Hansell-Elcock Co. v. Frankfort &c. Ins. Co., 177 Ill. App. 500.

to provide in policies of insurance that a written indorsement on the policy is essential to the validity of a modification of the contract or a waiver of condition. The mere fact that a contract provides that its terms shall not be altered except by a writing, is ineffectual to produce the desired effect because the provision requiring a writing may itself be abrogated by subsequent parol agreement.<sup>16</sup> But an insurer is ordinarily a corporation and, therefore, can act only by agents having actual or apparent authority. A provision that modifications of the policy must be written on the policy implies that the actual authority of an agent to vary the contract is limited to variations indorsed on the policy, and as this limitation is expressed in the written contract, the possibility of apparent authority in excess of actual authority seems excluded. It should be observed, however, that waiver of a condition may occur without modification of the contract,<sup>17</sup> and therefore a provision in a policy which forbids merely alteration or modification of the contract without written indorsement does not exclude the possibility of parol waiver.<sup>18</sup> To meet this difficulty a stronger limitation of power has been inserted in policies to the effect that no modification or waiver of any term of the policy shall be binding except in writing indorsed upon the policy. By such a provision authority of an agent not only to modify

had sufficient actual or apparent authority to bind the company. The numerous decisions on what constitutes such authority cannot be here considered.

<sup>16</sup> *Insurance Company of N. America v. Williams* (Ala.), 77 So. 159. And see *infra*, § 1828.

<sup>17</sup> See *supra*, § 595.

<sup>18</sup> *Mutual Reserve &c. Assoc. v. Cleveland Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212; *Continental Fire Ins. Co. v. Brooks*, 131 Ala. 614, 30 So. 876; *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135, 2 Am. St. Rep. 567; *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Farmers' & Mech. Life Assoc. v. Caine*, 224 Ill. 599, 70 N. E. 956; *Viele v. Germania Ins. Co.*, 26 Ia. 9, 96 Am. Dec. 83; *New Orleans Ins. Co. v.*

*O'Brian*, 8 Ky. L. Rep. 785; *Liverpool, etc., Ins. Co. v. Sheffy*, 71 Miss. 919, 16 So. 307; *Dilleber v. Knickerbocker L. Ins. Co.*, 76 N. Y. 567; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; *Mentz v. Lancaster Fire Ins. Co.*, 79 Pa. 475; *Crescent Ins. Co. v. Griffin*, 59 Tex. 509; *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201. But see *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43, 10 N. E. 518; *Parker v. Rochester Ins. Co.*, 162 Mass. 479, 39 N. E. 179. Not all the cases in this note were rested on any distinction between a policy requiring consent merely to modifications of the contract and decisions requiring consent to waivers also, but their facts seem to make such distinction possible.

the contract orally but also to waive orally a condition or to estop the insurance company seems on principle excluded. Though there may be a waiver based on promissory estoppel without a variation of the contract,<sup>19</sup> it is essential for estoppel of any kind that action shall be reasonably taken in reliance on some representation or promise made by the person estopped or by one having power to bind him. The terms of a policy containing the provision under discussion not only preclude the supposition of authority on the part of an agent to make parol representations or promises, but also preclude the reasonableness of any reliance thereon.<sup>20</sup> Doubtless the corporation cannot limit its own power to make oral substituted contracts or waivers, and the fact that it states in a policy that the powers of its agents are limited to what is stated in writing will not prevent it from giving them larger powers during the life of the

<sup>19</sup> See *supra*, § 595.

<sup>20</sup> In *Gladding v. California, etc., Fire Ins. Assoc.*, 66 Cal. 6, 8, 4 Pac. 764, the court thus expressed the matter: "The mode is the measure of the power. If so, no officer of the company was authorized to consent to an increase of the risk in any other than the prescribed mode." To the same effect are: *Northern Assurance Co. v. Grand View Building Assoc.*, 183 U. S. 308, 46 L. Ed. 213, 22 S. Ct. 133; *Enos v. Sun Ins. Co.*, 67 Cal. 621, 8 Pac. 379; *Kyte v. Commercial Assur. Co.*, 144 Mass. 43, 10 N. E. 518; *Atwood v. Caledonian Am. Ins. Co.*, 206 Mass. 96, 92 N. E. 32; *Woodside Brewing Co. v. Pacific Fire Ins. Co.*, 11 N. Y. App. Div. 68, 42 N. Y. Supp. 620, *affd.* 159 N. Y. 549, 54 N. E. 1095. And see cases *infra*, n. 39.

In *Baumgartel v. Providence, etc., Insurance Co.* decided by the Court of Appeals of New York, 136 N. Y. 547, 32 N. E. 990, the owner of the insured property, about a week after the issuance of the second policy, told the agent, who issued the previous policy and the one sued upon, that he had taken out some additional insurance,

when the agent said: "All right, I will attend to it." Nothing further was said. The policy was never delivered to the agent, and he never indorsed thereon the company's consent to the issuance of the additional policy. The policy was a standard form containing provisions requiring written indorsement of permission for other insurance. The insured property was destroyed by fire, and the insurer defended on the ground that additional insurance had been taken out without having the written consent of the insurer indorsed upon the first policy. The plaintiff contended that, because of the defendant's knowledge of the concurrent insurance and the promise of its agent "to attend to it" (which was understood to mean that he would indorse the company's consent on the policy), the clause prohibiting additional insurance was waived. The court held that the condition could not be waived except in the manner provided therefor in the policy, and that the policy had been forfeited. To the same effect is *Hrouish v. Home Ins. Co.*, 33 S. Dak. 428, 146 N. W. 588.

policy.<sup>21</sup> But such a change cannot be assumed without proof, and if by authority of the directors of the company the powers of all its officers or agents are limited, one of them, even the president, cannot enlarge the powers of any of them. If the insurer chooses to require a vote of the directors for the validity of even a trivial act and brings notice of the requirement to the other interested party, there can be no legal objection to the requirement. Clear as this seems on principle, the hardship that arises when the insured in good faith trusts to parol representations or promises of an agent authorized to write insurance, has led many courts to hold that a parol waiver based on estoppel may be worked against the company by such an agent in spite of any limitations of authority in the policy.<sup>22</sup>

**§ 760. Express limitation on powers of agents to waive conditions.**

A prohibition more precise (though it seems of identical meaning) attempted by insurance companies to the effect that no officer or agent of the company should have power to modify or to waive terms of the policy without written indorsement has also been held ineffectual by some courts;<sup>23</sup> but the con-

<sup>21</sup> *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689.

<sup>22</sup> *People's National F. Ins. Co. v. Jackson*, 155 Ky. 150, 159 S. W. 688; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Dahrooge v. Sovereign F. Ins. Co.*, 175 Mich. 248, 141 N. W. 572; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297; *Goldwater v. Liverpool, etc., Ins. Co.*, 39 Hun, 176, *affd.* in 109 N. Y. 618, 15 N. E. 895; *St. Paul, etc., Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 46 N. W. 481, 27 Am. St. Rep. 402 (but see *Hartford Fire Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 779); *Springfield Fire &c. Ins. Co. v. Halsey*, 52 Okl. 469, 153 Pac. 145.

<sup>23</sup> *Southern States F. Ins. Co. v. Vann*, 69 Fla. 549, 68 So. 647, L. R. A.

1916 B. 1189; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772; *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, 27 Ky. L. Rep. 105, 84 S. W. 551; *Rediker v. Queen Ins. Co.*, 107 Mich. 224, 65 N. W. 105; *Wilson v. Commercial Union Assur. Co.*, 51 S. Car. 540, 29 S. E. 245, 64 Am. St. Rep. 700; *Cave v. Home Ins. Co.*, 57 S. Car. 347, 35 S. E. 577; *Wagner v. Westchester Fire Ins. Co.*, 92 Tex. 549, 50 S. W. 569; *Carey v. German-American Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. Rep. 907. (But see *Straker v. Phoenix Ins. Co.*, 101 Wis. 403, 77 N. W. 752). See also *Crumley v. Sovereign Camp*, 102 S. Car. 386, 86 S. E. 954, and an article by S. B. Warner in 6 Calif. L. Rev. 203, on the effect of a provision in an insurance policy

trary and sounder view is supported by good authority.<sup>24</sup> Finally, a still more explicit provision has been attempted which confines the authority to modify or waive conditions to certain specified officers who, it is provided, are authorized to make such modifications or waivers in writing on the policy. Even with such a provision parol waivers have been upheld;<sup>25</sup> though other courts enforce the terms of the policy.<sup>26</sup>

limiting the authority of an agent to alter the contract.

<sup>24</sup> See cases cited *infra*, n. 43, also *Meigs v. London Assur. Co.*, 134 Fed. 1021, 68 C. C. A. 249; *Mulrooney v. Royal Ins. Co.*, 157 Fed. 598; *Maryland Casualty Co. v. Eddy*, 239 Fed. 477, 152 C. C. A. 355; *Cohen v. Home Ins. Co. (Del.)*, 97 Atl. 1014; *Lippman v. Aetna Ins. Co.*, 108 Ga. 391, 33 S. E. 897, 75 Am. St. Rep. 62; *Bailey v. First Nat. F. Ins. Co.*, 18 Ga. App. 213, 89 S. E. 80; *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775, 27 So. 143; *Urbaniak v. Firemen's Ins. Co.*, 227 Mass. 132, 116 N. E. 413; *Hunt v. State Ins. Co.*, 66 Neb. 121, 92 N. W. 921; *Union Central Life Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. 906; *Morgan v. American Central Ins. Co.*, 80 W. Va. 1, 92 S. E. 84, L. R. A. 1917 D. 1049. See also *Cauman v. American Credit Indemnity Co.*, 229 Mass. 278, 118 N. E. 259. In New York a distinction is made between a policy which contains merely general terms forbidding modifications or waiver without writing, and a policy which provides that no officer or agent shall have power to modify or waive by parol. If a policy contains the latter provision, a parol waiver is ineffectual. *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5. The New York court also takes the distinction between "conditions which relate to the inception of the contract, where the agent delivered it and received the premium with a knowledge of the true situation," and conditions broken subsequently.

In the former case the provision in

the policy denying power to the agent to modify or waive, is held ineffectual. *Gibson Electric Co. v. Liverpool, etc., Ins. Co.*, 159 N. Y. 418, 428, 54 N. E. 23. See also *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101. But see the criticism on this view in—*Northern Assurance Co. v. Grand View Building Assoc.*, 183 U. S. 308, 340, 46 L. Ed. 213, 22 S. Ct. 133.

<sup>25</sup> *Industrial Mut. Indemnity Co. v. Thompson*, 83 Ark. 574, 104 S. W. 200, 10 L. R. A. (N. S.) 1064; *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314; *Union Central Life Ins. Co. v. Whetsel*, 29 Ind. App. 658, 65 N. E. 15; *King v. Council Bluffs Ins. Co.*, 72 Ia. 310, 33 N. W. 690; *Lutz v. Anchor Fire Ins. Co.*, 120 Ia. 136, 94 N. W. 274, 98 Am. St. Rep. 349; *James v. Mutual Reserve Fund Life Assoc.*, 148 Mo. 1, 49 S. W. 978; *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521; *Aetna Life Ins. Co. v. Fallow*, 110 Tenn. 720, 77 S. W. 937; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

<sup>26</sup> *Porter v. United States Life Ins. Co.*, 160 Mass. 183, 35 N. E. 678; *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 80 Pac. 609, 108 Am. St. Rep. 578; *Wheeler v. United States Casualty Co.*, 71 N. J. L. 396, 59 Atl. 347; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28, 31 N. E. 265; *Union Central Life Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. 906; *Metropolitan Life Ins. Co. v. Hall*, 104 Va. 572, 52 S. E. 345;

A distinction seems possible in this respect between a waiver based on estoppel or on a promise, on the one hand, and election on the other. While an agent's powers to promise or to represent may be limited, an insurance company having knowledge of a breach cannot retain a benefit to which it is only entitled on the theory that a policy continues in force, and also deny the validity of the policy. And if the company by its agents or officers authorized to receive and retain the benefit does so retain benefits which it is entitled to retain only on the assumption that the policy continues, the legal consequences of election will follow although the policy may state in express terms that they shall not.<sup>27</sup> A statute also may give one who solicits insurance or receives premiums the powers of an agent.<sup>28</sup> Likewise if an agent is authorized to make an oral contract for insurance, an oral contract on new consideration in substitu-

*Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *Stevens v. Queen Ins. Co.*, 81 Wis. 335, 51 N. W. 555, 29 Am. St. Rep. 905, and see cases *supra*, n. 41.

<sup>27</sup> *Beatty v. Mutual Reserve Fund L. Assoc.*, 75 Fed. 65, 21 C. C. A. 227; *Crumley v. Sovereign Camp*, 102 S. Car. 386, 86 S. E. 954. Thus where an insurance company receives insurance premiums, having knowledge of a breach, and retains them, the retention will amount to an election to choose the benefit of the premiums rather than the avoidance of the policy, in spite of clauses requiring waivers to be in writing. *Bennett v. Union Central Life Ins. Co.*, 203 Ill. 439, 67 N. E. 971; *Union Central Life Ins. Co. v. Whetzel*, 29 Ind. App. 658, 65 N. E. 15; *Northam v. International Ins. Co.*, 45 N. Y. App. D. 177, 61 N. Y. S. 45, *affd.* 165 N. Y. 666, 59 N. E. 1127. The same principle was applied in *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88, 45 N. E. 381, 56 Am. St. Rep. 600, where a general agent with authority to indorse a waiver promised but failed to go to a mortgagee of the insured property who held the policy,

and make the required indorsement. See also *Kotwicki v. Thuringia Ins. Co.*, 134 Mich. 82, 95 N. W. 976. *Cf.* *Northam v. Dutchess Co. Mut. Ins. Co.*, 166 N. Y. 319, 59 N. E. 912, 82 Am. St. Rep. 655. Where the agent, in reply to a statement of the insured that the insured property had been assigned, and that the policy was locked up in a safe which he could not open, said, "I will see that the insurance is all right." In this case and in *Baumgartel v. Providence, etc., Ins. Co.*, 136 N. Y. 547, 32 N. E. 990, where the agent said, "All right, I will attend to it," the court held that there was no estoppel. There was "at best but a promise to make the proper indorsement when the policy should be presented to the agent." A still more difficult case to distinguish from *Manchester v. Guardian Ins. Co.*, *supra*, is *Perry v. Caledonian Ins. Co.*, 103 N. Y. App. Div. 113, 93 N. Y. S. 50.

<sup>28</sup> A Florida statute to this effect was sustained in *American F. Ins. Co. v. King Lumber & Mfg. Co.*, (U. S. Oct. Term, 1918), 39 S. Ct. Rep. 431.

tion for a previous written policy may well be held valid; the prohibition in the policy against any but written modifications being construed as aimed only at changes in the policy without additional premium.<sup>29</sup>

**§ 761. Whether an ineffectual attempt to collect a premium deprives the insurer of a known defence.**

An ineffectual attempt without suit to collect a premium after the policy by its terms has become invalidated by non-payment has been held to preclude the insurer from thereafter, for that reason, refusing to fulfil its contract.<sup>30</sup> These decisions find support in a dictum by Parke, B., in regard to the analogous case of a landlord electing to continue a tenancy rather than dispossess a tenant for breach of condition. He said—"I think that an absolute unqualified demand of the rent [accruing subsequent to breach of condition] by a person having sufficient authority, would have amounted to a waiver of the forfeiture."<sup>31</sup> This dictum, however, seems never to have been followed.<sup>32</sup> Such a result seems undesirable. The facts doubtless show that the insurer or landlord is willing to accept payment at the time when demand is made and, on condition that payment is then made, to disregard the delay up to that time; but they do not show a willingness to keep the contract in force even though the payment is not made. The decisions are inconsistent with the cases of election referred to in the preceding section, and are opposed by other authorities holding that merely demanding a premium is not a conclusive election to continue a policy of insurance in force.<sup>33</sup> Moreover, a de-

<sup>29</sup> *Mackintosh v. Agricultural F. Ins. Co.*, 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234.

<sup>30</sup> *Gallier v. State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833, 124 Am. St. Rep. 83; *Union Central Life Ins. Co. v. Burnett*, 136 Ill. App. 187; *Union Central Life Ins. Co. v. Spinks*, 119 Ky. 261, 83 S. W. 615, 69 L. R. A. 264; *Walls v. Home Ins. Co.*, 114 Ky. 611, 71 S. W. 650, 102 Am. St. Rep. 298; *New England Mutual Life Ins. Co. v. Springgate*, 129 Ky. 627, 112 S. W. 681, 113 S. W. 824; *Olmsted v.*

*Farmers' Mutual Fire Ins. Co.*, 50 Mich. 200, 15 N. W. 82; *Robinson v. Pacific F. Ins. Co.*, 18 Hun, 395.

<sup>31</sup> *Doe v. Birch*, 1 M. & W. 406, 408.

<sup>32</sup> It was quoted in *Dendy v. Nicholl*, 4 C. B. (N. S.) 376, 735, with the remark (at page 386) "that dictum goes beyond what is necessary in the present case." In *Dendy v. Nicholl*, it was held that bringing an action for rent accruing subsequent to the forfeiture was a conclusive election to continue the tenancy.

<sup>33</sup> *Ware v. Millville, etc., Ins. Co.*, 45



mand of a premium can certainly not amount to an election or surrender of any defence, where the premium has already been earned because the risk attached, and the insurer is entitled to the premium even though the policy is no longer continued in force. Where, however, the insurer is entitled to the premium only on the assumption of the continuance of the insurance, obtaining a judgment for a premium is a conclusive election.<sup>34</sup> But demanding payment in justifiable ignorance of material facts will not ordinarily be a binding election;<sup>35</sup> and certainly a demand for payment cannot be, when made upon a condition which the insured never fulfils.<sup>36</sup>

Even the actual receipt of a premium if accepted conditionally and returned when the condition is not fulfilled is an election to continue insurance in force.<sup>37</sup>

N. J. L. 177; *Cohen v. Continental Fire Ins. Co.*, 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; *Cowen v. Equitable Life Ins. Co.*, 37 Tex. Civ. App. 430, 84 S. W. 404. See also *Linn v. New York Life Ins. Co.*, 78 Mo. App. 192. Placing a premium note in the hands of an attorney for collection was held inconclusive in *Iles v. Mutual Reserve Life Ins. Co.*, 50 Wash. 49, 96 Pac. 522, 18 L. R. A. (N. S.) 902, 126 Am. St. Rep. 886.

<sup>34</sup> *National Life Ins. Co. v. Reppond* (Tex. Civ. App.), 81 S. W. 1012.

<sup>35</sup> *Potter v. Continental Ins. Co.*, 107 Ky. 326, 53 S. W. 669. (Loss had already occurred.)

<sup>36</sup> *Fidelity Mutual Life Ins. Co. v. Price*, 117 Ky. 25, 77 S. W. 384. (The presentation of a health certificate.)

<sup>37</sup> *Clifton v. Mutual Life Ins. Co.*, 168 N. C. 499, 84 S. E. 817, 818. The court said:—"The defendant had a right to receive the premium and hold it, awaiting the return of the health certificate. That not being forthcoming, the defendant properly returned the premium after the death of the insured. Receiving the premium under such circumstances is no evi-

dence of a waiver. *Melvin v. Piedmont Ins. Co.*, 150 N. C. 398, 64 S. E. 180, 134 Am. St. Rep. 943; *Sexton v. Insurance Co.*, 157 N. C. 142, 72 S. E. 863; *Wilkie v. National Council*, 151 N. C. 527, 66 S. E. 579; *Page v. Junior Order*, 153 N. C. 404, 69 S. E. 414. . .

"The doctrine laid down in the textbooks and by the decisions of other states is in line with the decisions of this state, as are also the decisions of the Supreme Court of the United States. *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662; *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789."

But in *Francis v. Ancient Order United Workmen*, 150 Mo. App. 347, 357, 130 S. W. 500, the court said:—"It appears in proof defendant received the November remittance from the insured amounting to \$15.44 on or prior to December 20th, for it wrote him of that date that it would hold the money in abeyance until he had furnished the health certificate required. There can be no doubt that the insurance was forfeited on the first day of December by virtue of the contract and it may be defendant



§ 762. Temporary breach of warranty or condition.

Where a warranty or condition applies to a continuing state of things, as occupancy of premises insured against fire, or the residence of one whose life is insured within certain countries or latitudes, the question may arise whether breach of the condition avoids liability only if loss is caused while the condition is being broken, or because of its breach, or whether the contract is entire and any breach is fatal to any claim upon it, whenever or however arising. The question should properly be regarded as depending on the expressed intention of the parties. Obvious as this is, the cases often assume that there is some principle of insurance law which necessarily involves one or the other result. But it is perfectly possible to make a contract in either form. If, however, the policy states that breach of the condition renders the policy void, the words if given their natural meaning must apply to the whole promise of the insured. Though this construction has been accepted by many courts,<sup>38</sup> others in order to avoid hardship to the insured have construed the contract as merely suspended while

should not be declared to have waived the forfeiture by the mere holding of this money a few days or a reasonable length of time for the health certificate to be furnished, but it appears that the health certificate was not finally furnished until the 6th or 8th of February thereafter. It seems that this of itself would indicate a purpose on the part of defendant not to enforce the provisions of the contract with respect to forfeiture. At any rate, under the established rule of decision in this state, defendant should have returned the assessment promptly or within a reasonable time at least or it will be treated as having waived the forfeiture. In *Andrus v. Insurance Co.*, 168 Mo. 151, 165, 166, 67 S. W. 582, a case presenting one feature much resembling this one, our Supreme Court has said substantially, the insurer may not thus retain the assessment and thereafter insist on the forfeiture even

though it communicated the fact to the insured that it held such payment on condition that a health certificate would be furnished."

<sup>38</sup> *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Germania Fire Insurance Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868; *Howell v. Equitable Soc.*, 16 Md. 377; *Turnbull v. Insurance Co.*, 83 Md. 312, 34 Atl. 875; *Lyman v. Insurance Co.*, 14 Allen, 329; *Kyte v. Assurance Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508; *First Congregational Church v. Holyoke Fire Ins. Co.*, 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508; *Mead v. Northwestern Insurance Co.*, 7 N. Y. 530; *Newport Imp. Co. v. Home Insurance Co.*, 163 N. Y. 237, 57 N. E. 475; *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608; *Bemis v. Harborcreek Ins. Co.*, 200 Pa. 340, 49 Atl. 769.

the breach of condition continues if the loss was not due in any degree to breach of the condition.<sup>39</sup>

Such a construction prevents the condition from working a penalty or forfeiture, but it must be confessed with some straining of the meaning of the English language. In a recent decision the Supreme Court of Maine<sup>40</sup> thus summarized the matter:

"An examination of the authorities reveals the fact that in some states the courts have held that the breach of these conditions does not render the policy void but merely suspends its operation, and when the breach ceases, the policy again attaches. They make it a case of suspended animation rather than of death. But it would seem that in order to do this they ignore the plain words of the contract and seek to reach a conclusion which under the circumstances might seem fairer to the assured, working out what they conceive to be 'substantial justice.'

"The reasons given for these decisions do not commend themselves to our judgment. In some cases the later decisions are based upon earlier ones arising under a different form of policy where the temporary suspension was expressly provided for, but the distinction is not noted, or, if noted, the earlier is followed, notwithstanding the changed contract."<sup>41</sup>

<sup>39</sup> *Putnam v. Insurance Co.*, 4 Fed. 753; *Schloss v. Westchester Fire Ins. Co.*, 141 Ala. 566, 37 So. 701, 109 Am. St. Rep. 58; *Athens Insurance Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013; *Traders' Insurance Co. v. Catling*, 163 Ill. 256, 45 N. E. 255; *Born v. Insurance Co.*, 110 Ia. 379, 81 N. W. 676, 80 Am. St. Rep. 300, 120 Ia. 299, 94 N. W. 849; *Phoenix Insurance Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Germania Fire Ins. Co. v. Turley*, 167 Ky. 57, 179 S. W. 1059; *Jower v. Insurance Co.*, 19 La. 28, 36 Am. Dec. 665; *Lane v. Insurance Co.*, 12 Me. 44, 28 Am. Dec. 150; *Worthington v. Bearse*, 12 Allen, 382, 90 Am. Dec. 152; *Hinckley v. Insurance Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; *Insurance Co. v. Pitts*, 88 Miss. 587, 41 So. 5, 117 Am. St. Rep. 756, 7

L. R. A. (N. S.) 627; *State Insurance Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696; *Johansen v. Insurance Co.*, 54 Neb. 548, 74 N. W. 866; *Garrison v. Insurance Co.*, 56 N. J. L. 235, 28 Atl. 8; *Tompkins v. Insurance Co.*, 22 N. Y. App. Div. 380, 49 N. Y. S. 184; *Cottingham v. Maryland Motor Car Ins. Co.*, 168 N. C. 259, 84 S. E. 274, L. R. A. 1915 D. 344; *Mutual Fire Insurance Co. v. Coatesville*, 80 Pa. 407; *Warehouse Co. v. Insurance Co.*, 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941; *Silver v. Assurance Corp.*, 61 Wash. 593, 112 Pac. 666.

<sup>40</sup> *Dolliver v. Granite State Fire Ins. Co.*, 111 Me. 275, 89 Atl. 8, 50 L. R. A. (N. S.) 1106.

<sup>41</sup> The court continues: "For in-

§ 763. Waiver after loss.

If an insurer after a loss has taken place, for which the insurer is not liable, should promise to pay the loss, there is no consideration for the promise. If the reason why the insurer is not

stance, three early cases are often cited as authority for the doctrine of revivification, viz.: *Lounsbury v. Insurance Co.*, 8 Conn. 459, 21 Am. Dec. 686; *Phoenix Insurance Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521, and *United States F. & M. Insurance Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325, but in each of them the policy provided, not that it should be void in case the property were used contrary to the conditions specified, but that 'so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no effect.' It is obvious that under that plain language the policy was suspended by its own terms, but when that language was abandoned and it was provided that the policy should be 'void,' it is difficult to see how these early decisions form any precedent in favor of the doctrine of suspension. In fact they are authorities against it. Yet these decisions among others are cited as authorities in *Athens Mutual Insurance Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013, one of the more recent cases that adopt the theory of suspension and revivification.

"Along the same line are the decisions in Illinois. The earliest case on this subject in that state, and the one often cited by that court as the leading case, is *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221.

"But the policy in that case provided, as in the other early cases before referred to, that if the premises should be appropriated to any prohibited use then 'so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect.' . . .

"But following this the Illinois court has extended the doctrine even to cases where the policy contains the word 'void,' as in *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489, and *Traders' Insurance Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595.

"In *Germania Fire Ins. Co. v. Klewer*, *supra*, the court went so far as to hold that while the policy provided that it should be void in case of other insurance existing at the time the policy was taken out, the legal effect was, not to avoid the second policy, the one in suit, but to suspend it until the expiration of the prior policy and then it would come into full force.

"Our court has squarely rejected such a doctrine in a case arising under the same clause, and presenting the same point. *Bigelow v. Insurance Co.*, 94 Me. 39, 46 Atl. 808. The opinion concludes: 'By the express terms of the policy in suit, the defendant company is absolved from all liability thereunder.' To the same effect are *Jersey City Insurance Co. v. Nichol*, 35 N. J. Eq. 291, 40 Am. Rep. 625; *Georgia Home Ins. Company v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96, and *Carleton v. Insurance Co.*, 109 Me. 79, 82 Atl. 649. . . .

"In *Athens Mutual Ins. Co. v. Toney*, *supra*, after citing the early decisions before referred to and others including decisions from Illinois, the court say: 'We place our decision squarely on the proposition that the violation of the condition as to vacancy in this case in no wise contributed to the loss. The increased hazard existed. while the house was vacant, but when the house was reoccupied the danger

liable is because of breach of some condition prior to the loss, which has not increased the risk, or at least has not contributed to the loss, it may be argued that the excuse is purely technical and that the new promise should have the same efficacy as a promise to pay a debt barred by the Statute of Limitations, or by discharge in bankruptcy. These supposed analogies are, however, exceptional cases. They do not represent the general rule, and the exception has, in the main, been confined to cases where at one time there was an enforceable debt. Moreover, there is rarely a true promise made to pay such a loss. Courts which define a waiver as an intentional surrender of a known right will certainly have difficulty in finding an intention on the part of an insurance company to subject itself to an obligation to pay a loss for which it is not liable, without receiving any return. Even if such a promise were made, it would seem beyond the powers of an officer of a corporation and even beyond that of the directors to agree to give away corporate property in this way. In jurisdictions where the insurer is required to surrender the portion of the premium relating to so much of the term as was subsequent to the breach of condition in order to avoid future liability on the policy,<sup>42</sup> the doctrine is not generally applied where the insurer first learns of the breach after a loss has occurred.<sup>43</sup> But even here it has been suggested that "the company might prefer to keep the premium, waive the condition, and pay the loss,"<sup>44</sup> certainly not a very probable hypothesis.

from vacancy terminated, and the policy again attached and became of binding effect, and the company was liable for the loss.' The same reason is given in *Born v. Insurance Co.*, 110 Iowa, 379, 81 N. W. 876, 80 Am. St. Rep. 300, when construing the clause against incumbrance, and in *Insurance Company v. Pitts*, 88 Miss. 587, 117 Am. St. Rep. 756, 41 So. 5, 7 L. R. A. (N. S.) 627, when construing the clause as to vacancy.

"Here again our court has taken the directly opposite view and has rejected the doctrine that the effect of vacancy, under the present form of policy depends upon the increase of risk."

<sup>42</sup> See *supra*, § 757.

<sup>43</sup> *Goorberg v. Western Assurance Co.*, 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N. S.) 876; *Ætna Ins. Co. v. Mount*, 90 Miss. 642, 44 So. 162, 15 L. R. A. (N. S.) 471.

<sup>44</sup> *Scott v. Liverpool, etc., Ins. Co.*, 102 S. Car. 115, 86 S. E. 484, 488. The fundamental error in this decision is in holding that the duty was on the company to return the premium to escape liability, rather than on the insured to demand a return. The error was the more glaring because the policy in terms provided that "the unearned portion [of the premium] shall be returned on surrender of this policy."

The insurer's excuse, however, may be nothing which happened before loss, but a failure on the part of the insured to comply with some condition concerning proof of loss. A condition of this latter sort may no doubt be waived by conduct leading the insured to fail to perform the condition which otherwise he might, and presumably would have done.<sup>46</sup> But where the insured has already failed to comply with the conditions of the policy regarding proof, and the time has elapsed within which compliance is possible, a new promise by the insurer falls within the same principle as a promise to pay a loss for which the insurer is not liable because of a breach of condition before loss. Though such a promise unsupported by consideration or promissory estoppel would be enforced by few courts, many decisions show a disposition to seize upon slight circumstances of estoppel as a basis for enforcing the promise.

§ 764. Requesting proof of loss or appraisal.

The effect of accepting defective proofs of loss when no condition of the policy had been broken previously has been considered in an earlier section;<sup>46</sup> but even when the insured has forfeited his rights before loss, if the insurer thereafter demands proofs of loss or an examination, it has been held that he is precluded thereby from setting up any ground of forfeiture known to him when he made the demand.<sup>47</sup> Such de-

<sup>46</sup> *Hansell-Elcock Co. v. Frankfort &c. Ins. Co.*, 177 Ill. App. 500; *Farmers' Handy Wagon v. Casualty Co. of America* (Ia.), 167 N. W. 204; *Lusk v. American Central Ins. Co.*, 80 W. Va. 39, 91 S. E. 1078; and see *infra*, § 767.

<sup>47</sup> § 744.

<sup>48</sup> *Planters' Insurance Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136; *Silverberg v. Phenix Ins. Co.*, 67 Cal. 36, 7 Pac. 38 (see also *Frank v. New Amsterdam Casualty Co.*, 175 Cal. 293, 165 Pac. 927); *Smith v. St. Paul &c. Ins. Co.*, 3 Dak. 80, 13 N. W. 355; *Queen Insurance Co. v. Patterson Drug Co.*, 73 Fla. 665, 74 So. 807, L. R. A. 1917, D. 1091; Ger-

man Fire Ins. Co. v. Grunert, 112 Ill. 68; *Replogle v. American Ins. Co.*, 132 Ind. 360, 31 N. E. 947; *Corson v. Anchor Mut. F. Ins. Co.*, 113 Iowa, 641, 85 N. W. 806; *Petroff v. Equity F. Ins. Co.* (Ia.), 167 N. W. 660; *Peabody v. Fraternal Accident Assoc.*, 89 Me. 96, 35 Atl. 1020; *Maxwell v. Dirigo Mut. F. Ins. Co.* (Me., 1918), 104 Atl. 812; *Walter v. Mutual City &c. Ins. Co.*, 120 Mich. 35, 78 N. W. 1011; *Veenstra v. Farmers' Mut. F. Ins. Co.*, 195 Mich. 55, 161 N. W. 824 (cf. *Wilms v. New Hampshire F. Ins. Co.*, 194 Mich. 656, 161 N. W. 940); *Crenshaw v. Pacific &c. Ins. Co.*, 71 Mo. App. 42; *Home Ins. Co. v. Phelps*, 51 Neb. 623, 71 N. W. 303; *Titus v.*

cisions lose sight of the fact that this is not a case of election where a party cannot take inconsistent attitudes, but a case of subjecting the insured gratuitously to a new liability with no compensating advantage. There is no rule, recognized as of general application in the law of contracts which would prohibit a man from saying first—"I think that I will make you a present by paying you that insurance for which I am not bound;" and afterwards saying—"I have concluded that I will not make the payment."<sup>48</sup> Further, the act of demanding proofs does not involve, as matter of fact, any promise to pay the loss, even if such a promise were enforceable. It is perfectly reasonable for an insurance company to demand proofs and yet reserve for later consideration the question whether it will pay the policy. In many of the decisions where the insurer was held liable, some circumstances involving trouble or expense to the insured besides the original demand of proof of loss was relied upon, such as demanding further proofs, or making an examination, or demanding an appraisal. That such trivial circumstances can justify enforcement of the policy cannot be admitted. The case is not similar to cases of excusing the promisee from a condition, or from an obligation, the time for performing which had not then arrived.<sup>49</sup> Some

Glens Falls Ins. Co., 81 N. Y. 410; McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Walker v. Phoenix Ins. Co., 156 N. Y. 628, 632, 51 N. E. 392; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; Beauchamp v. Retail Merchants' &c. F. Ins. Co., 38 N. Dak. 483, 165 N. W. 545; Phoenix Assurance Co. v. Munger &c. Mfg. Co. (Tex. Civ. App.), 49 S. W. 271; Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366; Cannon v. Home Ins. Co., 53 Wis. 585, 11 N. W. 11; Oshkosh Gaslight Co. v. Germania F. Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233. See also Southern States F. Ins. Co. v. Kronenberg (Ala.), 74 So. 63.

<sup>48</sup> C. F. Adams Co. v. Helman, 58 Ind. App. 394, 400, 106 N. E. 733.

<sup>49</sup> The following quotations illustrate the attitude of perhaps the majority of American courts (from Cox v. The American Insurance Co., 184 Ill. App. 419, 424):—

"The collection of the note of itself will not constitute a waiver of the forfeiture, for the reason that the policy provides that the collection of the note by legal process, or otherwise, shall in no case create any liability against the company for loss occurring while the assured was in default (Schimp v. Cedar Rapids Insurance Co., 124 Ill. 354); but the sending an adjuster to negotiate with the assured, and the adjuster going and discussing the loss with defendant in error, and placing valuations on the various items of the list of personal property prepared by defendant in error, when a managing

courts attempt a distinction between requesting preliminary proofs of loss on the one hand, and asking for additional or amended proofs, or subjecting the insured to questioning or examination in accordance with the policy on the other. The difference is one of degree, but even in the most extreme form no conclusion seems warranted except that the insurer wishes to ascertain all the facts before making a decision.<sup>50</sup> It is the

officer had full knowledge of the cause of forfeiture several days before any of such acts on the part of the company, were inconsistent with, and were a waiver of the forfeiture."

(From *Hollis v. The State Insurance Company*, 65 Iowa, 454, 459, 21 N. W. 774):

"When plaintiff asserted a claim under the policy for the loss, and defendant was informed of the facts out of which the forfeiture grew, it had the right at once to treat the contract as at an end. If it had elected simply to remain silent, perhaps a waiver could not have been inferred from its silence. But if, with knowledge of the circumstances, it continued to treat the contract as of binding force, and induced plaintiff to act in that belief [by making proofs of loss] the rule holding that it thereby waived the forfeiture is a very just one. . . . See *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67, 17 Am. Rep. 479; *Northwestern Mut. Life Ins. Co. v. Germania Ins. Co.*, 40 Wis. 446; *Cannon v. Home Ins. Co.*, 53 Wis. 585, 11 N. W. 11." *Boyle v. Hamburg Ins. Co.*, 169 Pa. 349, 32 Atl. 553; *Wainer v. Milford Ins. Co.*, 153 Mass. 335, 11 L. R. A. 598, and note; *Farnum v. Phoenix Ins. Co.*, 12 Mont. 458, 33 Am. St. Rep. 591, and note, 599.

<sup>50</sup> In *Boyd v. Insurance Co.*, 90 Tenn. 212, 219, 16 S. W. 470, 25 Am. St. Rep. 676, the court said:

"It is inconceivable that there

should be authority for the position that if the insurer, after a loss, requires proof of loss, it thereby waives all right to set up as a defence that it is not liable by reason of the fact that it never had a valid contract at all." But the same court said in *Hickerson v. Insurance Companies*, 96 Tenn. 193, 199, 33 S. W. 1041, 32 L. R. A. 172:

"We are of opinion, therefore, that the insurer cannot demand an appraisal and arbitration of the amount of loss, while, at the same time, it denies all liability under its policy, and a demand for appraisal by the insurer is a waiver of other defences going to the question of Liability." Citing *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406. In *McCord v. Masonic Casualty Co.*, 201 Mass. 473, 476, 88 N. E. 6, the court said:—

"It is not like the case of a defect of form in a notice where the time for giving notice has not expired. See *Cook v. North British & Mercantile Ins. Co.*, 181 Mass. 101, 103, 104, 62 N. E. 1049. In the case at bar (as in *Cook v. North British & Mercantile Ins. Co.*) the objection to the notice was that it was not given within the prescribed time. That defect could not be cured by further action on the part of the plaintiff. But even in that class of cases there may be an action on the part of the company which amounts to a waiver. See for example *Moore v. Wildey Casualty Co.*, 176 Mass. 418, 57 N. E. 673. . . .

"The plaintiff relies on the case of *Peabody v. Fraternal Accident Associa-*



bald case of the creation of a new obligation on the part of the insurer because he has put the insured to a little trouble. There is no misrepresentation of fact; the insured knows the facts as well as the insurer. There is rarely anything from which a promise by the insurer can be implied, which might have been relied upon. Even if there were a promise, it does not generally give rise to a cause of action when in reliance on a gratuitous promise clearly made the promisee incurs some detriment;<sup>51</sup> and, as has been said, in the case supposed, there is no real evidence of a promise. To recreate a defunct obligation there should at least be a promise clearly implied in fact. To revive a debt barred by the Statute of Limitations, this is held necessary;<sup>52</sup> and there only the remedy is barred, whereas here there has never arisen any liability.<sup>53</sup> Questions identical in principle arise in regard to provisions in telegraph blanks,<sup>54</sup> and

tion, 89 Me. 96, 35 Atl. 1020. The policy there in question was like the certificate now before us. But the acts which were held to constitute a waiver were quite different. There the company not only sent a blank for a preliminary proof, containing a clause similar to that in the case at bar, but in addition sent a blank for a final proof which contained no such clause; and made through its agents a bodily examination of the plaintiff. The facts of that case are like *Moore v. Wildey Casualty Co.*, 176 Mass. 418, and the decision was in terms ultimately made on that ground. There is a statement in the opinion in that case that sending the blank for the preliminary proof with the special clause 'was strong evidence of waiver.' But we are of opinion that it is not evidence which warranted a finding of waiver. We have examined all the cases cited by the plaintiff. The cases of *Hohn v. Interstate Casualty Co.*, 115 Mich. 79, 72 N. W. 1105; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Burlington Insurance Co. v. Lowery*, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196, and *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389, 5

N. W. 845, come within the same class as *Moore v. Wildey Casualty Co.* and *Peabody v. Fraternal Accident Association*. The other cases relied upon by him do not need special notice, except the case of *Meech v. National Accident Society*, 50 N. Y. App. Div. 144. That is the only decision which has come to our notice on the point now before us. It supports the conclusion at which we have arrived." See also *Wilms v. New Hampshire F. Ins. Co.*, 194 Mich. 656, 161 N. W. 940.

<sup>51</sup> See *supra*, § 139.

<sup>52</sup> See *supra*, §§ 160 *et seq.*

<sup>53</sup> See as tending to support the contentions of the text: *Banco De Sonora v. Bankers' Mut. Casualty Co. (Ia.)*, 95 N. W. 232; *Boruszweski v. Middlesex Mutual Ins. Co.*, 186 Mass. 589, 72 N. E. 250; *Briggs v. Firemen's Fund Insurance Co.*, 65 Mich. 52, 31 N. W. 616; *Johnson v. American Ins. Co.*, 41 Minn. 396, 43 N. W. 59; *Keet-Rountree, etc., Co. v. Mercantile, etc., Ins. Co.*, 100 Mo. App. 504, 74 S. W. 469; *Freedman v. Insurance Co.*, 175 Pa. 350, 34 Atl. 730.

<sup>54</sup> In *Western Union Telegraph Co.*



bills of lading,<sup>542</sup> requiring claims to be made within a fixed period, as a condition of their validity.

*v. Heathcoat*, 149 Ala. 623, 630, 43 So. 117, the court said of the effect of the defendant's conduct after the lapse of the contractual period:—"While the defendant was entitled to have the claim for damages presented in writing within 60 days after the message was delivered for transmission, we think there is no doubt that the right is a limitation for the benefit of the defendant, is of its own creation, and may be waived by it, and the waiver may rest in parol—27 Am. & Eng. Ency. Law (2d ed.), p. 1049; *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 1 Elliott on Ev., § 596. It may be that an oral promise of a general agent or a manager of a telegraph company to look into the claim is not a waiver of the condition requiring the claim to be in writing. This point, however, we do not decide. *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257; *Albers v. Western Union Tel. Co.*, 98 Iowa, 51, 66 N. W. 1040; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224. In the

case at bar we think the evidence offered by the plaintiff on the subject of a waiver goes further than a mere promise to look into the matter, and makes the question of waiver *vel non* one to be determined by the jury."

In *Wheelock v. Postal Telegraph Co.*, 197 Mass. 119, 125, 83 N. E. 313, the court said of the effect of the defendant's conduct prior to the lapse of the contractual period of limitation: "It is contended by the plaintiffs that this requirement was waived by the defendant. Questions like that which arise on this contention have often been considered in suits upon policies of insurance. There was a series of communications between the parties touching the subject, in all of which, from first to last, the defendant discussed the question of liability on its merits, and professed in the beginning to intend to deal with it, and finally to have dealt with it, in reference to rights created by other parts of the contract, apart from any question as to the formal presentation of a claim in writing. The defendant's conduct in

<sup>542</sup> In *Atlantic Coast Line R. Co. v. Bryan*, 109 Va. 523, 528, 65 S. E. 30, discussing the case of waiver after loss of a condition in a bill of lading, the court said:—"When the letter was written, the time had long passed within which the plaintiff should have made his claim in writing for the loss of the goods, and the defendant's exemption from liability had long since attached and become a vested right. Nothing, therefore, that was said in this letter could have operated as an inducement to the plaintiff to put himself in any disadvantageous position. His position had long before become fixed with all of its attendant disadvantages. The letter could not, there-

fore, estop the defendant from relying on its exemption as a defence.

There is nothing in this letter that can be construed as a contract to waive the exemption, nor does it imply an intention on the part of the defendant to waive such exemption. At most, it does not do more than imply a possible willingness to treat with the plaintiff after receiving and examining the papers asked for; but this does not operate in any way to place the consignor in any worse position than he then occupied. In no view can this letter be regarded as a waiver by the defendant of its right to the exemption stipulated for in the bill of lading."

### § 765. Non-waiver agreements.

The insurer is placed in a difficult position when he seeks to avoid waiving such defences as he may have. If he objects to the proofs of loss as insufficient, he is thereby held by many courts to waive other defences. If, on the other hand, he does not object to the proofs of loss as insufficient, he is said to waive any defects that there may be in them. Doubtless he may expressly object to liability on more than one ground. Whether he could reserve all rights by the broad statement after loss that he waived nothing, or reserved the right to take any objection which the facts might warrant, may possibly be doubted as matter of positive law, in some States at least;<sup>55</sup> though, on principle, it is hard to see why he may not assert that the in-

regard to it was such as naturally to throw the plaintiffs off their guard, and it appears that they did not read this stipulation nor consult counsel about their claim until after the sixty days had expired. We think they naturally might infer from the defendant's conduct that the claim was to be considered and determined upon its merits, and that there was no intention to set up a formal or technical defence, founded on the time or manner of presenting the claim. We are of opinion that there was evidence for the jury on the question whether the defendant waived its right to rely upon this defence. *Walker v. Lancashire Ins. Co.*, 188 Mass. 560, 75 N. E. 66; *Graves v. Washington Ins. Co.*, 12 Allen, 391; *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263, 265, 25 N. E. 290; *Brown v. Henry*, 172 Mass. 559, 567, 52 N. E. 1073; *Moore v. Wildey Casualty Co.*, 176 Mass. 418, 57 N. E. 673; *Hill v. Western Union Telegraph Co.*, 85 Ga. 425, 11 S. E. 874; *Hays v. Western Union Telegraph Co.*, 70 S. C. 16, 48 S. E. 606; *Western Union Telegraph Co. v. Stratemeier*, 6 Ind. App. 125, 130, 32 N. E. 871."

In regard to the same question the court said in *Stone v. Postal Telegraph Cable Co.*, 35 R. I. 498, 503, 87 Atl.

319, 46 L. R. A. (N. S.) 180: "In regard to the message of August 26th, 1909, the plaintiff bases his contention that the defendant had waived the provision that it would not be liable for damages if the claim was not presented within sixty days after the message was filed for transmission upon the following facts: On August 27th he made a verbal complaint to an employee at the Providence office of the defendant because the message of August 26th had not been delivered at his office, and on September 11th, 1909, he made another verbal complaint to the manager of the Providence office of the defendant, with regard to the same matter; also when the plaintiff presented to the defendant the written notice of his claim for damages for its failure to deliver the several telegrams in question at the plaintiff's office, the defendant made no objection to the claim of loss as to the telegram of August 26th on the ground that the plaintiff had failed to give the defendant written notice of his claim within sixty days. These facts fall far short of establishing a relinquishment by the defendant of its right to insist upon the provisions of said stipulation."

<sup>55</sup> See *Interstate &c. Accident Assoc. v. Greene*, 132 Ark. 546, 201 S. W. 799.

sured must at his peril comply with all conditions, and that he himself waives nothing, but insists on strict performance. A more certainly effective way to achieve the desired result is by a bilateral agreement of both parties instead of a unilateral declaration of the insurer.<sup>56</sup>

It is also often provided in the original policies of insurance that the requirements of the insurer in the way of proof, examination and appraisal, shall not constitute a waiver. There is no possible reason in the law of contracts why full effect should not be given to such a provision and generally this has been so held.<sup>57</sup>

The insurer may indeed as has been pointed out orally dispense with this requirement to the same extent that he may so dispense with any other requirement;<sup>58</sup> but when the parties have expressly agreed whether orally or in writing that certain acts otherwise ambiguous shall not be taken to have a certain meaning, that meaning should not be attributed to them. The result is the same where a separate non-waiver agreement is signed by the parties.<sup>59</sup> A few courts, however, have confused the situation here presented with the case of election. Where a party may choose one of two alternative benefits, he cannot take both even though he asserts that he intends to do so, and that his claim of one right shall not bar him from asserting the other.<sup>60</sup> But even in such a case if the other party

<sup>56</sup> *Urbanab v. Firemens' Ins. Co.*, 227 Mass. 132, 116 N. E. 413.

<sup>57</sup> *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900; *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *Boyd v. Insurance Co.*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676; *City Drug Store v. Scottish Union & Nat. Ins. Co. (Tex. Civ. App.)*, 44 S. W. 21; *Oshkosh Match Works v. Manchester Fire Ass. Co.*, 92 Wis. 510, 66 N. W. 525. See also *Queen Insurance Co. v. Young*, 86 Ala. 424, 5 So. 116, 11 Am. St. Rep. 51 (n.); *Holbrook v. Baloise Fire Ins. Co.*, 117 Cal. 561, 49 Pac. 555; *Briggs v. Fireman's Fund Ins. Co.*, 65 Mich. 52, 31 N. W. 616;

*Johnson v. American Ins. Co.*, 41 Minn. 396, 43 N. W. 59; *London & L. Ins. Co. v. Honey*, 2 Vict. L. 7.

<sup>58</sup> *Beauchamp v. Retail Merchants' &c. F. Ins. Co.*, 38 N. Dak. 483 165, N. W. 545, and see *infra*, § 1828.

<sup>59</sup> *Insurance Company of N. America v. Williams*, (Ala. 1917), 77 So. 159; *Fletcher v. Minneapolis &c. Ins. Co.*, 80 Minn. 152, 83 N. W. 29; *Urbanab v. Firemen's Ins. Co.*, 227 Mass. 132, 116 N. E. 413; *Keet-Rountree, etc., Co. v. Mercantile, etc., Co.*, 100 Mo. App. 504, 74 S. W. 469; *Hayes v. United States F. Ins. Co.*, 132 N. C. 702, 44 S. E. 404.

<sup>60</sup> See *supra*, § 684.

to the contract expressly agreed that the assertion of one right should not exclude the other, this agreement should be enforced. Still more obviously this is true where, as in the case under discussion the only choice presented to the insurer is whether he will pay the loss without receiving any compensating advantage, or whether he will refuse to pay.<sup>61</sup>

**§ 766. Whether a breach of condition avoids an entire policy insuring several articles.**

In a recent California decision,<sup>62</sup> Sloss, J., speaking for the court, thus stated the law:—"The courts of a number of states have laid down the rule accepted by the trial court in the case at bar,—namely, that where the property insured consists of different items which are separately valued or insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one item will not affect the insurance on the remainder of the property, even though the premium be entire."<sup>63</sup> On the other hand, there are many cases

<sup>61</sup> A non-waiver agreement was disregarded in *Phoenix Assurance Co. v. Munger, etc., Mfg. Co.* (Tex. Civ. App.), 49 S. W. 271. See also *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 So. 923; *Queen Ins. Co. v. Patterson Drug Co.*, 73 Fla. 665, 74 So. 807, L. R. A. 1917 D. 1091; *Palatine Ins. Co. v. Whitfield*, 73 Fla. 716, 74 So. 869; *Corson v. Mutual Fire Ins. Co.*, 113 Ia. 641, 85 N. W. 806; *Petroff v. Equity F. Ins. Co. (Ia.)*, 167 N. W. 660; *Gibson Electric Co. v. Liverpool, etc., Ins. Co.*, 159 N. Y. 418, 426, 54 N. E. 23; *Beauchamp v. Retail Merchants', etc., F. Ins. Co. (N. Dak.)*, 165 N. W. 545. Some courts restrict the meaning of the agreement to conditions essential to the life of the policy prior to loss, and do not apply it to stipulations required to be performed thereafter. *Lusk v. American Central Ins. Co.*, 80 W. Va. 39, 91 S. E. 1078, and cases cited.

<sup>62</sup> *Goorberg v. Western Assurance Co.*, 150 Cal. 510, 513, 517, 89 Pac. 130, 10 L. R. A. (N. S.) 876.

<sup>63</sup> Citing: *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184; *Schuster v. Dutchess County Mut. Ins. Co.*, 102 N. Y. 260, 6 N. E. 406; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521; *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079; *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696, 43 N. W. 340, 6 L. R. A. 524; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Sullivan v. Hartford Fire Ins. Co.*, 89 Tex. 665, 36 S. W. 73; *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44; *Bullman v. North British, etc., Ins. Co.*, 159 Mass. 118, 34 N. E. 169; *Wright v. Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87; *Coleman v. New Orleans Ins. Co.*, 49 Ohio St. 310, 31 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565; *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58

holding that such contracts are entire, and that a breach of any condition or warranty vitiates the whole insurance, most of these decisions basing their conclusion on the ground that the premium was a single or gross sum.<sup>64</sup> There is still another line of cases which take a middle ground between the extreme doctrines above stated and hold that the question of the severability of the contract in such cases depends upon the nature of the risk,—i. e., that where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the other items, so that what affects the risk on one item does not affect the risk on the others, the policy must be regarded as severable.<sup>65</sup> In our opinion, the rule declared in the cases last cited is supported by reason and tends to produce a just result. Whether a contract is entire or severable is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time

S. W. 851; *Connecticut Fire Ins. Co. v. Tilley*, 88 Va. 1024, 29 Am. St. Rep. 770, 14 S. E. 851; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582. See also *Downey v. German Alliance Ins. Co.*, 252 Fed. 701, 164 C. C. A. 541; *Fisher v. Sun Ins. Co.*, 74 W. Va. 604, 83 S. E. 729.

<sup>64</sup> Citing *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. 210, 94 Am. Dec. 55; *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91; *Plath v. Minnesota Farmers' Mut. Fire Ins. Assn.*, 23 Minn. 479, 23 Am. Rep. 697; *Garver v. Hawkeye Ins. Co.*, 69 Ia. 202, 28 N. W. 555; *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N. C. 480, 2 S. E. 258; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; *McGowan v. People's Mut. Fire Ins.*, 54 Vt. 211, 41 Am. Rep. 843.

<sup>65</sup> Citing: *Havens v. Home Ins. Co.*,

111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Pickel v. Phoenix Ins. Co.*, 119 Ind. 291, 21 N. E. 898; *Worachek v. New Denmark, etc., Fire Ins. Co.*, 102 Wis. 88, 78 N. W. 411; *Taylor v. Anchor Mutual Fire Ins. Co.*, 116 Iowa, 625, 88 N. W. 807, 57 L. R. A. 328, 93 Am. St. Rep. 261; *Western Assurance Co. v. Stoddard*, 88 Ala. 606, 7 So. 379; *Republic County, etc., Ins. Co. v. Johnson*, 69 Kan. 146, 76 Pac. 419, 105 Am. St. Rep. 157; *Hartshorne v. Agricultural Ins. Co.*, 50 N. J. L. 427, 14 Atl. 615; *Brehm Lumber Co. v. Svea Ins. Co.*, 36 Wash. 520, 79 Pac. 34, 68 L. R. A. 109; *Herzog v. Palatine Ins. Co.*, 36 Wash. 611, 79 Pac. 287; *Ætna Ins. Co. v. Resh*, 44 Mich. 55, 6 N. W. 114, 38 Am. Rep. 228; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *Baldwin v. Hartford Fire Ins. Co.*, 60 N. H. 422, 49 Am. Rep. 324.

they contracted.<sup>66</sup> In these cases the policy, insuring several classes of property, provides that it shall be void in certain events. In view of the settled rule that any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer, it is proper to say that this language should not be given the effect of avoiding the policy as to every item insured in all cases. Where the warranty or condition which is broken does not affect the risk on certain items, the insurance should not be held to be ineffective as to those items. Such construction would subject the insured to a forfeiture for a cause which had no substantial relation to the interest of the insurer. . . .

"In the foregoing discussion we have laid no stress on the fact that the language of the policy is that 'this *entire* policy shall be void, if,' etc. In most of the cases cited above the word 'entire' did not appear in the policy in this connection. It has been held (sometimes even in jurisdictions where separate valuations are ordinarily regarded as rendering the contracts divisible) that the inclusion of this word makes the contract entire and indivisible.<sup>67</sup> But there are also cases holding, in effect, that no valid distinction can be drawn between the words 'this policy shall be void' and 'this entire policy shall be void.'<sup>68</sup> In view of our conclusion that the policy in question is for other reasons an entire contract, it is not necessary in this case to express any opinion as to the effect of the use of the word 'entire' in a policy which in the absence of such word would be treated as divisible." To this statement it may be added that though it be granted that an insurance policy should be construed most strongly against the insurer, it is only by a somewhat strained construction that any part of a

<sup>66</sup> *Citing*: *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305.

<sup>67</sup> *Citing*: *Germania Fire Ins. Co. v. Schild*, 69 Ohio St. 136, 68 N. E. 706, 100 Am. St. Rep. 663; *Germier v. Springfield F. & M. I. Co.*, 109 La. 341, 33 So. 361; *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 33 Atl. 429, 51 Am. St. Rep. 457, 30 L. R. A. 633; *Martin v. Insurance Co. of N. A.*, 57 N. J. L. 623, 31 Atl. 213; *McWilliams*

*v. Cascade F. & M. I. Co.*, 7 Wash. 48, 34 Pac. 140.

<sup>68</sup> *Citing*: *Kiernan v. Dutchess County Mutual Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 53 Kans. 623, 36 Pac. 983; *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848, 42 Am. St. Rep. 523, 23 L. R. A. 719.

policy can be saved in such a case as that under discussion; and if "this policy shall be void" and "this entire policy shall be void" mean the same thing, it proves that under both clauses the contract is indivisible, not that in both cases it is divisible.

**§ 767. Excuse of conditions by conduct showing that the promisor will not perform even if the condition is performed.**

It is an old maxim of the law that it compels no man to do a useless act, and this principle was applied in the time of Coke, if not before, to the case of a conditional promise. If the promisor is not going to keep his promise in any event, it is useless to perform the condition and the promisor becomes liable without such performance.<sup>69</sup> So if before the time for the performance of a condition by a promisee, the promisor leads the promisee to stop performance by manifesting himself an intention not to perform on his part, even though the condition is complied with, "it is not necessary for the first to go further and do the nugatory act."<sup>70</sup> The principle finds application in a great variety of contracts. It applies to conditions, the performance of which is not the real exchange for the thing promised. For instance, if an insurance company indicates that it is not going to pay an insurance loss, in any event, the insured

<sup>69</sup> *Mayne's Case*, 5 Coke, 20 b. This was an action on an obligation to make a new lease upon the surrender of a certain outstanding lease. To a plea that the promisor had made the surrender impossible by accepting a fine the defendant demurred. It was adjudged for the plaintiff and resolved "that Sir Anthony Mayne had broken his covenant without any surrender made; for by the said fine levied by him for eighty years, he had disabled himself either to take a surrender or to make a new lease, and the law will not force any one to do a thing which would be vain and fruitless . . . and although the lessee in this case, by the words of the indenture, ought to do the first act, namely to make the surrender;

yet when the lessor hath disabled himself not only to take the surrender, but also to make a new lease according to the covenant, for this cause the lessor's covenant is broken without any surrender made."

<sup>70</sup> *Jones v. Barkley*, 2 Doug. 684. See also *Ripley v. M'Clure*, 4 Exch. 345; *Cort v. Ambergate, etc., Ry. Co.*, 17 Q. B. 127; *Columbia Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Allegheny Valley Brick Co. v. C. W. Raymond Co.*, 219 Fed. 477, 135 C. C. A. 189; *Grippio v. Davis*, 92 Conn. 693, 104 Atl. 165; *Duffy v. Patten*, 74 Me. 396; *Goeppel v. Kurtz Action Co.*, 179 N. Y. App. D. 687, 167 N. Y. S. 317.



is excused from compliance with a condition requiring proofs of loss;<sup>71</sup> or requiring arbitration,<sup>72</sup> or other preliminary.<sup>73</sup>

The principle is also applicable where the performance of the condition is the substantial exchange for the performance of the promisor, as in a contract to buy and sell. An anticipatory refusal by either party to perform excuses the other party from the performance or tender of performance which would ordinarily be a condition precedent to the enforcement of liability.<sup>74</sup> A manifestation of inability to perform has the same effect.<sup>75</sup> The principle is applicable alike to express and to implied conditions. Here, as in the case of prevention,<sup>76</sup> it is

<sup>71</sup> *Royal Ins. Co. v. Martin*, 192 U. S. 149, 48 L. Ed. 385, 24 S. C. Rep. 247; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. Ed. 204, 23 Sup. Ct. Rep. 126; *Continental Ins. Co. v. Parkes*, 142 Ala. 650, 39 So. 204; *Continental Ins. Co. v. Daniel*, 25 Ky. L. Rep. 1501, 78 S. W. 866; *Prudential Ins. Co. v. Devoe*, 98 Md. 584, 56 Atl. 809; *Sergeant v. Liverpool, etc., Ins. Co.*, 155 N. Y. 349, 49 N. E. 935; *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773; *Moore v. General Accident &c. Assoc.*, 173 N. C. 532, 92 S. E. 362; *Frost v. North British, etc., Ins. Co.*, 77 Vt. 407, 60 Atl. 803; *Peninsula Land Co. v. Frank Ins. Co.*, 35 W. Va. 666, 676; *Cooper v. Insurance Co.*, 96 Wis. 362, 71 N. W. 606.

<sup>72</sup> *Jureidini v. National, etc., Ins. Co.*, [1915] A. C. 490.

<sup>73</sup> *Farmers' Handy Wagon Co. v. Casualty Co. of America (Ia.)*, 167 N. W. 204. It may be questioned whether this principle is applicable to a condition relating to the time of beginning suit since such a condition is inserted to apply to the very case which has arisen—a denial of liability by the insurer. In *Hansell-Elcock Co. v. Frankfort &c. Ins. Co.*, 177 Ill. App. 500, the court held that while a total denial of liability would justify suit at once in spite of a provision that suit should not be brought for a period

not yet expired, such a denial would not justify suit after the date permitted by the terms of the policy.

<sup>74</sup> *Ripley v. M'Clure*, 4 Exch. 345; *Allegheny Valley Brick Co. v. C. W. Raymond Co.*, 219 Fed. 477, 135 C. C. A. 189; *Miller v. Watson*, 139 Ga. 29, 73 S. E. 585; *Burkhalter v. Roach*, 142 Ga. 344, 82 S. E. 1059; *B. F. Swartz v. Woldert Grocery Co.*, 151 Ky. 743, 152 S. W. 934; *Southern Sawmill Co. v. Ducote*, 120 La. 1052, 46 So. 20; *Green v. Ohl*, 81 N. J. L. 626, 80 Atl. 547; *Dordoni v. Hughes*, 83 N. J. L. 355, 85 Atl. 353; *Wester v. Casein Co.*, 206 N. Y. 506, 100 N. E. 488; *Caluwart v. Schapiro*, 90 N. Y. Misc. 301, 152 N. Y. S. 1016; *Bateman v. Hopkins*, 157 N. C. 470, 73 S. E. 133; *Lathrop v. Columbia Collieries Co.*, 70 W. Va. 58, 73 S. E. 299.

<sup>75</sup> In *Primm v. Wise & Stern*, 126 Iowa, 528, 102 N. W. 427, the court said: "Where plaintiff, under a contract to purchase real estate, had knowledge that defendants had no title to the property on the date specified for performance, and were unable to perform, it was not incumbent on plaintiff, before rescinding, to make a technical tender of performance, he being then willing and able to perform had defendants been able to do so." See also *Gebbie v. Efros*, 95 Ohio, 215, 116 N. E. 31.

<sup>76</sup> See *supra*, § 677.



essential that the promisor's conduct should be the cause of the promisee's failure to perform the condition. If the promisee could not or would not have performed the condition in any event, the manifestation of unwillingness or inability of the promisor to perform will not give rise to a cause of action because the promisee cannot allege and prove that he would have become entitled to receive performance by complying with the condition, had it not been for the promisor's misconduct.<sup>77</sup> It has been said that the conduct of the promisor must show unequivocally that performance of the condition will be useless in order to render the principle applicable,<sup>78</sup> but it may be doubted if this is always true. Where the conduct of the promisor shows that it is very unlikely that he will perform, even though there is a chance that he may, and performance of the condition precedent will involve a serious detriment to the promisee, if not followed by due performance on the part of the promisor, it seems reasonable to hold that a right of action may arise without performance of the condition.<sup>79</sup>

It is generally said of the excuses considered in this section that the promisor has "waived" performance by the other side. Such nomenclature, however, seems to imply that the right of the promisee to recover without performing the condition depends upon the permission of the promisor, whereas his right is given him by law irrespective of the promisor's wishes. The

<sup>77</sup> *Winslow v. Dundon*, 46 Mont. 71, 125 Pac. 136; *Reid v. America Co.*, 136 N. Y. S. 75. See also *infra*, §§ 871, 882.

<sup>78</sup> In *Caldwell v. Cockshutt Plow Co.*, 30 Ont. Law Rep. 244, 257, the court said:—"No doubt, 'a positive absolute refusal by one party to carry out the contract is, in itself, a breach of the contract on his part, and dispenses the other party from the useless formality of tendering the performance of a condition precedent.' *McCowan v. Mackey*, 22 C. L. T. Occ. N. 100; but it must be something of a positive unequivocal character, equivalent to a statement by the one that, even if the other should perform his part, he himself would not perform his. Such a case

was *Withers v. Reynolds*, 2 B. & Ad. 882, where the substance was, 'You may bring your straw, but I will not pay you upon delivery, as under the contract I ought to do.' But everything which the one party may consider to be a breach of the contract or a waiver of a condition precedent is not so; there must be something unequivocal and clear. The authorities are summed up in *Mersey Steel and Iron Co. v. Naylor Benzon & Co.*, 9 App. Cas. 434." There seems some failure here to distinguish between what amounts to a breach of contract and what amounts to an excuse of a condition precedent.

<sup>79</sup> See *infra*, §§ 877 *et seq.*

condition is as fully excused where the promisor says, "I insist that you shall perform the condition on your part although I can not and will not perform my promise afterwards," as where the promisor says, "You need not perform the condition because I can not or will not perform my promise." Moreover, if in any true sense the promisor waived performance of the condition, the promisee would become entitled to the full performance which the promisor contracted to render after receiving performance of the condition, whereas if performance of the condition was wholly or partly the price or exchange which the promisor was to receive for his own performance, the measure of damages is the difference between the value of what the promisee was to give, and of what he was to receive for it.

**§ 768. Conditions precedent as well as conditions concurrent are excused by the promisor's prospective non-performance.**

A distinction has been attempted between conditions concurrent and conditions precedent in regard to excuse by prospective failure to perform the promise. Where the performance of the condition requires coöperation on the part of the promisor for its performance, as is the case with concurrent conditions, and the promisor announces beforehand that he will not give such coöperation, there is threatened prevention. The promisee may clearly take the promisor at his word unless he withdraws his statement before the time for performance comes, and therefore may maintain an action against the promisor without tendering performance of the concurrent condition.<sup>80</sup> Where, however, performance of the condition requires no coöperation by the other party, there is no prevention of performance. The promisee can perform. He merely does not wish to do so because his performance will not be followed by performance on the part of the promisor. To the argument that it is unreasonable to require the promisee to perform the condition when it is certain that he will not secure performance of the counter promise, the answer has been made "that it is not unreasonable to require him to do so if he wishes to sue on the covenant or promise, for it is the necessary consequence of

<sup>80</sup> See cases cited in the previous section.

the conditions being precedent. The only security that one ever has, when he performs a condition precedent, that the covenant or promise will be performed, is an action for damages, and that the plaintiff has in the case supposed."<sup>81</sup> This argument, however, is opposed to justice and practical convenience, and is required by no theoretical principle. The injustice of requiring performance of the condition in order to acquire a right of action when the promisor has indicated that he will not keep the promise is obvious. Contracts are not made with the expectation that they will be broken, but with the expectation that they will be performed. A promisee will rarely think it wise to perform a condition precedent, involving large expense, when he knows that the promisor will not perform in his turn. Yet to deny him because of this a right of action against the promisor who has brought the situation about is unjust and inconvenient. It may be urged that the contrary view involves enforcing against the promisor a promise which he never made; namely, an absolute instead of a conditional promise; but owing to his own conduct he should be precluded from insisting upon the condition. There is no doubt that this is the law, and that no distinction is taken by the courts in this respect between conditions which require coöperation or concurrent action by the promisor and those which do not.<sup>82</sup>

<sup>81</sup> Langdell, *Summ. of Contracts*, § 172.

<sup>82</sup> "If a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the

act which he has so rendered himself unable to perform." Per Maule, J., *Sands v. Clarke*, 8 C. B. 751, 762. See also *Newcomb v. Brackett*, 16 Mass. 161, and cases, especially insurance cases, in the preceding section.

## CHAPTER XXV

### EXCUSE OF CONDITIONS AND PROMISES WHICH WOULD CAUSE A FORFEITURE OR PENALTY

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§ 769. What is meant by a forfeiture.

Though the law cannot create contractual obligations which are not based on the expressed intention of the parties,<sup>1</sup> it can excuse the performance either of conditions or promises agreed upon by the parties for any reasons which seem to it just. The mere fact that a promise or condition is somewhat harsh or unfair in its operation is not enough to furnish such an excuse, but a principle of somewhat vague boundaries prohibits the enforcement of forfeitures or penalties. Though these two words are often used as synonyms, the word forfeiture carries an implication of deprivation of something previously owned as distinguished from subjection to a liability, but the distinction is often blurred. The use of the term forfeiture became common in connection with the doctrines of equity concerning mortgages. The fundamental idea is doubtless that the person subjected to a forfeiture thereby loses property which belonged to him, without adequate return and without any breach of duty on his part commensurate in value with the property lost. Even in the case of a mortgage, however, it will be observed that the enforcement of the mortgage, according to the strict terms of the contract, does not work a forfeiture of property. When the transaction was entered into, the complete title was vested in the mortgagee; certainly, in an old-fashioned mortgage so the deed provided. By failing to pay the debt on the law day the mortgagor technically does not lose a title which he had immediately before that day; he fails to acquire again by the happening of a condition subsequent a title which he had lost when he made the mortgage.\* But however valid this argument may be from

<sup>1</sup> The law can wherever desirable      expressed intention, but they are not  
create obligations without regard to      contractual.

a technical standpoint, it is evident that in substance a failure to make prompt payment would cause a loss to the mortgagor and a gain to the mortgagee out of all proportion to the importance of the mortgagor's breach of contract. Situations identical in principle frequently arise in other contracts.

**§ 770. What is meant by penalty.**

A penalty as distinguished from a forfeiture involves the enforcement of an obligation to pay a sum fixed by law or agreement of the parties as a punishment for the failure to fulfill some primary obligation. A forfeiture deprives a man of what he previously possessed, or at least prevents him from acquiring what he has substantially paid for; a penalty subjects him to a liability beyond the actual damage caused by his breach of the primary obligation. As the type of forfeiture is a mortgage, so the type of penalty is a bond on condition. Transactions in substance identical with mortgages or penal bonds may be made in other forms. Though the law has been reluctant to formulate a universal principle on the subject based on the essential character of transactions as distinguished from their form, it is nevertheless desirable in order to understand the possible application to conditions of doctrines relating to forfeiture and penalty, to have in mind the better settled doctrines relating to the relief given in case of conveyances which involve a forfeiture, and in case of promises which provide for a penalty.

**§ 771. Non-enforceability of provisions for forfeiture in mortgages.**

The old form of mortgage still in use in many jurisdictions in terms is an absolute deed of conveyance to the mortgagee with a condition subsequent, or separate deed of defeasance, providing that if a sum of money owing by the mortgagor is repaid on a certain day, the title to the property shall revert in the mortgagor. If literal effect were given to the instrument, failure to pay on the precise day when the debt falls due would involve the total loss of the mortgaged estate whatever might be its value. Courts of equity at an early date allowed the mortgagor to redeem his property after the day by paying

interest in addition to the debt; and to avoid the hardship on the mortgagee, which possible indefinite delay might cause, he was allowed at any time after the maturity of the debt to file a bill to foreclose the mortgagor's right of redemption. On such a bill the court decreed that unless the mortgagor should pay the mortgage with interest within a certain time specified by the decree, he should be forever foreclosed. In other respects courts of equity, and subsequently courts of law, defied the literal meaning of a mortgage, and treated the property as belonging to the mortgagor except so far as was necessary to protect the mortgagee's security for his debt.<sup>2</sup> These results have not been reached by searching for the intention of parties either actual or expressed. At the present time doubtless the mortgagor and mortgagee understand the meaning of

<sup>2</sup>The ultimate effect in the United States of this treatment has been summarized by a learned writer as follows: "A mortgage deed commonly professes to vest in the grantee real estate; it really vests in him, in this country, only a chattel interest in real estate. It declares that upon default the mortgagee shall at once, by the mere operation of the deed, have an absolute title, free from all right of the grantor; it really gives the grantee, from the time of default, a mere right to enforce payment or indemnity. It professes to leave in the grantor nothing but a right of re-entry upon certain terms; it really leaves in him, in this country, the absolute ownership, subject it is true, to a charge, but only as the ownership of land may always be subject to a charge,—for taxes, for an annuity, for a mechanic's lien, for debts of an owner deceased. It must have the word 'heirs,' (*Sedgwick v. Laffin*, 10 All. 430; *Allendorff v. Gaugengigl*, 146 Mass. 542, 1 Jones, Mortg., § 67) or the security dies with the mortgagee, even though the debt is unpaid; yet the interest granted is not realty; there is no dower or curtesy in it, because it is not real estate, and it goes to the ex-

ecutor, and not to the heirs. In Massachusetts a mortgage on land is attachable as realty if owned by a State bank or a domestic insurance corporation; (Mass. Pub. Sts. c. 118, § 92; St. 1887, c. 214, § 27), otherwise not. We find it laid down, on the one hand, in the law reports and statutes of a given State, that a mortgage of land is a mere 'pledge' or 'hypothecation' of it, and creates only a 'lien'; (*Jackson v. Mut. Fire Ins. Co.*, 23 Pick. 418, 424; *Ewer v. Hobbs*, 5 Met. 1, 3; *Butler v. Page*, 7 Met. 40, 43; Mass. Pub. Sts. c. 178, § 44), that a mortgagor by deed and defeasance may relinquish his title by simply cancelling his bond of defeasance; (*Trull v. Skinner*, 17 Pick. 213); and yet we find in the same reports the doctrine laid down that, unless the condition is performed on the day fixed, the mortgagor's ownership of the land is gone, at law, and the legal ownership is now in the mortgagee, (*Currier v. Gale*, 9 All. 522), subject only to a right of redemption in equity,—a proposition maintainable only by viewing the mortgage deed as a deed on condition and not as a deed creating a lien." *H. W. Chaplin*, in 4 Harv. L. Rev. 3.

the transaction between them to be different from that which the mortgage expresses; but when courts of equity first established their doctrines in regard to the matter, the expressed intention was doubtless the real intention, yet the intention was disregarded; and it is still true to-day that an agreement, however clearly expressed, that the mortgaged property shall be forfeited if payment is not made when due, will be futile. The maxim, "Once a mortgage, always a mortgage," will be applied and redemption allowed.<sup>3</sup> The mortgagor may indeed sell his equity of redemption to the mortgagee, but in considering the validity of such a sale "principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question."<sup>4</sup> Even though a conveyance made as security for a debt is in terms absolute, and there is no written agreement for a reconveyance or for revesting of title in the grantor, equity will allow redemption of the property if the transaction is clearly proved to be a mortgage.<sup>5</sup>

<sup>3</sup> Howard v. Harris, 1 Vern. 190; Seton v. Slade, 7 Ves. 264, 273; Cowdry v. Day, 1 Giff. 316; Noakes v. Rice, [1902] A. C. 24; Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; Fields v. Helms, 82 Ala. 449, 3 So. 106; Pierce v. Robinson, 13 Cal. 116, 125; Walker v. Farmers' Bank, 6 Del. Ch. 81, 10 Atl. 94; Seymour v. Mackay, 126 Ill. 341, 18 N. E. 552; Reed v. Reed, 75 Me. 264, 272; Batty v. Snook, 5 Mich. 231; Marshall v. Thompson, 39 Minn. 137, 39 N. W. 309; Wilson v. Drumrite, 21 Mo. 325; Weathersly v. Weathersly, 40 Miss. 462, 90 Am. Dec. 344; Vanderhaize v. Hugues, 13 N. J. Eq. 244; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Robinson v. Willoughby, 65 N. C. 520, 523, 524; Stover v. Bounds, 1 Ohio St. 107. Cf. De Martin v. Phelan, 47 Fed. 761, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115.

In Ball v. Milliken, 31 R. I. 36, 76 Atl. 789, 37 L. R. A. (N. S.) 623, the court said: "It is one of the principles of equity that it will not decree a for-

feiture. 'It will never aid in the divestiture of an estate for a breach of a covenant on a condition subsequent, although it will often interfere to prevent the divestiture of an estate for a breach of a covenant or condition.'" 2 Story, Equity, § 1319.

<sup>4</sup> Villa v. Rodriguez, 12 Wall. 323, 339, 20 L. Ed. 406. See also Peugh v. Davis, 96 U. S. 332, 337, 24 L. Ed. 775; Savings Soc. v. Davidson, 97 Fed. 696, 38 C. C. A. 365; Oakley v. Shelley, 129 Ala. 467, 29 So. 385; West v. Reed, 55 Ill. 242; Hicks v. Hicks, 5 G. & J. 75; Trull v. Skinner, 17 Pick. 213; Falis v. Insurance Co., 7 Allen, 46; De Lancey v. Finnegan, 86 Minn. 255, 90 N. W. 387; Randall v. Sanders, 87 N. Y. 578; McLeod v. Bullard, 86 N. C. 210; Shaw v. Walbridge, 33 Oh. St. 1; Tripler v. Campbell, 22 R. I. 262, 47 Atl. 385; Hall v. Hall, 41 S. C. 163, 19 S. E. 305, 44 Am. St. Rep. 696; Swarm v. Boggs, 12 Wash. 246, 40 Pac. 941.

<sup>5</sup> See *supra*, § 635.



### § 772. Conditional sales distinguished from mortgages.

Though property cannot be conveyed by way of mortgage on such terms as will forfeit the mortgagor's right of redemption, a sale may be made with a right or option on the part of the seller to repurchase the property on or before a fixed day. A bargain of this sort will be enforced according to its terms, and if the right is not exercised by the agreed day, the property will become absolutely that of the purchaser.<sup>6</sup> Such a transaction is called a conditional sale. The legal relation of the parties in such a transaction, however, is entirely different from that in the bargain commonly called a conditional sale of personal property where goods are sold and delivered to the purchaser with a reservation of title in the seller until the price is paid. In the latter kind of case the transaction is in substance a mortgage;<sup>7</sup> in the former it is vitally distinguishable from a mortgage. General statements about "conditional sales" originally made in regard to one of these transactions are sometimes applied to the other or stated as applicable to both.<sup>8</sup> The distinction between a bargain of the kind considered in this section and a mortgage is to be found in the existence of a debt where a mortgage relation exists. A primary reason for relief in equity from the strict terms of a mortgage is that the mortgagor must pay the debt in any event, even though the mortgaged property is insufficient to meet it. On the other hand, in the conditional sale, the parties are taking a business chance which may or may not turn out favorably to the purchaser. If the land diminishes in value, the seller will not exer-

<sup>6</sup> *Davis v. Thomas*, 1 Russ. & M. 506; *Williams v. Owen*, 5 M. & Cr. 303, 306; *Conway's Exrs. v. Alexander*, 7 Cr. 218, 237; *Wallace v. Johnstone*, 129 U. S. 58, 32 L. Ed. 619, 9 Sup. Ct. 243; *Beck v. Blue*, 42 Ala. 32, 94 Am. Dec. 630; *Stryker v. Hershy*, 38 Ark. 264; *Henley v. Hotaling*, 41 Cal. 22; *Vance v. Anderson*, 113 Cal. 532, 45 Pac. 816; *Spence v. Steadman*, 49 Ga. 133; *Hanford v. Blessing*, 80 Ill. 188; *Bigler v. Jack*, 114 Ia. 667, 87 N. W. 700; *Flagg v. Mann*, 14 Pick. 467; *Daniels v. Johnson*, 24 Mich. 430; *Buse v. Page*, 32 Minn. 111, 19 N. W. 736, 20 N. W.

95; *Magee v. Catching*, 33 Miss. 672; *Turner v. Kerr*, 44 Mo. 429; *Slutz v. Desenberg*, 28 Oh. St. 371; *Tripler v. Campbell*, 22 R. I. 262, 47 Atl. 385; *Ruffier v. Womack*, 30 Tex. 332; *Rich v. Doane*, 35 Vt. 125; *McComb v. Donald*, 82 Va. 903, 5 S. E. 558; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941; *Kunert v. Strong*, 103 Wis. 70, 74, 79 N. W. 32.

<sup>7</sup> See *infra*, § 965.

<sup>8</sup> Instances of such misapprehension may be found in *Pontiac Buggy Co. v. Skinner*, 158 Fed. 866, 868, and in 6 Am. & Eng. Encyc. (2d ed.) 442 *et seq.*

cise his option to repurchase, and the purchaser must bear the loss. This it is conceived balances the chance that the purchaser may get an advantage if the land exceeds in value the price fixed for its repurchase, and the seller nevertheless fails by negligence or misfortune to exercise his option.

### § 773. Technicality of the distinction.

It is obvious, however, that as a practical matter this distinction amounts to nothing if the price paid for the granted property is much below its value. In such a case the grantee is amply protected without any right of action for the recovery of a debt. All that he can desire is to be left in undisturbed ownership of the property. It is commonly said in the cases that whether a transaction is a mortgage or a conditional sale depends upon the intention of the parties. But it is perfectly possible that the original owner, induced by his necessities, does intend to sell his property for a fraction of its value relying on the option to repurchase it, which he hopes to be able to exercise. If this intention is given effect and the transaction literally enforced, no relief being given the grantor if he fails to exercise the option at the stated day, a ready means is provided for nullifying the rules which equity has gradually built up in regard to mortgages. To be sure, in case of doubt a transaction is construed rather as a mortgage, than as a conditional sale,<sup>9</sup> and inadequacy of the price is a strong circumstance tending to show that a conveyance was intended merely to secure a debt;<sup>10</sup> and in this way hard cases are generally taken care of; but unless it is observed that the ultimate distinction in principle depends not on the form of the transaction, whether that of a mortgage or a condition sale, but on gross inequality between the price and the value of the property, the law is likely to be confused and the chance of injustice unnecessarily great. It is true that equity does not prevent a man from contracting to sell his property for an inadequate

<sup>9</sup> *Conway v. Alexander*, 7 Cranch, 431, 60 N. E. 22; *Hubby v. Harris*, 68 218; *Douglass v. Moody*, 80 Ala. 61; Tex. 91, 3 S. W. 558.  
*Hughes v. Sheaff*, 19 Ia. 335; *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369; <sup>10</sup> *Parish v. Gates*, 29 Ala. 254; *Matthews v. Sheehan*, 69 N. Y. 585; *Bigler v. Jack*, 114 Ia. 667, 87 N. W. 700.  
*Hughes v. Harlam*, 166 N. Y. 427,

price, but where he agrees to make such a sale with an option to repurchase the property it is evident that the expectation of regaining the property has been a powerful motive, and if he is deprived by a strict enforcement of the terms of the option of the right to repurchase, there is in substance precisely the same forfeiture that equity has relieved against in case of mortgages. It should not be admitted that a court of equity to-day has an inferior instinct for natural justice or an inferior power to give effect to it, than Chancellors possessed three centuries ago.<sup>11</sup>

### § 774. Relief from penalties in bonds.

The common early form of contractual obligation in England was a bond upon condition, so that in the early books the word obligation without more is used to designate such a bond. The purpose of the bond obviously was, and still is, to secure performance of the condition; but instead of attempting to secure this result by exacting a promise from the obligor to perform the condition, there is an acknowledgment of indebtedness—in effect a promise to pay a sum of money if the condition is not performed. The only remedy on such an instrument would naturally be an action for the sum promised, and such was the early law. Later by a somewhat forced construction, there was held to be an implied promise to perform the condition of the bond.<sup>12</sup> Nevertheless debt for the penal sum of the bond remained the ordinary remedy for the enforcement of the instrument.

The court of equity early assumed jurisdiction to limit the recovery in such an action to the damages actually suffered by the obligee, regarding the literal enforcement of the obligation as unconscientious.<sup>13</sup> A distinction was taken, however, between bonds "where the party might be put in as good a plight as where the condition itself was literally performed,"

<sup>11</sup> A learned writer on the early history of penalties and forfeitures has said truly: "To the court of chancery fell the task of moulding the law of penalties and forfeitures into harmony with more humane standards of conduct, a task slowly performed and still

uncompleted. For example, neither law nor equity has dealt adequately with oppressive instalment contracts." William H. Loyd, 29 Harv. L. Rev. 123.

<sup>12</sup> See *supra*, § 670.

<sup>13</sup> See the following section.

and cases "where the condition was collateral and no recompense or value could be put on the breach of it."<sup>14</sup> In the former case equity would give relief; in the latter case it would not; and this distinction has developed into the modern distinction between penalties and liquidated damages. So far as bonds to secure the payment of money were concerned, the power exercised by Chancery, afterwards enacted into statute law,<sup>15</sup> was entirely effective to prevent ultimate recovery of more than the actual damage suffered by the obligee; but still inconvenience was caused by the allowance of judgment at law for the full penalty of the bond against which relief must be sought by application to equity. Another statute was accordingly passed requiring the assignment by the obligee of a breach of condition, and a jury thereupon assessed such damages as had been caused to the plaintiff by the breach or breaches alleged.<sup>16</sup> These statutes, the effect of which has been adopted by statute or otherwise in modern American law, ordinarily preclude the recovery on a penal bond (whether to secure the payment of money or some other performance) of more than the actual damage assessed by a jury, for the injury suffered by breach of condition.<sup>17</sup>

Where, however, the law imposes by statute a penalty for the doing or failure to do a particular act, it is no defence that the failure has not caused damages equal to the statutory penalty, and the wrongdoer is not the less liable for the full penalty if under the authority of law a bond is taken to secure performance.<sup>18</sup>

<sup>14</sup> Stated in argument in *Marks v. Marks*, Prec. in Ch. 487, as ruled by Lord Somers.

<sup>15</sup> 4 and 5 Anne, c. 16, §§ 12, 13.

<sup>16</sup> 8 and 9 William III, c. 11, § 8. Though the statute was only permissive in its terms, the court held (see *Roles v. Rosewell*, 5 T. R. 538; *Hardy v. Bern*, 5 T. R. 636) that it was mandatory in effect. Even where judgment went by default the plaintiff must suggest on the record breaches of condition, upon which damages would be assessed.

<sup>17</sup> *Turck v. Marshall, etc., Co.*, 8

Col. 113, 5 Pac. 838; *Ripley v. Eady*, 106 Ga. 422, 32 S. E. 343; *Doane v. Chicago City Ry. Co.*, 51 Ill. App. 353; *Bolster v. Post*, 57 Ia. 698, 11 N. W. 637; *Henry v. Davis*, 123 Mass. 345; *Coker v. Brevard*, 90 Miss. 64, 43 So. 177; *Gillilan v. Rollins*, 41 Neb. 540, 59 N. W. 893; *Davis v. Gillett*, 52 N. H. 126; *Disosway v. Edwards*, 134 N. C. 254, 46 S. E. 501; *Keck v. Bieber*, 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846.

<sup>18</sup> In *Benson v. Gibson*, 3 Atk. 395, Lord Hardwick said: "Nor is it like the case of bonds given as a security not to

It is also true, especially where the rights of the public are involved, that if the nature of a breach is such that the damages are uncertain, and it is apparent that the penal sum named in a bond is a reasonable liquidation of the actual damages, recovery of the sum named may be had although the contract is in form a bond with penalty.<sup>19</sup> Subject to these quali-

defraud the revenue, because there, where a person is guilty of a breach, it is considered in law as a crime, and this court will not relieve for that reason."

In *Dieckerhoff v. United States*, 136 Fed. 545, 547, 69 C. C. A. 255, the court said: "There is a line of authorities holding that, where the sum named in the bond is a fixed penalty imposed by law as a punishment for a breach of duty enjoined by law, the court will not undertake to alter or refuse the penalty which the Legislature has fixed for the nonperformance of a statutory duty. It was so held in *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780, where the statute granting authority to extend a line of railroad provided that the railroad company should deposit with the State Treasurer 'their bond in the sum of \$100,000, that they will complete the said road before January, 1872.' In *United States v. Pingree*, 1 Sprague 339, Fed. Cas. No. 16,050, the bond was for rewarehousing, and the statute expressly provided that if the goods were not rewarehoused the collector should levy and collect the original duty plus an additional duty of 100 per cent. In *United States v. Oteri*, 67 Fed. 146, 14 C. C. A. 344, the law required that in cases of withdrawal for export the exporter should give bond in a penal sum equal to double the amount of the estimated duties to produce the proof required by law of the landing of the same beyond the limits of the United States. In *United States v. Hatch*, 1 Paine, 336, Fed. Cas. No. 15,325, the statute re-

quired the master to enter into a bond in the sum of \$400, that he shall exhibit a certain certified copy of a list of his crew, and also the crew (except such as may have died, absconded, etc.) to the boarding officer at the first United States port he might reach. In *United States v. Montell*, Taney, 47, Fed. Cas. No. 15,798, the statute required a bond to be given in an amount which varied with the tonnage of the vessel, conditioned that the certificate of registry of the vessel shall be solely used for the vessel for which it is granted, and shall not be sold, lent, etc. The court said: 'It would be difficult by any course of proof, or by any process of reasoning, to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury or be liquidated by agreement between the parties. The sum for which the parties are to become bound is manifestly a penalty or forfeiture, inflicted by the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offence.'" See also *American Book Co. v. Wells*, 83 S. W. 622, 26 Ky. L. Rep. 1159; *Marshall v. Atkins* (Tex. Civ. App.), 127 S. W. 1148.

<sup>19</sup> *Blewett v. Front St. Ry.*, 49 Fed. 126, 51 Fed. 625, 2 C. C. A. 415, 7 U. S. App. 285; *Welbourn v. Kee*, 134 Ark. 361, 204 S. W. 220; *New Britain v. New Britain Telephone Co.*, 74 Conn. 336, 50 Atl. 881, 1015; *Fiscal Court v. Kentucky Pub. Service Co.*, 181 Ky.

fications, in every case the amount of the penalty,<sup>20</sup> with the possible addition of interest,<sup>21</sup> furnishes the outside limit of possible recovery.

**§ 775. Early history of the jurisdiction of equity to relieve from forfeiture and penalties.**

A learned writer<sup>22</sup> says of the early history of the development of the rules of law referred to in the preceding section: "The meagreness of the early equity reports makes it difficult to fix accurately the time when this policy was finally adopted (Spence says<sup>23</sup> in the reign of Charles I), and, logically, it could not long be delayed when the mortgagor's right to redeem was established. Certainly by the time of the Restoration it could be said: 'It is a common case to give relief against the penalty of such bonds to perform covenants, etc., and to send it to a trial at law to ascertain the damages in a *quantum damnificatus*.'"<sup>24</sup> So, also, it became the common course to relieve against forfeitures for non-payment of rent, and upon payment of arrears to compel the landlord to make a new lease.<sup>25</sup> Richard Francis summarizes the principle in his twelfth maxim: 'Equity suffers not advantage to be taken of a penalty or forfeiture where compensation can be made.' While text-writers have shown an inclination to consider this as a branch of equity jurisdiction to relieve against accidents, the decisions cannot

245, 204 S. W. 77; *Grant's Pass v. Rogue River &c. Corp.*, 87 Oreg. 637, 171 Pac. 400; *York v. York Railways*, 229 Pa. 236, 78 Atl. 128.

<sup>20</sup> See *supra*, § 670.

<sup>21</sup> See *infra*, § 1414.

<sup>22</sup> William H. Loyd, 29 Harv. L. Rev. 117, 125.

<sup>23</sup> Spence, Equity, 630. See Malton v. Pennell, Toth. 29 (1636-1637).

<sup>24</sup> 1 Equity Cases, Abr. 91. See *Hall v. Higham*, 3 Ch. Rep. 5 (1663); *Wilson v. Barton*, Nelson, 148 (1671); *Friend v. Burgh*, Finch, 437 (1679); *Varnees' Case*, 2 Freem. 63 (1680); *Cage v. Russel*, 2 Vent. 352 (1681); *Hele v. Hele*, 2 Ch. Ca. 87 (1682); *Hayward v. Angell*, 1 Vern. 222 (1683);

*Hale v. Thomas*, 1 Vern. 349 (1685); *Grimston v. Bruce*, 1 Salk. 156 (1707); *Aylet v. Dodd*, 2 Atk. 238 (1741).

<sup>25</sup> *Baker v. Olibeare*, 2 Freem. 92 (1685); Anonymous, 2 Freem. 116 (1690); *Bowen v. Whitmore*, 2 Freem. 192 (1693). See *Poore v. Oxenbridge*, Toth. 104 (1602). The Act of 4 Geo. II, ch. 28, limited the time within which the tenant might file a bill to six months after ejectment and dispensed with the necessity for a new lease. See Common Law Procedure Act of 1852 (15 & 16 Vict.), ch. 76, §§ 210-212; *Bowser v. Colby*, 1 Hare, 109 (1841), at p. 130; *Howard v. Fanshawe*, [1895] 2 Ch. 581; *Dendy v. Evans*, [1910] 1 K. B. 263.



be so limited, the facts, in many instances, showing default pure and simple. Relief was given in chancery as the principal agency of law reform and was justified by public opinion, hostile to catching bargains, which had become proportionately odious as wealth had become more widely distributed and capital more secure. Lord Eldon, characteristically, took pains to express his disapproval of the doctrine of equitable relief against penalties and forfeitures—'a principle,' he said, 'long acknowledged in this court but utterly without foundation.'<sup>25</sup> But, as Mr. Justice Story put it: 'There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of the parties which are constantly interfered with by courts of equity upon the broad grounds of public policy on the pure principles of natural justice.'<sup>26</sup> And, having adopted the rule, it was only common sense to permit it to be administered at law, as was accomplished by the Acts of 8 & 9 William III and 4 Anne, which, in effect, provided that the plaintiff in actions on penal bonds should state the breaches of the condition, and, although entitled to judgment for the amount of the penalty, should be limited in his recovery to the damages proved, the judgment merely remaining as security for further breaches. Payment, also, of principal and interest due by the condition might be pleaded at law, although not made in strict accordance with the terms of the obligation, thus bringing law and equity into accord, at least as to bonds intended to secure money payments."<sup>27</sup>

<sup>25</sup> *Hill v. Barclay*, 18 Ves. 56 (1811). See also *Wallis v. Smith*, 21 Ch. D. 243, 257 (1882) where Jessel, M. R., said: "It has always appeared to me that the doctrine of the English law as to non-payment of money—the general rule being that you cannot recover damages because it is not paid by a certain day—is not quite consistent with reason. A man may be utterly ruined by the non-payment of a sum of money on a given day, the damages may be enormous, and the other party may be wealthy. However, that is our law. If, however, it were not our

law the absurdity would be apparent."

<sup>26</sup> 2 Story, *Equity Jurisprudence*, 13th ed., § 1316. See also the remarks of Lord Mansfield in *Bonafous v. Rybot*, 3 Burr. 1370 (1763).

<sup>27</sup> 8 & 9 Wm. III (1697), ch. II, § 8; 4 Anne (1705), ch. 16, §§ 12, 13; 1 Wms. Saunders, 58, n.; *Roles v. Rosewell*, 5 T. R. 538 (1794); *Hardy v. Bern*, 5 T. R. 636 (1794); *Mackworth v. Thomas*, 5 Ves. 329 (1800); *Walcot v. Goulding*, 8 T. R. 126 (1799); *Keating v. Peddrick*, 240 Pa. St. 590, 88 Atl. 11 (1913); *Jennings v. Wall*, 217 Mass. 278, 104 N. E. 738 (1914).

**§ 776. Provisions for penalty are invalid in any contract.**

The principles first developed in actions upon bonds were subsequently extended to all contracts and applied by courts of law as well as by courts of equity.<sup>28</sup> The difficulty which has vexed modern courts, and which has caused much litigation, is to distinguish between a provision for a penalty and one for liquidated damages. Though difficulties frequently arise in the application of the principle distinguishing one from the other, and though the statements in the cases have not always been clear, the fundamental basis of the distinction at least is evident. A penalty is a sum named, which is disproportionate to the damage which could have been anticipated from breach of the contract, and which is agreed upon in order to enforce performance of the main purpose of the contract by the compulsion of this very disproportion. It is held *in terrorem* over the promisor to deter him from breaking his promise. Liquidated damage, on the other hand, is a sum fixed as an estimate made by the parties at the time when the contract is entered into, of the extent of the injury which a breach of the contract will cause.<sup>29</sup> A provision for a penalty is, therefore, necessarily invalid, though the fact that parties do or do not call a provision a penalty is not conclusive of its character.<sup>30</sup> A provision for a forfeiture, on the other hand, though not favored by the law, is not necessarily invalid. The nature of a contract may make a provision for a specific forfeiture in case of a breach only a legitimate agreement for liquidated damages;<sup>31</sup>

<sup>28</sup> The leading case is *Astley v. Weldon*, 2 B. & P. 346. The contract there involved bound the defendant to perform at the plaintiff's theatre, and provided that if either of the parties broke the contract, he should pay the other £200. The provision was held to be penal and not recoverable.

<sup>29</sup> "Compensation for damages sustained is the legitimate object of such provisions, and where that object is lost sight of and a penalty imposed they will not be given effect by the courts. Equity will enjoin the enforcement of inequitable and unjust provisions of this nature and courts of

law will refuse to enforce them." *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 Ohio, 180, 115 N. E. 1014, 1016.

<sup>30</sup> See *infra*, § 778.

<sup>31</sup> In *Stennick v. Jones*, 252 Fed. 345, 352, 164 C. C. A. 269, the court said: "There are also many decisions where the measure of damages for the breach of a contract by a vendor being ascertainable without difficulty, forfeiture will not be enforced. But these equitable doctrines do not override the principle that parties may make a contract to run for years, and of a character where, actual damages being



and even though what is forfeited by one who breaks a contract is disproportionate to the damage suffered by the injured party, if the latter has already acquired the forfeiture by the partial performance of the contract he is in many cases not deprived of any part of it or of its value.<sup>32</sup>

**§ 777. How far the question of penalty or liquidated damages is one of construction.**

It is commonly said in the cases that the decision of the question whether a certain provision is penal or not, is one of construction;<sup>33</sup> yet it is evident that the question is at least not wholly one of construction. If the matter were fully summed up by saying that the duty of the courts is "to give effect to the plainly expressed will of the contracting parties,"<sup>34</sup> the recovery of penalties would generally if not universally be allowed. To be sure, in the case of a bond, it is no doubt generally understood to-day that the penalty is not intended or expected to be enforced; that performance of the condition is the purpose which the parties have exclusively in mind; but this is not the meaning of the language of the bond, and indeed is not only in direct contradiction of plain language but in contradiction of what was undoubtedly the intention of the parties when equity first gave relief. There can be no doubt that our forefathers when they provided in a bond that a penalty should be paid if a certain condition were not performed, meant exactly what they said; and even to-day though this may no longer be true in regard to bonds, there can be no doubt that in other penal contracts it is generally the clearly expressed will of the parties that the penalty shall be paid if

uncertain of estimation, there may be provision for a forfeiture or transfer of ownership in case of a substantial breach, which the courts, after inquiry will enforce. *Edmunds v. Spanish R. P. & P. Co.*, 206 Fed. 92."

<sup>32</sup> See *infra*, §§ 790, 791, 1473-1477.

<sup>33</sup> See for instance *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 662, 46 L. Ed. 366; *Dunlop Pneumatic Tyre Co. v. New Garage*

and *Motor Co.*, [1915] A. C. 79, 87.

<sup>34</sup> As said in *Sun Printing & Publishing Assoc. v. Moore*, 183 U. S. 642, 662, 46 L. Ed. 366. Cf. *Wise v. United States*, (U. S. Oct. Term 1918), 39 Sup. Ct. 303, where the court upholds the provision because it is a "genuine pre-estimate," and *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 148 C. C. A. 257; *In re Liberty Doll Co., Inc.*, 242 Fed. 695.

the main agreement is not performed, and their expressed will represents their actual intention if that is of any importance. Therefore, the first step towards a clear understanding of the matter is to recognize that the determination of whether a particular provision is penal or merely provides for liquidated damages only, does not depend on the natural meaning of the language used by the parties. The legal effect of an instrument depends on rules of law which sometimes contradict the meaning of the instrument and the intention of the parties.<sup>35</sup> Probably all that most courts mean—at any rate all that can be defended—is to say that the validity of the stipulation is to be “judged of as at the time of the making of the contract, not as at the time of the breach,”<sup>36</sup> and this is undoubtedly true.<sup>37</sup>

The question whether a sum is liquidated damages or a penalty, also, is not a question of the law of damages. It is a question of the legal validity of a stipulation in a contract. If the contract which the parties have made is enforceable according to its terms, no troublesome problem of damages is presented; the real problem is whether the bargain of the parties is enforceable or not.

### § 778. Intention of the parties.

It is not unnatural that the question under consideration should be ordinarily classified as one of construction because it is very commonly said that whether a stipulation involves a penalty or liquidated damages depends wholly or largely upon the intention of the parties. As shown in the preceding section, the statement is misleading. Where intention of the parties is spoken of in the law of contracts it normally means their expressed intention that something shall or shall not be done.

<sup>35</sup> See criticism of the use of the terminology which ascribes to construction or interpretation all legal effects which the law gives to a writing, *supra*, § 601. This, however, is a question of terminology, and when, *e. g.*, Smith, J., says in *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 496, 148 C. C. A. 257, that the

question is one of “construction rather than interpretation” he is taking the same view as that suggested in the text.

<sup>36</sup> *Dunlop Pneumatic Tyre Co. v. New Garage Motor Co.*, [1915] A. C. 79, 87.

<sup>37</sup> *Learned v. Holbrook*, 87 Oreg. 576, 170 Pac. 530, 171 Pac. 222.

In every case, either of penalty or of liquidated damages, the parties have manifested a clear intention that the sum stated in the contract shall be paid in the contingency which has occurred. If their intention is to be given effect, every penalty will be enforced. If, however, by intention of the parties is meant their intention that the particular provision in question shall be liquidated damages or shall be a penalty, it should be observed that most people who make contracts know nothing about these terms, nor what they connote. If they do know that there is a distinction made by the law, the surest way of indicating that they mean one or the other is to call it by its appropriate name; and when contracts are drawn by lawyers the sum stipulated for is usually called liquidated damages, but courts rightly pay little attention to the name given to a sum payable in terms on breach of a contract. Calling a sum to be paid under a contract liquidated or stipulated damages, will not prevent the court from treating it as a penalty.<sup>38</sup> Nor will the use of the word "forfeit"<sup>39</sup> or "penalty"<sup>40</sup> prevent the court in a proper case from regarding as liquidated damages a sum named in a contract; though the use of words appropriate for liquidated damages<sup>41</sup> and especially the use of

<sup>38</sup> *Green v. Price*, 13 M. & W. 695, 701; *Betts v. Burch*, 4 H. & N. 506, 511; *Bignall v. Gould*, 119 U. S. 495, 30 L. Ed. 491; *Pacific Hardware & Steel Co. v. United States*, 48 Ct. Cl. 399; *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 496, 148 C. C. A. 257; *Pogue v. Kaweah, etc., Co.*, 138 Cal. 664, 668, 72 Pac. 144; *New Britain v. New Britain Telephone Co.*, 74 Conn. 326, 50 Atl. 881, 1015; *Greenblatt v. McCall*, 67 Fla. 165, 64 So. 748; *Scotfield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388; *Sanders v. McKim*, 138 Ia. 122, 115 N. W. 917; *Baye v. Ambrose*, 28 Mo. 39; *Wibaux v. Grinnell, etc., Co.*, 9 Mont. 154, 22 Pac. 492; *Whitfield v. Levy*, 35 N. J. L. 149, 155; *Brownold v. Rodbell*, 130 N. Y. App. Div. 371, 114 N. Y. S. 846; *Eakin v. Scott*, 70 Tex. 442, 444,

7 S. W. 777; *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490.

<sup>39</sup> *Merica v. Burget*, 36 Ind. App. 453, 75 N. E. 1083; *Ross v. Loescher*, 152 Mich. 386, 116 N. W. 193, 125 Am. St. Rep. 418; *Streeper v. Williams*, 48 Pa. 450.

<sup>40</sup> *Sainter v. Ferguson*, 7 C. B. 716; *Parfitt v. Chambre*, L. R. 15 Eq. 36; *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 120, 51 L. Ed. 731, 27 Sup. Ct. Rep. 450; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Whitfield v. Levy*, 35 N. J. L. 149, 154; *Ward v. Hudson River B'g Co.*, 125 N. Y. 230, 26 N. E. 256; *Stewart v. Turner*, 67 Pa. Super. 255; *Grant Marble Co. v. Marshall & Ilsley Bank*, 164 Wis. 547, 165 N. W. 14.

<sup>41</sup> *Reilly v. Jones*, 1 Bing. 302; *Geiger v. Western Md. R.*, 41 Md. 4, 15; *Makletzova v. Diaghileff*, 227 Mass. 100, 116 N. E. 231.

words appropriate for a penalty or forfeiture <sup>42</sup> are of some evidentiary value. "Where a sum of money fixed by the parties 'as liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof' was held by the court to be a penalty, it seems an abuse of language to say that this was in accordance with the parties' intention." <sup>43</sup> It may be said, however, that though the value of these terms is unknown to most persons who are not lawyers, they know whether a stipulation was inserted for the purpose of securing performance by being held *in terrorem* over a promisor, and that the intention of the parties with reference to this makes the vital distinction.<sup>44</sup> But provisions for liquidated damages are intended for security as well as provisions for penalties. When liquidated damages of \$10 a day are stipulated for, if a building is not completed on time, or payment of \$5,000 if a promisor fails to comply with his promise not to enter into competition with the promisee, there can be no doubt that these provisions are intended not merely as a provision for an unpleasant and unexpected contingency but also to secure the promisee in the performance of the main obligation and to make the promisor more reluctant to break it. This distinction, therefore, is at least partially fictitious. The only sense in which the intention of the parties can have any meaning in this connection, and this seems to be the meaning generally given to the phrase by the courts when the matter is analyzed by them, is an intention to name a sum that is fixed in good faith as the equivalent of the injury which will probably be caused by breach of the contract, rather than an attempt to secure performance by a provision for an excessive payment. "Intention of the parties" is, however, a misleading and undesirable designation for this requirement, and the first step towards clearing the confusion

<sup>42</sup> *Van Buren v. Digges*, 11 How. 461, 467, 13 L. Ed. 771; *Nichols v. Haines*, 98 Fed. 692, 39 C. C. A. 235; *Zenor v. Pryor*, 57 Ind. App. 222, 106 N. E. 746; *Keinath v. Reed*, 18 N. Mex. 358, 137 Pac. 841; *Smith v. Wainwright*, 24 Vt. 97, 102.

<sup>43</sup> *Sedgwick on Damages*, § 406, referring to *Kemble v. Farren*, 6 Bing. 141.

<sup>44</sup> Thus in *Dubinsky v. Wells Bros. Co.*, 218 Mass. 232, 237, 105 N. E. 1004, Crosby, J., said: "We are of opinion that this deposit was intended by the parties to secure the performance of the contract and was not to be retained by the defendant as liquidated damages for the breach of the contract by the plaintiff." See also *Westfall v. Albert*, 212 Ill. 68, 72 N. E. 4.

of the law on the subject is to drop the use of the phrase from the discussion. Even the suggested substitute of an inquiry whether the parties in good faith attempted to estimate the real injury—<sup>45</sup> is a somewhat artificial cloak for the true principle; for the only evidence that the court ever has before it bearing on the issue whether the parties in good faith made such an estimate, besides their statement in the contract that the sum named is liquidated damages, or a penalty (and to this as has been seen the court rightly pays little attention) is the reasonableness in fact of the amount; and the matter would be much simplified if it were clearly recognized and stated that the reasonableness of the agreed sum looked at as of the time when the contract was made is the only important thing.<sup>46</sup>

"That is, made a "genuine pre-estimate" of the probable damage. *Wise v. United States*, (U. S. Oct. Term, 1918), 39 Sup. Ct. 303.

"The artificial character of the search for intention is brought out by *Marshall, J., in Seeman v. Biemann*, 108 Wis. 365, 373, 84 N. W. 490. "The law is too well settled to permit any reasonable controversy in regard to it at this time, that where parties stipulate in their contract for damages in the event of a breach of it, using appropriate language to indicate that the damages are agreed upon in advance, and such damages are unreasonable considered as liquidated damages, the stipulated amount will be construed to be a mere forfeiture or penalty and the recoverable damages be limited to those actually sustained. While courts adhere to the doctrine that the intention of the parties must govern in regard to whether damages mentioned in their contract are liquidated, they uniformly take such liberties in regard to the matter, based on arbitrary rules of construction, so called, as may be necessary to effect judicial notions of equity. . . . The judicial power thus exercised cannot properly be justified under any ordinary rules

of judicial construction. . . . In determining whether an amount agreed upon as damages was intended as liquidated damages or as a penalty, rules of language are ignored and the expressed intent of parties is made to give way to the equity of the particular case, having due regard to precedents.

"This court, in harmony with the weight of authority, early adopted the arbitrary rule that where damages may be readily computed, and the stipulated damages, so called, are largely in excess of actual damages, the court will disregard what the parties say they intended and presume that they intended what is fair and reasonable under the circumstances, however much that may violate their language." In *Schoolnick v. Gold*, 89 Conn. 110, 93 Atl. 124, 125, the court said, "A provision in a contract for the payment of a stipulated sum in the event of its breach will be regarded and enforced as one for liquidated damages when three conditions co-exist, to wit: (1) That the damages to be anticipated as resulting from the breach are uncertain in amount or difficult to prove; (2) that there was an intent on the part of the parties



### § 779. Whether the liquidation must be reasonable.

In spite of the language of cases regarding the intention of the parties, there is little doubt that a sum named as liquidated damages in order to be given effect must be reasonable in amount.<sup>47</sup> To be sure, under the recent decisions of the most authoritative courts, the primary question seems to be whether the parties honestly endeavored to fix a sum equivalent in value to the breach.<sup>48</sup> But as has been seen, the chief, almost

to liquidate them in advance; and (3) that the amount stipulated was a reasonable one, that is to say, not greatly disproportionate to the presumable loss or injury. *Banta v. Stamford Motor Co.*, 89 Conn. 51, 92 Atl. 665." In *Mount Airy Milling, etc., Co. v. Runkles*, 118 Md. 371, 376, 84 Atl. 533, L. R. A. 1915 E. 373, the court said, "As just compensation for the injury done is the end which the law aims to reach, the intention of the parties at the time the contract was entered into is often, though not always, given weight; and whilst the language which they have used in the instrument, if they declare that the damages shall be liquidated, is a circumstance that may have its influence; yet even their explicit words will sometimes be disregarded, and the measure of damages will be restricted to such as the evidence shows have been actually sustained, if the entire agreement, and the peculiar circumstances of the subject-matter of the contract indicate that the reason and justice of the case require this to be done." See also *Giesecke v. Cullerton*, 280 Ill. 510, 117 N. E. 777.

<sup>47</sup> *In re Liberty Doll Co., Inc.*, 242 Fed. 695; *People v. C. P. R. R.*, 76 Cal. 29, 18 Pac. 90; *Banta v. Stamford Motor Co.*, 89 Conn. 51, 92 Atl. 665; *Schoolnick v. Gold*, 89 Conn. 110, 93 Atl. 124; *Scofield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *Maxwell v. Allen*, 78 Me. 32, 2 Atl. 386; *Baltimore Bridge Co. v. United Rys., etc., Co.*,

125 Md. 208, 93 Atl. 420; *Myer v. Hart*, 40 Mich. 517, 523, 29 Am. Rep. 553; *Jones v. Stainton*, 200 Mich. 694, 166 N. W. 966; *Biddle v. Biddle*, 202 Mich. 160, 168 N. W. 92; *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 Ohio, 180, 115 N. E. 1014, 1016; *Daly v. Maitland*, 88 Pa. 384, 32 Am. Rep. 457; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739. See also *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 51 L. Ed. 731, 27 Sup. Ct. Rep. 450; *Gay Mfg. Co. v. Camp*, 65 Fed. 794, 13 C. C. A. 137, 68 Fed. 67, 15 C. C. A. 226, 25 U. S. App. 134, 376; *Chicago House Wrecking Co. v. United States*, 106 Fed. 385, 389, 53 L. R. A. 122, 45 C. C. A. 343; *Makletzova v. Diaghileff*, 227 Mass. 100, 116 N. E. 231; *Blunt v. Egeland*, 104 Minn. 351, 116 N. W. 653; *Werner v. Finley*, 144 Mo. App. 554, 129 S. W. 73; *Ward v. Hudson River Building Co.*, 125 N. Y. 230, 235, 26 N. E. 256; *Grant Marble Co. v. Marshall & Ilsley Bank*, 164 Wis. 547, 165 N. W. 14.

In *May v. Crawford*, 142 Mo. 390, 401, 44 S. W. 260, the court said: "The touchstone of validity of contracts of the sort before us is found by solving the question whether the amount ostensibly awarded, for the breach complained of, is or is not reasonably appropriate and just, regard being had to the nature of the stipulation for the possible breach of which the agreement provides."

<sup>48</sup> *Clydebank Engineering, etc., Co.*

the only, means of determining whether the parties in good faith endeavored to assess the damages is afforded by the amount of damage stipulated for, and the nature of the breach upon which the stipulation was agreed to become operative. This is but saying in other words that the reasonableness or unreasonableness of the stipulation is decisive.<sup>49</sup>

*v. Castaneda*, [1905] A. C. 6; *Sun Printing, etc., Association v. Moore*, 183 U. S. 642, 46 L. Ed. 366, 22 S. Ct. 240. There are even some expressions in the latter decision which would warrant the inference that any valuation agreed upon by the parties and clearly stated by them as of the essence of the agreement would be binding, but the case did not require so extreme a view, nor can it be supported. The relief granted against penalties is not granted because of accident or mistake in the agreement, but in opposition to the intention of the parties. It has been suggested that this case should be rested on the doctrine of estoppel, 9 Mich. L. Rev. 588, 18 *id.* 50, but there seems no reason to suppose that a defendant by admitting that the plaintiff's property has an excessive value can render himself liable to pay that value any more fully by means of estoppel than by direct promise.

<sup>49</sup>In *Clydebank Engineering &c. Co. v. Castaneda*, [1905] A. C. 6, 16, Lord Davey said: "It is always open to the parties to show that the amount named in the clause is so exorbitant and extravagant that it could not possibly have been regarded as damages for any possible breach which was in the contemplation of the parties.

"In *Forest & Barr v. Henderson & Co.*, 8 Session Cases (Macpherson), 187, 193, the Lord President (Lord Inglis) says this: 'I hold it to be part of our law on this subject that, even where parties stipulate that a sum of this kind shall not be regarded as a penalty, but shall be taken as an

estimate and ascertainment of the amount of damage to be sustained in a certain event, equity will interfere to prevent the claim being maintained to an exorbitant and unconscionable amount.' My only criticism upon that sentence would be this—that I do not think that that is the right way of putting it. I think the fact of a claim being of an exorbitant or of an unconscionable amount as compared with any possible damages that could have been within the contemplation of the parties, is a reason for holding it not to be liquidated damages but a penalty. But that is only a difference of expression, and with the substance of the observation I entirely agree. But the Lord President adds this significant sentence: 'But, of course, the question whether it is exorbitant or unconscionable is to be considered with reference to the point of time at which the stipulation is made between the parties.' That is to say, you are to consider whether it is extravagant, exorbitant, or unconscionable, whatever word you like to select, at the time when the stipulation is made."

In *Giesecke v. Cullerton*, 280 Ill. 510, 117 N. E. 777, 778, the court said: "While the intention of the parties must be taken into consideration, the language of the contract is not conclusive. The courts of this state, as well as in other jurisdictions, lean toward a construction which excludes the idea of liquidated damages and permits the parties to recover only the damages actually sustained. *Advance Amusement Co. v. Franke*, 288 Ill. 579, 109 N. E. 471; *Gobble v. Linder*, 76 Ill.

**§ 780. Distinction between contracting in advance for a penalty and making an unreasonable accord after breach.**

Courts of equity do not ordinarily relieve against harsh or unfair contracts. Specific enforcement of such contracts may indeed be refused, but the court of equity leaves the parties to their remedy at law, and neither the court of equity nor the court of law considers the adequacy of the consideration for a promise.<sup>50</sup> Therefore, in a contract of accord for breach of a previously broken contract, the parties may agree on what terms of settlement they will (except a larger liquidated sum in settlement of a broken obligation to pay a smaller undisputed and liquidated debt) however unfavorable the accord may be to the party in default. It may be urged therefore, that where the parties agree beforehand on liquidated damages they should have the same freedom to contract, and that however unfair the agreed damages may be, the court should enforce the contract. But experience has shown that dangerous advantage is likely to be taken of a party to a contract if he is allowed to stipulate in advance as a part of the contract that he will pay damages of any amount which the agreement may name, if he breaks the contract. It matters not that the parties have in terms agreed that an excessive sum, known by them to be excessive, shall be paid as damages. The sum is a penalty and payment of it will not be enforced.

**§ 781. Alternative contracts.**

A contract may give an option to one or both parties either to perform a specified act or to make a payment; and though this form of contract cannot be used as a cover for the enforcement of a penalty, yet if on a true construction it appears that it was intended to give a real option, (that is that it was conceived possible that at the time fixed for performance, either alternative might prove the more desirable) the contract will be enforced according to its terms.<sup>51</sup> The fact that a promise is

157; *Scotfield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160. The great weight of authority in this and other jurisdictions is based upon the principle that a stipulated sum will not be allowed as

liquidated damages unless it may be fairly allowed as compensation for the breach."

<sup>50</sup> See *supra*, § 115.

<sup>51</sup> See for instances of such contracts,



expressed in the alternative, however, may easily be given too much weight. As the question of liquidated damages or penalty is based on equitable principles, it cannot depend on the form of the transaction, but rather on its substance. It follows that a contract expressed to be in the alternative when examined in the light of the existing facts, may prove to be (1) a contract contemplating a single definite performance with a penalty stated as an alternative; (2) a contract contemplating a single definite performance with a sum named as liquidated damages as an alternative,<sup>52</sup> or (3) a contract by which either alternative may prove the more advantageous and is as open to the promisor as the other. A contract may belong to the third class even though the term "liquidated damages" is applied in the contract to one alternative.<sup>53</sup> But the fact

and the measure of damages for breach of them—*Cockburn v. Alexander*, 6 C. B. 791, 814; *Deverill v. Burnell*, L. R. 8 C. P. 475; *Steel v. People's Oil Co.*, 147 Ill. App. 133; *Smith v. Bergengren*, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768; *Missouri Edison Electric Co. v. M. J. Steinberg Co.*, 94 Mo. App. 543, 68 S. W. 383; *Taylor v. Smith*, 25 N. Y. App. Div. 632, 50 N. Y. S. 1134. Also *infra*, § 1407. *Jackson v. Hunt*, 76 Vt. 284, 56 Atl. 1010, and *supra*, § 1407.

<sup>52</sup> In *Stewart v. Bedell*, 79 Pa. 336, 339, the court said: "The defendant's covenant not to engage in business within prescribed limits, and the covenant, if he should do so, that he would pay \$10,000 liquidated damages, are not alternative; the latter being merely the agreed consequence of a breach of the former. If covenants be alternative and either be performed there is no breach. An election is given to the covenantor to perform either. But here a breach of the former covenant is necessary to give effect to the latter. Hence there is no election in such case, except that which arises from a determination to suffer the consequence of a breach.

Here then the former covenant is broken, and its breach must be shown to entitle the plaintiff to resort to the secondary covenant to pay the damages. Hence the plea of 'covenants performed' applied only to the breach alleged in the declaration, to wit, of the covenant not to engage in business."

<sup>53</sup> In *Curnan v. Delaware, etc., Rd.*, 138 N. Y. 480, 34 N. E. 201, a contract reserved a right to terminate it on notice and payment for all labor which had been performed plus \$3,000 "liquidated damages." The court held that exercise of the right of termination was not a breach of contract, and therefore if any breach did take place, and the power had not been exercised, the contractor must be allowed to recover his actual damages in excess of \$3,000. So in *Glynn v. Moran*, 174 Mass. 233, 54 N. E. 535, where a contract provided that a joint business might be discontinued at any time, on one party paying the other \$1,500, the court while treating the sum as liquidated damages, said, at page 236, "It is possible that the plaintiff's right to the \$1,500 per annum might stand on the simple ground that the defendants agreed to pay it if they

that a contract appears from its terms to belong to the third class, does not prove that it does not belong to the first. A contract that in consideration of \$10,000 paid on January 1st, the promisor will at his option and as he may prefer, either repay that sum on or before July 1st, with 6% interest or convey an absolute title to Blackacre, may be as obnoxious to equity as any mortgage or penalty. Whether this is so depends simply on whether Blackacre was or was not on January 1 worth greatly in excess of \$10,300. If a contract states that upon breach of an obligation, there shall be enforced, instead of the primary promise, a reasonable alternative mode of settlement the agreement for liquidation of the damages will be enforced.<sup>54</sup> Thus a provision in a note that if it is not paid at maturity, it shall bear a specified high rate of interest, is enforceable if not in conflict with usury laws;<sup>55</sup> though it is obvious that if the rate were unconscionably high, the provision would be penal.<sup>56</sup>

**§ 782. The form of a contract cannot make a penalty enforceable.**

Numerous attempts have been made to achieve the desired

discontinued the business, without resorting to the idea of damage at all. See *Smith v. Bergengren*, 153 Mass. 236, 26 N. E. 690." See also *Pearson v. Williams' Admr.*, 24 Wend. 244, 246, 26 Wend. 630.

<sup>54</sup> The principle was applied in *Hughes v. Hughes*, 162 Ky. 505, 172 S. W. 960. In that case a husband and wife who had separated entered into a contract for the support of the wife. The husband agreed to pay either \$3,500 or to pay \$35 monthly during his wife's life. There was a further provision that if six monthly payments were overdue and unpaid at that time, the wife might at her option demand \$3,500 in full satisfaction of the contract. The husband elected to pay in monthly instalments, but becoming in default for more than six months, was held liable for the capital sum.

<sup>55</sup> *Linton v. National Life Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54; *Finger v. McCaughey*, 114 Cal. 64, 45 Pac. 1004; *Bane v. Gridley*, 67 Ill. 388; *Parker v. Plymell*, 23 Kans. 402; *Crump v. Berdan*, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345; *Hope v. Barker*, 112 Mo. 338, 20 S. W. 567; 34 Am. St. Rep. 387; *Havemeyer v. Paul*, 45 Neb. 373, 389, 63 N. W. 932; *Connecticut, etc., Ins. Co. v. Westerhoff*, 58 Neb. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101. But see *Yndart v. Den*, 116 Cal. 533, 48 Pac. 618, 58 Am. St. Rep. 200, 125 Cal. 85, 57 Pac. 761; *Smith v. Crane*, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20; *Ward's Adm. v. Cornett*, 91 Va. 676, 22 S. E. 494.

<sup>56</sup> See *In re Liberty Doll Co.*, 242 Fed. 695.

result of making a penal sum recoverable in case of the non-performance of a contract. If the question were wholly one of construction such attempts would be successful. It is not difficult to make clear beyond dispute that recovery of any amount named was contemplated and was intended, if the promisor failed to fulfil his primary undertaking or any performance named as an alternative; but though the decisions are not wholly uniform, principle and authority both justify the statement at the head of this section. An alternative promise, as has been said, is ordinarily binding according to its terms. A promise to give either a horse on Oct. 1st, or a cow on Oct. 2d is unobjectionable; but an alternative promise, no more than any other form of bargain can be made successfully a vehicle for the enforcement of a penalty. A promise to give a horse of ordinary value on Oct. 1st, or to pay ten thousand dollars on Oct. 2d, contains presumably in the second alternative a provision for a penalty. Even though what is in fact a penal sum be stated as an absolute debt, its character may, nevertheless, appear from the nature of the contract and surrounding circumstances. If so, the bargain is unenforceable. Thus where a company leasing machines contracted for rental payable on the first day of each month, but the lease contained a further provision that if the rent thus due should be paid on or before the 15th day of the month, a discount of 50% should be allowed, it was held that the smaller sum was the actual debt, and that even though payment was not made before the 15th of the month, only the smaller sum could be recovered.<sup>57</sup> It is true that a contrary decision on a similar lease has been reached by the Circuit Court of Appeals,<sup>58</sup> Judge Sanborn saying: "The parties to this agreement were competent to contract and they expressly agreed to the con-

<sup>57</sup> *Goodyear Shoe Machinery Co. v. Sels*, 157 Ill. 186, 41 N. E. 625. See also *Longworth v. Askren*, 15 Oh. St. 370. In this case an instalment note was payable in ten years with interest. It contained the proviso that if each instalment was paid when due, or not more than ten days thereafter, \$200 should be remitted from the amount

of the note at the maturity of the last instalment. The note was held to provide for a penalty, and the maker held entitled to the deduction though he had not made prompt payments.

<sup>58</sup> *United Shoe Machinery Co. v. Abbott*, 158 Fed. 762, 86 C. C. A. 118, Adams, J., diss.

trary. If agreements for discounts were vulnerable as penalties there could be but one criterion of their validity, and that would be their relation to lawful interest. If the parties were not free to contract for such discounts as they chose, then agreements for them in excess of lawful interest must be void, and those not so in excess alone valid. There could be no other standard by which to try them. And a rule of law to the effect that notwithstanding the express agreement of the parties the actual debt, when an unearned discount is agreed upon, is the agreed debt less the discount, would avoid every contract for a discount in excess of lawful interest, and would strike down thousands of commercial contracts that are now valid and enforceable." The battles of the law frequently have to be fought over the same ground; but it would seem that a contract, the strict enforcement of which was thought by courts of equity 400 years ago too harsh to be permitted, would be thought obnoxious to the same objection to-day. Every word which Judge Sanborn said in support of the provision before him is applicable to a money bond on condition with penalty.

In the case of the bond as in the case before the court, the obligor promises in terms that his debt shall be the larger sum, and there is a proviso that if half that sum is paid on a certain day, the obligation shall be void. So far as the language of the contract goes, there is no undertaking to pay the smaller sum, and it was only by a construction finding no justification in the language of the instrument but based only on the comparative values of the penalty and the performance of the condition that the courts finally decided that there was an implied promise to perform the condition of the bond.<sup>59</sup> Nor does the argument seem valid that if the promise in question were held to involve a penalty, an agreement for discount of more than legal interest would be open to the same objection. Where no usury law is in force, parties may obviously bargain for whatever compensation they choose, whether by way of direct interest, or by way of discount, so long as the amount is not penal in character; and as interest is calculated from day to day, rather than given in a lump sum for any delay whatever, the case would necessarily be extreme where a reservation of interest

<sup>59</sup> See *supra*, § 670.

or discount would be penal. In the case in question where a single day's delay over the permitted fifteen involves doubling the amount to be paid the case is very extreme indeed. If a usury law were in force, the question is one of construction of the statute. Does it apply to discounts for prompt payment or not? But merely because the discount is not obnoxious to the statute, it does not follow that it may not be objectionable as a penalty, if unreasonable in amount.<sup>60</sup> There seems no reason to doubt a moderate discount, such as is common in case of electric light or gas contracts, would be enforceable.<sup>61</sup>

Similar in principle is a note for a fixed sum payable at a day certain, with a provision for a discount if paid before maturity. Such notes have been held enforceable.<sup>62</sup> But if the amount of the discount were unconscionably large it would seem to indicate that the smaller sum was in truth the actual debt, and the larger sum the penalty. And if a contract were obviously framed to evade a usury law, which was in substance violated, the contract would be unenforceable.<sup>63</sup>

<sup>60</sup> See decisions *infra* on notes where the rate of interest is increased after maturity.

<sup>61</sup> In *Missouri Edison Electric Co. v. Steinberg Hat & Fur Co.*, 94 Mo. App. 543, 68 S. W. 383, an electric lighting contract provided for discounts from the monthly bills if paid by the tenth of the month. The discount ranged from ten per cent to forty per cent, varying with the amount of the bill; the discount being greater, the larger the bill. The contract was upheld and it seems rightly; the large discount from the large bill being justified by the ordinary commercial practice of selling large quantities at lower rates than smaller quantities. Whether such a contract made by a public service company might not be obnoxious to the objection of being a device for improperly giving a lower rate to a large consumer than to a small one, is another question. The court relied on two earlier decisions: *Missouri Electric Light &*

*Power Co. v. Carmody*, 72 Mo. App. 534, 537; *Missouri Edison Electric Co. v. Bry*, 88 Mo. App. 135, 136. But these decisions do not involve the same question as the later case. In the two earlier decisions there were involved contracts providing for a discount, not for prompt payment but in consideration of an agreement by the consumer to take electric current from the plaintiff, in one case of five years and the other for three years.

<sup>62</sup> *Carter v. Corley*, 23 Ala. 612, *Waggoner v. Cox*, 40 Oh. St. 539; *Campbell v. Shields*, 6 Leigh, 517. But see *contra* *Moore v. Hylton*, 1 Dev. Eq. 429.

<sup>63</sup> *Orr v. Churchill*, 1 H. Bl. 227; *Clark v. Kay*, 26 Ga. 403; *Brown v. Maulsby*, 17 Ind. 10; *Kurtz v. Sponsable*, 6 Kan. 395; *Davis v. Freeman*, 10 Mich. 188; *Gray v. Crosby*, 18 Johns. 219; *Shelton v. Gill*, 11 Ohio, 417; *cf.* *Gould v. Bishop Hill Colony*, 35 Ill. 324.

**§ 783. Rules aiding the court in determining whether a sum is liquidated damage.**

Whether the essential question to be determined is (1) the reasonableness of a sum named as liquidated damages or (2) the fact that the parties attempted to value in good faith when the contract was made, the actual injury which would be caused by a breach, there cannot well be any other liquidated damages for a breach which causes an injury, the extent of which is mathematically certain, than the very sum thus mathematically determined; and if the amount of the injury, though not mathematically certain, can readily be valued, and a valuation must, as matter of obvious fact, fall within narrow limits, not only is a sum much beyond those limits unreasonable, but the parties must be regarded as chargeable with notice of that fact. Moreover, there is small reason to suppose that the parties will attempt in good faith to value the injury beforehand, if it can perfectly well be valued afterwards; so that not only are the parties more likely to make a *bona fide* attempt to liquidate their damage if from the nature of the contract the breach will cause damage uncertain in amount and not readily calculable, but the courts also are more ready to regard a provision as reasonable where ordinary principles of compensation cannot easily be applied, and will not afford certain relief.<sup>64</sup> The amount of the sum named, however, even

<sup>64</sup> Thus in *Ponsonby v. Adams*, 6 Brown Parl. Cas. 417. It was covenanted, that if the tenant failed to reside on an estate in Ireland leased to him, his rent should rise from 125*l.* to 150*l.* and it was decreed that the 25*l.* additional rent was to be considered as liquidated damages. In *Rolfe v. Peterson*, 6 Brown Parl. Cas. 470, the same doctrine was laid down respecting a covenant that the tenant should pay 5*l.* *per annum* for every acre broken up and converted into tillage. In *Lowe v. Peers*, 4 Burr. 2225, 2229, the same was held of a promise to pay 1000*l.* if the defendant married any woman except the plaintiff. In *Clydebank Engineering, etc.,*

*Co. v. Castaneda*, [1905] A. C. 6, 11, Lord Davey said of a stipulation for damages of £500 a week for delay in delivering torpedo boat destroyers: "The very reason why the parties do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult, and expensive. If I wanted an example of what might or might not be said and done in controversies upon damages, unless the parties had agreed beforehand, I could not have a better example than that which the learned counsel has been entertaining us with

in such a case, has also an important bearing upon the question. Though the mere fact that, as it turns out, the sum named exceeds the actual damage, will not make it a penalty, since the reasonableness of the provision must be considered as of the date of the contract,<sup>65</sup> yet the excessive size of the sum agreed

for the last half-hour in respect of the damage resulting to the Spanish Government by the withholding of these vessels beyond the stipulated period. Supposing there was no such bargain, and supposing the Spanish Government had to prove damages in the ordinary way without insisting upon the stipulated amount of them, just imagine what would have to be the cross-examination of every person connected with the Spanish Administration such as is suggested by the commentaries of the learned counsel: "You have so many thousand miles of coast-line to defend by your torpedo-boat destroyers; what would four torpedo-boat destroyers do for that purpose? How could you say you are damaged by their non-delivery? How many filibustering expeditions could you have stopped by the use of four torpedo-boat destroyers?" See also *Kemble v. Farren*, 6 Bing. 141; *Reynolds v. Bridge*, 6 El. & Bl. 528; *Clark v. Barnard*, 108 U. S. 436, 456, 27 L. Ed. 780, 2 Sup. Ct. 878; *Sun Printing, etc., Assoc. v. Moore*, 183 U. S. 642, 46 L. Ed. 366, 22 Sup. Ct. 240; *In re Liberty Doll Co.*, 242 Fed. 695; *Consolidated Lumber Co. v. Los Angeles*, 33 Cal. App. 698, 166 Pac. 385; *School-nick v. Gold*, 89 Conn. 110, 93 Atl. 124, 125; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345; *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267; *Hamilton v. Overton*, 6 Blackf. (Ind.) 206, 38 Am. Dec. 136; *Commonwealth v. Ginn*, 111 Ky. 110, 63 S. W. 467; *Maxwell v. Allen*, 78 Me. 32, 2 Atl. 386, 57 Am. Rep. 783; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. 760, 85 Am.

St. Rep. 473, 89 Minn. 12, 93 N. W. 659; *Womack v. Coleman*, 89 Minn. 17, 93 N. W. 663; *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359; *St. Louis v. Parker-Washington Co.*, 271 Mo. 229, 196 S. W. 767, cert. denied 245 U. S. 651, 38 S. Ct. 11, 62 L. Ed. 531; *Hurd v. Dunsmore*, 63 N. H. 171; *Lansing v. Dodd*, 45 N. J. L. 525; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Lange v. Werk*, 2 Oh. St. 519; *Alvord v. Banfield*, 85 Oreg. 49, 166 Pac. 549; *Powell v. Burroughs*, 54 Pa. St. 329; *Emery v. Boyle*, 200 Pa. 249, 49 Atl. 779; *Muse v. Swayne*, 2 Lea (Tenn.), 251, 31 Am. Rep. 607; *Crawford v. Heatwole*, 110 Va. 358, 66 S. E. 46, 34 L. R. A. (N. S.) 587; *Herberger v. Orr Co.*, 62 Wash. 526, 114 Pac. 178; *Barrett v. Monro*, 69 Wash. 229, 124 Pac. 369, 40 L. R. A. (N. S.) 763; *Lyman v. Babcock*, 40 Wis. 503. Where a partner agreed not to use intoxicants and that if he did so, the partnership should be terminated and he should lose his interest therein and be entitled in lieu thereof merely to a stipulated salary until the breach occurred, the provision was held enforceable as liquidated damages. *Henderson v. Murphree*, 109 Ala. 556, 20 So. 45. "The certainty of some damage and the uncertainty of means and standards by which the actual damage can be ascertained requires the court to uphold the contract as one for liquidated damages."

<sup>65</sup> *Clydebank Engineering, etc., Co. v. Castaneda*, [1905] A. C. 6; *Sun Printing, etc., Association v. Moore*, 183 U. S. 642, 46 L. Ed. 366, 22 Sup. Ct. 240; *Blackwood v. Liebke*, 87 Ark. 545, 113 S. W. 210; *Banta v.*

upon may tend to show that the parties did not make a *bona fide* effort to fix the actual value of the injury.<sup>66</sup> Even more clearly, where a contract contains a number of promises or a continuing obligation, a provision that a fixed sum shall be paid for any breach of any promise, or for any delay in performing the continuing obligation is a penalty.<sup>67</sup> The provision is in fact un-

Stamford Motor Co., 89 Conn. 51, 92 Atl. 665; Schoolnick v. Gold, 89 Conn. 110, 93 Atl. 124; District of Columbia v. Harlan, etc., H. Co., 30 D. C. App. 270; Baltimore Bridge Co. v. United Rys., etc., Co., 125 Md. 208, 93 Atl. 420; Mead v. Wheeler, 13 N. H. 351.

<sup>66</sup> Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Bradstreet v. Baker, 14 R. I. 546; Ward v. Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256.

<sup>67</sup> Kemble v. Farren, 6 Bing. 141; Wilson v. Love, L. R., [1896] 1 Q. B. 626; Magee v. Lavell, L. R. 9 C. P. 107, 111; Elphinstone v. Monkland Iron & Coal Co., 11 App. Cas. 332, 342; Clydebank, etc., Co. v. Castaneda, [1905] App. Cas. 6, 15; Pye v. British, etc., Syndicate, [1906] 1 K. B. 425, 429; Bignall v. Gould, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491; Keeble v. Keeble, 85 Ala. 552, 5 So. 149; Mansur, etc., Co. v. Tissier, etc., Co., 136 Ala. 597, 33 So. 818; Home Land, etc., Co. v. McNamara, 111 Fed. 822, 49 C. C. A. 642; Smith v. Newell, 37 Fla. 147, 20 So. 249; Greenblatt v. McCall, 67 Fla. 165, 64 So. 748; Trower v. Elder, 77 Ill. 452; Parker-Washington Co. v. Chicago, 267 Ill. 136, 107 N. E. 872; Heatwole v. Gorrell, 35 Kans. 692, 12 Pac. 135; State v. Larson, 83 Minn. 124, 86 N. W. 3, 54 L. R. A. 487; Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Squires v. Elwood, 33 Neb. 126, 49 N. W. 939; Monmouth Park Assn. v. Wallis Iron Works, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. 626; Summit v. Morris County Traction Co., 85 N. J. L. 193, 88 Atl. 1048, L. R. A. 1915 E. 385;

Lampman v. Cochran, 16 N. Y. 275; Berry v. Wisdom, 3 Oh. St. 241; El Reno v. Cullinane, 4 Okla. 457, 46 Pac. 510; Wilhelm v. Eaves, 21 Ore. 194, 27 Pac. 1053, 14 L. R. A. 297; Alvord v. Banfield, 85 Oreg. 49, 166 Pac. 549; Keck v. Bieber, 148 Pa. St. 645, 24 Atl. 170, 33 Am. St. 846; Johnson v. Cook, 24 Wash. 474, 64 Pac. 729; Sledge v. Arcadia Orchard Co., 77 Wash. 477, 137 Pac. 1051; Madison v. American Sanitary Engineering Co. 118 Wis. 480, 95 N. W. 1097. It is true that in Wallis v. Smith, 21 Ch. D. 243, where the leading English cases up to that time on the subject of penalties and liquidated damages were commented upon by the Court of Appeal, Jessel, Master of the Rolls, thus classified the decisions and *dicta* on the subject:

"1. Where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really a penalty, and you can only recover the actual damage, and the court will not sever the stipulations.

"2. Cases 'in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will, in all human probability, be small—that is, where it is not absolutely necessary that they should be small; but it is so near to a necessity, having regard to the probabilities of the case, that the court will presume it to be so.'



reasonable, and, furthermore, it is impossible to show in such a case that the parties made an honest attempt to estimate the actual injury which would be caused, since no reasonable person would suppose that the injury from any breach which might oc-

"Then the question is whether in what class of cases the same rule applies. Now, upon this there is no decision. There are a great many *dicta* upon the question, and a great many *dicta* on each side. I do not think it is necessary to express a final opinion in this case, but I do say this, that the court is not bound by the *dicta* on either side, and the case is open to discussion. It is within the principle, of principle it be, of a larger sum being a penalty for non-payment of a smaller sum; but, at the same time, it is also within another class of cases to which I am now going to call attention.

"3. The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are *dicta* there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance the sum has always been treated as liquidated damages.

"4. A class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does apply and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases." But in *Pye v. British, etc., Commercial Syndicate,*

*Ltd.*, [1906] 1 K. B. 425, 429, Bigham, J., said, "I think the only rule which applies to all cases is that the judge must look to all the circumstances of each particular contract—to what the parties did as well as to the language used—and must say from them what the intention of the parties was. No doubt, notwithstanding the observations of Jessel, M. R., in *Wallis v. Smith*, 21 Ch. D. 243, one thing to be taken into consideration is to see whether the sum agreed to be paid is to be paid on the happening of one event or of many events some of which may be of great and some of small importance, and with great deference to the criticism of Jessel, M. R., in that case, I think the dictum of Lord Coleridge, C. J., in *Magee v. Lavell*, L. R. 9 C. P. 107, at page 111, is right when he said in the course of the argument: 'The general principle of law appears to be that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty.' I have myself always understood that that is one of the rules which must guide a judge when he has to discover what the intention of the parties was. The only exception I would take to that dictum is the use of the word 'must,' and I am sure that Lord Coleridge, C. J., did not mean to say that if other circumstances existed which would throw light on the intention of the parties in making the agreement a judge might not come to a contrary conclusion. He meant only that this fact was an important matter to take into consideration when seeking to find out the intention of the parties."

cur would involve the same damage as any other breach. For the same reason an agreement to forfeit all wages which may be due at the time of a breach of a contract of service provides for a penalty;<sup>68</sup> while an agreement for the loss of six days' pay<sup>69</sup> or ten dollars<sup>70</sup> for such a breach will be enforced. Whether a provision is penal or only a liquidation of damages is a question of law.<sup>71</sup>

#### § 784. Classifications by Somerville, J., and by Lord Dunedin.

As criteria for determining whether a stipulation is for liquidated damages or for a penalty, Somerville, J., in a leading Alabama decision,<sup>72</sup> suggested certain rules. Some of these are open to question, as will appear from the previous discussion, but they, nevertheless deserve examination. He says: "The following general rules may be deduced from the authorities, each having more or less weight, according to the peculiar circumstances of each case, and the nature of the contract sought to be construed: (1) The court will always seek to ascertain the true and real intention of the contracting parties, giving weight to the language or words used in the contract, but not always being absolutely controlled by them, when the enforcement of such contract operates with unconscionable hardship, or otherwise works an injustice. (2) The mere denomination of the sum to be paid as 'liquidated damages,' or as 'a penalty,' is not conclusive on the court as to its real character. Although designated as 'liquidated damages' it may be construed as a penalty, and often when called a 'pen-

<sup>68</sup> *Richardson v. Woehler*, 26 Mich. 90; *Schrimpf v. Manufacturing Co.*, 86 Tenn. 219, 6 S. W. 131, 6 Am. St. Rep. 832. But see *Stone Sand & Gravel Co. v. United States*, 234 U. S. 270, 58 L. Ed. 1308, 34 Sup. Ct. 865; *Schietenger v. Bridgeport Knife Co.*, 54 Conn. 64, 5 Atl. 859; *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447, 58 Am. Dec. 718.

<sup>69</sup> *Wilson v. Godkin*, 136 Mich. 106, 98 N. W. 985.

<sup>70</sup> *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865. See also *Bilz*

*v. Powell*, 50 Colo. 482, 117 Pac. 344, 38 L. R. A. (N. S.) 847; *Gleaton v. Fulton, etc.*, Mills, 5 Ga. App. 420, 63 S. E. 520; *Werner v. Finley*, 144 Mo. App. 554, 129 S. W. 73; *Salzer v. Sheffield, etc., Co.*, 115 N. Y. S. 81.

<sup>71</sup> *Sainter v. Ferguson*, 7 C. B. 716; *Reindel v. Schell*, 4 C. B. (N. S.) 97; *Greenblatt v. McCall*, 67 Fla. 165, 64 So. 748; *Golden v. McKim*, 37 Nev. 205, 141 Pac. 676; *Whitfield v. Levy*, 35 N. J. L. 149, 154; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45.

<sup>72</sup> *Keeble v. Keeble*, 85 Ala. 552, 5 So. 149, 150.

ty' it may be held to be liquidated damages, where the intention to the contrary is plain. (3) The courts are disposed to lean against any interpretation of a contract which will make it liquidated damages; and, in all cases of doubtful intention, will pronounce the stipulated sum a penalty. (4) Where the payment of a smaller sum is secured by an obligation to pay a larger sum, it will be held a penalty, and not liquidated damages. (5) Where the agreement is for the performance or non-performance of a single act, or of several acts, or of several things which are but minor parts of a single complex act, and the precise damage resulting from the violation of each covenant is wholly uncertain or incapable of being ascertained save by conjecture, the parties may agree on a fixed sum as liquidated damages, and the courts will so construe it, unless it is clear on other grounds that a penalty was really intended. (6) When the contract provides for the performance of several acts of different degrees of importance, and the damages resulting from the violation of some, although not all, of the provisions are of easy ascertainment, and one large gross sum is stipulated to be paid for the breach of any, it will be construed a penalty, and not as liquidated damages. (7) When the agreement provides for the performance of one or more acts, and the stipulation is to pay the same gross sum for a partial as for a total or complete breach of performance, the sum will be construed to be a penalty. (8) Whether the sum agreed to be paid is out of proportion to the actual damages, which will probably be sustained by a breach, is a fact into which the court will not enter on inquiry, if the intent is otherwise made clear that liquidated damages, and not a penalty, is in contemplation. (9) Where the agreement is in the alternative, to do one of two acts, but is to pay a larger sum of money in the one event than in the other, the obligor having his election to do either, the amount thus agreed to be paid will be held liquidated damages, and not a penalty. (10) In applying these rules, the controlling purpose of which is to ascertain the real intention of the parties, the court will consider the nature of the contract, the terms of the whole instrument, the consequences naturally resulting from a breach of its stipulations, and the peculiar circumstances surrounding the transaction; thus permitting

each case to stand, as far as possible, on its own merits and peculiarities." With these rules may be compared a summary by Lord Dunedin in a recent decision of the House of Lords.<sup>73</sup>

"1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case.

"2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.<sup>74</sup>

"3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.<sup>75</sup>

"4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

"(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.<sup>76</sup>

"(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.<sup>77</sup> This though one of the most ancient instances is truly a corollary to the last test. Whether it has its historical origin in the doctrine of the common law that when A promised to pay B a sum of money on a certain day and did not do so,

<sup>73</sup> Dunlop Pneumatic Tyre Co., Ltd., v. New Garage & Motor Co., Ltd., [1915] A. C. 79, 86.

<sup>74</sup> Citing Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda, [1905] A. C. 6.

<sup>75</sup> Citing Public Works Commis-

sioner v. Hills, [1906] A. C. 368, and Webster v. Bosanquet, [1912] A. C. 394.

<sup>76</sup> Citing illustration given by Lord Halsbury in Clydebank Case, [1905] A. C. 6.

<sup>77</sup> Citing Kemble v. Farren, 6 Bing. 141.

B could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable,—a subject which much exercised Jessel, M. R.,<sup>78</sup> is probably more interesting than material.

“(c) There is a presumption (but no more) that it is a penalty when ‘a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.’<sup>79</sup> On the other hand:

“(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.”<sup>80</sup>

**§ 785. Reasonable stipulated damages per day for delay are enforceable.**

It is commonly provided in building and construction contracts, that there shall be deducted from the contractor's compensation a fixed sum for each day's delay in performing the contract beyond the day fixed therein. Such damages are obviously graded according to the extent of the breach, increasing proportionately with each day's delay. Moreover, each day's delay while unquestionably injurious, is injurious frequently in ways that are difficult to estimate. Accordingly, unless the sum fixed in the contract is very unreasonable the provision is treated as one for liquidated damages.<sup>81</sup> But if the

<sup>78</sup> Wallis v. Smith, 21 Ch. D. 243.  
<sup>79</sup> Citing Lord Watson in Lord Elphinstone v. Monkland Iron and Coal Co., 11 App. Cas. 332.  
<sup>80</sup> Citing Clydebank Case, Lord Halsbury, [1905] A. C. 6, 11; Webster v. Bosanquet, Lord Mersey, [1912] A. C. 394, 398.  
<sup>81</sup> Fletcher v. Dyche, 2 T. R. 32. In Clydebank, etc., Steamship Co. v. Castaneda, [1905] A. C. 6, £500 a week

for delay in furnishing war vessels to the Government of Spain, was upheld. So in Wise v. United States, (U. S. Oct. Term, 1918) 39 Sup. Ct. 303, \$200 a day for delay in building two laboratories for the Department of Agriculture; in United States v. United Engineering Co., 234 U. S. 236, 241, 58 L. Ed. 1294, \$25 a day for delay in constructing a pumping plant; in United States v. Bethlehem Steel Co.,

contract is totally abandoned, the agreed damages cannot be recovered. The provision is construed as applying only to delayed—not to abandoned performance.<sup>82</sup> And if the daily

205 U. S. 105, 51 L. Ed. 731, 27 Sup. Ct. 450, \$25 a day for delay in delivery of gun carriages; in *Maryland &c Contracting Co. v. United States*, 241 U. S. 184, 60 L. Ed. 945, \$20 a day for delay in dredging a channel, and in *Bedford v. J. Henry Miller, Inc.*, 212 Fed. 368, 129 C. C. A. 44, \$50 a day for delay in stonework, the contract price of which was \$190,000. And in many cases in the United States such liquidated damages have been enforced in building and construction contracts. *Wood v. Niagara, etc., Co.*, 121 Fed. 818, 58 C. C. A. 256; *Chapman, etc., Co. v. Security, etc., Ins. Co.*, 149 Fed. 189, 79 C. C. A. 137; *Simpson Bros. Corp. v. White*, 187 Fed. 418; *Bankers' Surety Co. v. Elkhorn River Drainage Dist.*, 214 Fed. 342, 130 C. C. A. 650; *Stratton v. Fike*, 166 Ala. 203, 51 So. 874; *George v. Roberts*, 186 Ala. 521, 65 So. 345; *Lincoln v. Little Rock Granite Co.*, 56 Ark. 405, 19 S. W. 1056; *Allen v. Narver (Cal.)*, 172 Pac. 980; *Denver, etc., Co. v. Rosenfeld Const. Co.*, 19 Colo. 539, 36 Pac. 146; *Dean v. Connecticut Tobacco Corp.*, 88 Conn. 619, 92 Atl. 408; *Banta v. Stamford Motor Co.*, 89 Conn. 51, 92 Atl. 665; *Washington v. Potomac, etc., Co.*, 132 Ga. 849, 65 S. E. 80; *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267; *Parker-Washington Co. v. Chicago*, 267 Ill. 136, 107 N. E. 872; *United States, etc., Foundry Co. v. Chicago*, 185 Ill. App. 558; *Barber, etc., Co. v. Wabash*, 43 Ind. App. 167, 86 N. E. 1034; *Kelly v. Fejervary*, 111 Ia. 693, 83 N. W. 791; *St. Louis, etc., Co. v. Gaba*, 78 Kans. 432, 97 Pac. 435; *Ford v. Ingles Coal Co.*, 31 Ky. L. Rep. 382, 102 S. W. 332; *Illinois Surety Co. v. Garrard Hotel Co.* (34 Ky. L. Rep.), 118 S. W. 967; *Hebert v. Weil*, 115

La. 424, 39 So. 389; *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775; *Baltimore Bridge Co. v. United Rys. &c. Co.*, 125 Md. 208, 93 Atl. 420; *Norcross Bros. Co. v. Vose*, 199 Mass. 81, 85 N. E. 468; *Germain v. Union School Dist.*, 158 Mich. 214, 122 N. W. 524, 123 N. W. 798; *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044; *Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456; *McClintic Marshall Const. Co. v. Board*, 83 N. J. Eq. 539, 91 Atl. 881; *Ferber Const. Co. v. Board of Education*, 90 N. J. L. 193, 100 Atl. 329; *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 479, 93 N. E. 81; *Macey Co. v. New York*, 144 N. Y. App. D. 408, 129 N. Y. S. 241; *McKegney v. Illinois Surety Co.*, 180 N. Y. App. D. 507, 167 N. Y. S. 843; *Malone v. Philadelphia*, 147 Pa. 416, 23 Atl. 628; *Carter v. Kaufman*, 67 S. C. 456, 45 S. E. 1017; *Railroad Company v. Cabinet Co.*, 104 Tenn. 568, 58 S. W. 303, 78 Am. St. Rep. 933; *Garrett v. Dodson (Tex. Civ. App.)*, 199 S. W. 675; *Wheeling, etc., Co. v. Wheeling, etc., Co.*, 58 W. Va. 62, 51 S. E. 129; *Erickson v. Green*, 47 Wash. 613, 92 Pac. 449; *Manistee, etc., Co. v. Shores Lumber Co.*, 92 Wis. 21, 65 N. W. 863; *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579, 99 N. W. 351; *Scott v. Dent*, 38 Up. Can. (Q. B.) 30; *Horton v. Tobin*, 20 N. S. 169.

<sup>82</sup> *Bacigalupi v. Phoenix, etc., Co.*, 11 Cal. App. 527; *Hahn v. Horstman*, 12 Bush. 249; *Murphy v. United States, etc., Co.*, 100 N. Y. App. Div. 93, 91 N. Y. S. 582. But where the contractor retained possession though the parties were in dispute as to the adequacy of his work, liquidated damages of \$10 a day were allowed from

or weekly sum stipulated is out of proportion to any possible damage that could be caused by a delay, it will be held penal even for delayed performance.<sup>83</sup> Similarly, for delay by a carrier, the contract may provide for reasonable daily damages;<sup>84</sup> and the common provisions for demurrage in charter parties involve the same principle.<sup>85</sup> So in contracts for the sale of goods,<sup>86</sup> or for engaging in competitive business,<sup>87</sup> or other contracts,<sup>88</sup> damages for each day's breach may be fixed. But when a contract is to furnish numerous articles, courts have refused to enforce a stipulation for the same daily damages for total failure to deliver any part of the goods and for a failure to deliver a single one of the articles to be delivered, especially where there has been substantial compliance with the con-

April 1 to Oct. 6, when the owner ejected the contractor. *Phaneuf v. Corey*, 190 Mass. 237, 76 N. E. 718. And in *Bedford v. J. Henry Miller, Inc.*, 212 Fed. 368, 129 C. C. A. 44, damages of \$50 a day for 392 days were enforced.

<sup>83</sup> *Coen v. Birchard*, 124 Iowa, 394, 100 N. W. 48 (\$5 a day for building which would rent for \$25); *Ross v. Loescher*, 152 Mich. 386, 116 N. W. 193, 125 Am. St. Rep. 418 (\$20 a day on structure costing \$825); *Cochran v. People's Railway*, 113 Mo. 359, 21 S. W. 6 (\$50 a day on building costing \$18,000); *McCann v. Albany*, 11 N. Y. App. Div. 378, 42 N. Y. S. 94 (\$50 a day, sewer construction); *Wheedon v. American, etc., Co.*, 128 N. C. 69, 38 S. E. 255 (\$10 a day for building which would rent for \$30 a month); *West v. Higgs*, (N. C. 1917), 93 S. E. 719; *Jennings v. Willer* (Tex. Civ. App.), 32 S. W. 24 (\$25 a day for house which would rent for \$150); *J. G. Wagner v. Cawker*, 112 Wis. 532, 88 N. W. 599 (\$50 a day on \$17,000 building); *Grant Marble Co. v. Marshall & Halsey Bank*, 164 Wis. 547, 165 N. W. 14. Damages of \$10 a day for delay in constructing a house were sustained in *DeGraff v. Wickham*, 89 Ia. 720, 52 N. W. 503, 57 N. W. 420;

*Crawford v. Heatwole*, 110 Va. 358, 66 S. E. 46, 34 L. R. A. (N. S.) 587; *Reichenbach v. Sage*, 13 Wash. 364, 43 Pac. 354. In *Baltimore Bridge Co. v. United Rys., etc., Co.*, 125 Md. 208, 93 Atl. 420, liquidated damages of \$25 a day were allowed for 59 days' delay in completing a bridge the total cost of which was less than \$7,000, but there were large actual damages due to the interference with the operation of a railway, and in *John Cowan, Inc., v. Meyer*, 125 Md. 450, 94 Atl. 18, liquidated damages of \$95 a day were allowed for about thirty days on a contract for excavation, for which the price was about \$10,000.

<sup>84</sup> *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

<sup>85</sup> *Creighton v. Dilks*, 49 Fed. 107; *Randall v. Sprague*, 74 Fed. 274, 21 C. C. A. 334, 33 U. S. App. 464; *Baldwin v. Sullivan Timber Co.*, 20 N. Y. S. 496.

<sup>86</sup> *Bergheim v. Blenavon, etc., Co.*, L. R. 10 Q. B. 319; *Louisville Water Co. v. Youngstown Bridge Co.*, 16 Ky. L. Rep. 350.

<sup>87</sup> *Kimbro v. Wells*, 112 Ark. 126, 165 S. W. 645.

<sup>88</sup> *Morris v. Wilson*, 114 Fed. 74, 52 C. C. A. 22.



tract. "Suppose," it has been said, "the contract was to furnish 10,000,000 brick, and the plaintiff had substantially furnished that number, but through inadvertence the delivery was two or three bricks short of the 10,000,000. Would that subject the plaintiff to \$50 a day for an indefinite time?"<sup>80</sup> The distinction, however, between a contract for a building and one for building materials is somewhat tenuous. One who contracts to erect a building must procure numerous materials. If he will be unable to finish the building until he obtains all of the numerous articles for which he has contracted, the failure to furnish any substantial amount of the materials will involve corresponding delay in finishing the whole building. In the decision from which the passage above quoted is taken, the general contractor required for the performance of his contract a quantity of terra cotta manufactured according to special designs. If the general contractor is subject to a daily liability for each day's delay in finishing the building, and that delay is due to the failure to obtain all the terra cotta required, the stipulation seems as reasonable when applied to the building materials as when applied to the building itself. The case illustrates the difficulty of laying down any narrower test than the reasonableness in each particular case of the sum agreed upon as compensation for the breach. A lump sum made payable for any delay whatever beyond a stipulated date is ob-

<sup>80</sup> *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 505, 148 C. C. A. 257, citing *Chicago, B. & Q. R. Co. v. Dockery*, 115 C. C. A. 173, 195 Fed. 221; *East Moline Co. v. Weir Plow Co.*, 37 C. C. A. 62, 95 Fed. 250; *O'Brien v. Illinois Surety Co.*, 121 C. C. A. 546, 203 Fed. 436; *Heatwole v. Gorrell*, 35 Kan. 692, 12 Pac. 135, 137; *Gower v. Saltmarsh*, 11 Mo. 271; *Long v. Towl*, 42 Mo. 545, 550, 97 Am. Dec. 355; *Boulware v. Crohn*, 122 Mo. App. 571, 99 S. W. 796, 800; *Wilkinson v. Colley*, 164 Pa. 35, 30 Atl. 286, 26 L. R. A. 114; *Emery v. Boyle*, 200 Pa. 249, 49 Atl. 779, 780; *Keeble v. Keeble*, 85 Ala. 552, 5 So. 149; *Madler v. Silverstone*, 55 Wash. 159,

104 Pac. 165, 166, 34 L. R. A. (N. S.) 1.

In *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 148 C. C. A. 257, the contract in question was for the manufacture and sale of \$13,000 worth of ornamental terra cotta to be used by the purchasers in the construction of a court house for which they were the general contractors. The contract for the terra cotta provided that should the contract not be completed by a fixed date the manufacturer should pay \$50 liquidated damages for each day's delay, but should the contract be completed earlier he should receive \$50 per day as bonus. The stipulation for damages was held unenforceable.



noxious to the objection of giving the same damage for a small breach as for a large one, and should not be allowed,<sup>90</sup> unless any delay whatever is totally destructive of the value of the performance.

# § 786. Stipulation for attorney's fees.

It is a common provision in promissory notes and an occasional provision in other contracts, especially mortgages, that in case of breach the promisor will pay an attorney's fee (the amount of which is sometimes stated) for enforcing the obligation. There seems no occasion to distinguish between mortgages and other contracts with reference to the provision. If it is penal or the reverse in one it is in the other.<sup>91</sup> It was much litigated prior to the passage of the Negotiable Instruments

<sup>90</sup> *Taylor v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384; *Savannah &c. Railroad v. Callahan*, 56 Ga. 331; *Condon v. Kemper*, 47 Kans. 123, 27 Pac. 820, 13 L. R. A. 671; *Ward v. Hudson River Building Co.*, 125 N. Y. 230, 26 N. E. 256. In *Brooks v. Wichita*, 114 Fed. 297, 52 C. C. A. 209, the court enforced a provision for \$10,000 damages for failure to have in operation by April 1, 1899, 150 arc lights. The court said: "The contract in this case does not stop with declaring that the sum of \$10,000 has been agreed upon between the parties as liquidated damages in case of its breach, but it contains the further and somewhat unusual provision that they have agreed upon this sum 'for the reason that the actual damages sustained by the said city in case of a breach of this contract cannot be definitely or accurately ascertained or computed.' This clause of the contract evinces a knowledge on the part of the contracting parties of the rules of law to which we have adverted, and which preclude a city from recovering substantial damages in this class of cases unless they are liquidated by the agreement of the parties. It was the knowledge of this fact that led the parties to this contract to agree on the

damages for its breach, and this is conclusive evidence that they intended what they expressed in their contract, namely, that the sum agreed upon was 'liquidated damages, and not a penalty.' If this provision of the contract does not mean what it says, then it does not mean anything." If this argument were sound any penalty which the parties agreed upon could always be enforced. They can always assert in the contract that the most unreasonable sum is agreed upon as a *bona fide* estimate of damages which were difficult to estimate. That such statements should be admissible evidence of the facts is clear, but if they are regarded as conclusive, or even as entitled to much weight, the rules which equity has built up against penalties are turned into a mere technicality with little to commend it.

<sup>91</sup> *Jarvis v. Southern Grocery Co.*, 63 Ark. 225, 38 S. W. 148; *Turner v. Boger*, 126 N. C. 300, 35 S. E. 592, 49 L. R. A. 590; *McAllister's Appeal*, 59 Pa. 204; *First Nat. Bank v. Larsen*, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365. A contrary suggestion in *Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555, is without support.

Law, whether such a provision did not destroy negotiability of a bill or note.<sup>92</sup> By that statute, however,<sup>93</sup> which has now been generally adopted, it is provided that an instrument is not rendered non-negotiable by such a stipulation. This statutory provision is in accordance with the weight of authority prior to its enactment; and its almost universal enactment renders a discussion of the effect of the provision on the negotiability of a note, academic. The statute, however, does not affect the question whether such a provision is penal.<sup>94</sup> The contract sometimes makes no provision concerning the amount of the stipulated fee; sometimes fixes a sum, either by stating a percentage (usually five or ten per cent) of the principal debt or by stating a lump sum. Any jurisdiction which permits a recovery of the fee where the amount is stated would undoubtedly allow a recovery of a reasonable fee where no sum is named in the contract.<sup>95</sup> Most jurisdictions enforce a provision fixing the amount, if its reasonableness is not justifiably attacked.<sup>96</sup> But if the amount is penal, either because of its size, or because the creditor was not compelled to pay an attorney the stipulated fee, the provision will be held to entitle the creditor only to a reasonable fee actually paid by him.<sup>97</sup> And in some

<sup>92</sup> See Daniel, *Negotiable Instruments*, § 62a.

<sup>93</sup> Sec. 2 (5); *infra*, § 1137.

<sup>94</sup> *Miller v. Kyle*, 85 Ohio St. 186, 97 N. E. 372; *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332, L. R. A. 1915, B. 928.

<sup>95</sup> See *Potts v. Crudup* (Okl.), 150 Pac. 170; *McCornick v. Swem*, 36 Utah, 6, 102 Pac. 626.

<sup>96</sup> *Re Keeton*, 126 Fed. 426; *Re Roche*, 101 Fed. 956, 42 C. C. A. 115; *Whaley v. American Freehold Land Mtge. Co.*, 74 Fed. 73, 42 U. S. App. 90, 20 C. C. A. 306, *aff'g*. 63 Fed. 743; *Langley v. Andrews*, 142 Ala. 665, 38 So. 238; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Carhart v. Allen*, 56 Fla. 763, 48 So. 47; *Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555; *Baker v. Jacobson*, 183 Ill. 171, 55 N. E. 724; *Keenan v. Blue*, 240 Ill. 177, 88 N. E. 553; *Smiley v. Meir*, 47 Ind. 559;

*Sharp v. Barker*, 11 Kan. 381; *Hansen v. Creditors*, 49 La. Ann. 1731, 22 So. 923; *Mjones v. Yellow Medicine County Bank*, 45 Minn. 335, 47 N. W. 1072; *Duncan Bank v. Brittain*, 92 Miss. 545, 46 So. 163; *First Nat. Bank v. Stam*, 186 Mo. App. 439, 171 S. W. 567; *Exchange Bank v. Tuttle*, 5 N. M. 427, 7 L. R. A. 445, 23 Pac. 241; *Howey v. Gessler*, 16 N. M. 319, 117 Pac. 734; *Cooper v. Bank of Indian Territory*, 4 Okla. 632, 46 Pac. 475; *Equitable Bldg. & L. Asso. v. Hoffman*, 50 S. C. 303, 27 S. E. 692; *Daly v. Sumpter Drug Co.*, 127 Tenn. 412, 155 S. W. 167; *Miller v. Gaar-Scott & Co.* (Tex. Civ. App.), 141 S. W. 1053; *Morrill v. Hoyt*, 83 Tex. 59, 18 S. W. 424, 29 Am. St. Rep. 630; *First Nat. Bank v. Larsen*, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365.

<sup>97</sup> *Montgomery v. Crosthwait*, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140, 24

States, the courts regard such a stipulation as necessarily penal or as opposed to the policy of the law, without reference to the amount of the fee.<sup>98</sup> In such States it is immaterial that the contract was made or performable in another State where the stipulation was enforceable.<sup>99</sup>

### § 787. Other illustrations.

A stipulated sum for breach of a contract not to compete by one who has sold the good will of a business has generally been enforced. It is obvious that the actual amount of damage in such a case is difficult to estimate even though it be considerable. On the other hand, the breach may be large or small, and stipulated damages of the same amount for a considerable breach, and for a small one are not usually permitted.

Am. St. Rep. 832; *Moran v. Garde-meyer*, 82 Cal. 96, 23 Pac. 6; *Florence Oil & Ref. Co. v. Hiawatha Gas, Oil & Ref. Co.*, 55 Colo. 378, 135 Pac. 454; *Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 106 Pac. 299, 27 L. R. A. (N. S.) 111; *Henke v. Gunsen-hauser*, 195 Ill. 130, 62 N. E. 896; *Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704; *White v. Lucas*, 46 Iowa, 319; *Campbell v. Worman*, 58 Minn. 561, 60 N. W. 568; *Warwick Iron Co. v. Morton*, 148 Pa. 72, 23 Atl. 1065; *Coley v. Coley*, 94 S. C. 383, 77 S. E. 49; *Holston Nat. Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31; *First Nat. Bank v. Robinson*, 104 Tex. 160, 135 S. W. 372; *Miller v. Laughlin* (Tex. Civ. App.), 147 S. W. 711; *Utah Nat. Bank v. Nelson*, 38 Utah, 160, 111 Pac. 907; *First Nat. Bank v. Larsen*, 60 Wis. 206, 19 N. W. 67, 50 Am. St. Rep. 365; *Mechanics' American Nat. Bank v. Coleman*, 204 Fed. 24, 122 C. C. A. 338.

<sup>98</sup> *Boozar v. Anderson*, 42 Ark. 167; *Arden Lumber Co. v. Henderson, etc.*, Co., 83 Ark. 240, 103 S. W. 185; *White-Wilson-Drew Co. v. Egelhoff*, 96 Ark. 105, 131 S. W. 208; *Witherspoon v. Musselman*, 14 Bush, 214, 29 Am. Rep. 404; *Clark v. Tanner*, 100 Ky. 275, 38

S. W. 11; *Equitable, etc., Assoc. v. Smith*, 23 Ky. L. Rep. 1567, 65 S. W. 609; *Oman v. American Nat. Bank*, 32 Ky. L. Rep. 502, 106 S. W. 277; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Wright v. Travers*, 73 Mich. 493, 41 N. W. 517; *People v. Bennett*, 122 Mich. 281, 81 N. W. 117; *Kemp v. Claus*, 8 Neb. 24; *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857; *National Bank v. Thompson*, 90 Neb. 223, 33 N. W. 199; *Howey v. Gessler*, 16 N. Mex. 319, 117 Pac. 734; *Tinsley v. Haskins*, 111 N. C. 340, 16 S. E. 325, 32 Am. St. Rep. 801; *Exchange Bank v. Apalachian, etc., Co.*, 128 N. C. 193, 38 S. E. 813; *Miller v. Kyle*, 85 Ohio St. 186, 97 N. E. 372; *Ronald v. Bank*, 90 Va. 813, 20 S. E. 780; *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332, L. R. A. 1915, B. 928. In Nebraska and in North Carolina, a special provision is inserted in the Uniform Negotiable Instruments Act, to the effect that nothing therein shall authorize the inclusion of attorney's fees.

<sup>99</sup> *Clark v. Tanner*, 100 Ky. 275, 38 S. W. 11; *Carsey v. Swan*, 150 Ky. 473, 150 S. W. 534; *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. 560.

Nevertheless as has been said, such contracts are generally upheld.<sup>1</sup>

An agreement for a fixed amount of damages for failure to carry out a contract to buy or sell is good if the amount of damage actually suffered is not readily calculable.<sup>2</sup> On the other hand, if similar property to that contracted for can readily be procured, and there is a market price ascertainable, a provision for fixed damages is penal,<sup>3</sup> especially if unreasonable in amount.<sup>4</sup>

<sup>1</sup> *Leighton v. Wales*, 3 M. & W. 545; *Crisdee v. Bolton*, 3 C. & P. 240; *Rawlinson v. Clarke*, 14 M. & W. 187; *Price v. Green*, 16 M. & W. 346; *Galsworthy v. Strutt*, 1 Exch. 659; *Atkyns v. Kinnier*, 4 Exch. 776; *Sainter v. Ferguson*, 7 C. B. 716; *National Provincial Bank v. Marshall*, 40 Ch. Div. 112; *McCurry v. Gibson*, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177; *Streeter v. Rush*, 25 Cal. 67; *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388; *Newman v. Wolfson*, 69 Ga. 764; *Boyce v. Watson*, 52 Ill. App. 361; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Johnson v. Gwinn*, 100 Ind. 466; *Stafford v. Shortreed*, 62 Ia. 524, 17 N. W. 756; *Holbrook v. Tobey*, 66 Me. 410, 22 Am. Rep. 581; *Augusta Steam Laundry Co. v. Debow*, 98 Me. 496, 57 Atl. 845; *Cushing v. Drew*, 97 Mass. 445; *Jaquith v. Hudson*, 5 Mich. 123; *Geiger v. Cawley*, 146 Mich. 550, 109 N. W. 1064; *Wills v. Forester*, 140 Mo. App. 321, 124 S. W. 1090; *Pankonin v. Gorder*, 97 Neb. 337, 149 N. W. 811; *Clark v. Britton*, 76 N. H. 64, 79 Atl. 494; *Hoagland v. Segur*, 38 N. J. L. 230; *Dakin v. Williams*, 17 Wend. 447, 22 Wend. 201; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; *Grasselli v. Lowden*, 11 Oh. St. 349; *Kelso v. Reid*, 145 Pa. 606, 23 Atl. 323, 27 Am. St. Rep. 716; *Rucker v. Campbell*, 35 Tex. Civ. App. 178, 79 S. W. 627; *Barry v. Harris*, 49 Vt. 392; *Canady v. Knox*, 43 Wash. 567, 86

Pac. 930. In *Schoolnick v. Gold*, 89 Conn. 110, 93 Atl. 124, a business was sold for \$800 and a covenant taken from the seller that he would not engage in similar business in competition for five years. Damages for breach of this covenant were stipulated for in the sum of \$2,000 and held not so unreasonable as to be penal. Cf. *Gougar v. Buffalo Specialty Co.*, 26 Colo. App. 8, 141 Pac. 511; *Floding v. Floding*, 137 Ga. 531, 73 S. E. 729; *Smith v. Wainwright*, 24 Vt. 97, where such agreements were held penal.

<sup>2</sup> *Diestal v. Stevenson*, [1906] 2 K. B. 345; *Gobble v. Linder*, 76 Ill. 157; *Gammon v. Howe*, 14 Me. 250; *Calbeck v. Ford*, 140 Mich. 48, 103 N. W. 516; *Sanford v. Belle Plaine Bank*, 94 Ia. 680, 63 N. W. 459; *Woodbury v. Turner, etc., Mfg. Co.*, 96 Ky. 459, 29 S. W. 295; *Maxwell v. Allen*, 78 Me. 32, 2 Atl. 386, 57 Am. Rep. 783; *Lynde v. Thompson*, 2 Allen, 456; *Chapman v. Propp*, 125 Minn. 447, 147 N. W. 442; *Lorius v. Abbott*, 49 Neb. 214, 68 N. W. 486; *Mead v. Wheeler*, 13 N. H. 351; *Gibbs v. Cooper*, 86 N. J. L. 226, 90 Atl. 1115; *Durst v. Swift*, 11 Tex. 273; *Yenner v. Hammond*, 36 Wis. 277.

<sup>3</sup> *Squires v. Elwood*, 33 Neb. 126, 49 N. W. 939; *Shreve v. Brereton*, 51 Pa. 175.

<sup>4</sup> *McCall v. Deuchler*, 174 Fed. 133, 98 C. C. A. 169; *Zenor v. Pryor*, 57 Ind. App. 222, 106 N. E. 746.

A provision is common in mortgage and other obligations that if the debtor fails to pay interest or to comply with some other obligations contained in the contract, the principal obligation shall at once become due, or shall so become due at the election of the creditor. Such provisions are enforceable.<sup>5</sup> There is no forfeiture in such cases of anything but a right of credit created by the contract, and terminable according to its terms.<sup>6</sup>

**§ 788. Whether the tendency of the court is to hold a doubtful provision a penalty or liquidated damages.**

It has been habitually laid down and probably would still be laid down in most jurisdictions that in a doubtful case the court would lean towards holding a provision for fixed damages penal rather than liquidated damages.<sup>7</sup> Especially, "Where the agreement has been partially performed it is the policy of the Courts to regard the damages as a penalty, and allow

<sup>5</sup> Wallingford v. Mutual Society, 5 A. C. 685; Miller v. Biddle, 13 L. T. Rep. 334; Wheeler v. Howard, 28 Fed. Rep. 741; De Hass v. Dibert, 70 Fed. Rep. 227, 28 U. S. App. 559, 30 L. R. A. 189, 17 C. C. A. 79, rev'g on another point 59 Fed. 853; Brewer v. Penn. Mut. L. Ins. Co., 94 Fed. 347, 36 C. C. A. 289; Mooney v. Tyler, 68 Ark. 314, 57 S. W. 1105; Kleinsorge v. Kleinsorge, 133 Cal. 412, 65 Pac. 876; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Sweeney v. Kaufmann, 168 Ill. 233, 48 Atl. 144; Curran v. Houston, 201 Ill. 442, 66 N. E. 228; Fox v. Gray, 105 Ia. 433, 75 N. W. 339; Miller v. McCrory, 3 Ky. L. Rep. 774; National L. Ins. Co. v. Butler, 61 Neb. 449, 85 N. W. 437, 87 Am. St. Rep. 462; Security Trust Co. v. N. J. Paper Board, etc., Co., 57 N. J. Eq. 603, 607, 42 Atl. 746; Roche v. Hiss, 84 N. J. Eq. 242, 93 Atl. 804; Hothorn v. Louis, 170 N. Y. 576, 62 N. E. 1096; Arnot v. Union Salt Co., 186 N. Y. 501, 79 N. E. 719.

<sup>6</sup> Arkenburg v. Lake Side Residence Assoc., 56 N. J. Eq. 102, 109, 38 Atl.

297. Nor is such a provision usurious. See *infra*, § 1696. As to its effect on the negotiability of an instrument, see an article by Z. Chafee, Jr., in 32 Harv. L. Rev. 747.

<sup>7</sup> Astley v. Weldon, 2 B. & P. 346; Davies v. Penton, 6 B. & C. 216; Pacific Hardware & Steel Co. v. United States, 48 Ct. Cl. 399; Stratton v. Fike, 166 Ala. 203, 51 So. 874; People v. Central Pac. R. Co., 76 Cal. 29, 18 Pac. 90; Moore v. Kline, 26 Colo. App. 334, 143 Pac. 262; Parker-Washington Co. v. Chicago, 267 Ill. 136, 107 N. E. 872; Zenor v. Pryor, 57 Ind. App. 222, 106 N. E. 746; Thompson v. St. Charles County, 227 Mo. 220, 126 S. W. 1044; Poppenberg v. Owen, 84 N. Y. Misc. 126, 146 N. Y. S. 478; Disosway v. Edwards, 134 N. C. 254, 46 S. E. 501; Alvord v. Banfield, 85 Ore. 49, 166 Pac. 549; Bearden v. Smith, 11 Rich. L. 554; Baird v. Tolliver, 6 Humph. 186, 44 Am. Dec. 298; Stidham v. Laurie (Tex. Civ. App.), 133 S. W. 1082; Wright v. Bott (Tex. Civ. App.), 163 S. W. 360; Smith v. Wainwright, 24 Vt. 97.

the plaintiff to recover only such damages as he has actually sustained.”<sup>8</sup> But an opposite tendency has been manifested in recent years by some courts of high authority. “The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained.”<sup>9</sup> This change in the attitude at least of some courts is not inconsistent with the principle here contended for that the question is one of the reasonableness of the stipulation in question, not properly one of intention or interpreting the meaning of the contract. An enlarged view of the boundaries of what is reasonable may well be consistent with public policy, and within these boundaries the expressed intention of the parties is controlling.

It is true on the one hand that parties should be left to make their own bargains: it is equally true that they cannot be left

<sup>8</sup> *Mount Airy Milling, etc., Co. v. Runkles*, 118 Md. 371, 379, 84 Atl. 533, citing Cyc. 104; *Shute v. Taylor*, 5 Metc. 61.

In *Sledge v. Arcadia Orchards Co.*, 77 Wash. 477, 486, 137 Pac. 1051, the court said: “One consideration, we think, is decisive, against recovering the sum in question as liquidated damages; namely, that here there has been a part performance, and an acceptance of such part performance. If the parties intended the sum named to be liquidated damages for the breach of the contract therein expressed, it was for an entire breach. Whether divisible in its nature or not, it was in fact divided by an offer and acceptance,

of part performance. It is like the case of an obligation to perform two or more independent acts, with a provision for single liquidated damages for non-performance; if one is performed, and not the other, it is not a case for the recovery of the liquidated damages. *Shute v. Taylor*, 5 Met. (Mass.) 61, 67.

“This rule was recognized and applied, and the above language quoted by this court in *Myers v. Ralston*, 57 Wash. 47, 106 Pac. 474.”

<sup>9</sup> *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 119, 51 L. Ed. 731, 27 Sup. Ct. 450; *Werner v. Finley*, 144 Mo. App. 554, 129 S. W. 73; *Peabody v. Richard Realty Co.*, 69 N. Y. Misc. 582, 125 N. Y. S. 349.

to do so without some limitation. It should be clear that the limit of reasonableness has been passed, before a court should set aside their contract.

**§ 789. Prevention of performance makes provision for liquidation inoperative.**

Where both parties are in fault a party who has contributed to the breach cannot recover a sum stipulated as liquidated damages, even though performance of the contract is continued, and the other party thereafter is at fault. "The better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time, and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived."<sup>10</sup> In building contracts there is often inserted

<sup>10</sup> *United States v. United Engineering Co.*, 234 U. S. 236, 242, 58 L. Ed. 1294, 34 Sup. Ct. 843.

The court added (at page 243): "This conclusion is in accord with the rule of the English cases. In *Dodd v. Churton*, L. R. 1 Q. B., [1897] 562, 568, Chitty, L. J., said: 'The law on the subject is well settled. The case of *Holme v. Guppy*, 3 M. & W. 387, and the subsequent cases in which that decision has been followed are merely examples of the well known principle stated in *Comyns' Digest*, Condition L (6), that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. The law on the subject was very neatly put by Byles, J., in *Russell v. Bandeira*, 13 C. B. (N. S.) 149. This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a

particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time.'

"The same rule was followed with approval by the New York Court of Appeals in a well-considered case, *Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479, 93 N. E. 81, in which it was held that, even where both parties are responsible for the delays beyond the fixed time, the obligation for liquidated damages is annulled, and in the absence of a provision substituting another date it cannot be revived, and the recovery for subsequent delays must be for actual loss proved to have been sustained." See also *Early v. Tussing*, 182 Mich. 314, 148 N. W. 678; *Mitchell v. Davis*, 73 W. Va. 352, 80 S. E. 491.

a provision giving the architect power to certify an extension of time in certain cases; by virtue of which the effect of a delay caused by the owner operates merely as an extension of the time for performance, and a new time is substituted for the old.<sup>11</sup> In that event though the owner causes delay the builder is liable in liquidated damages, but the period of delay caused by the owner is deducted from the total delay.<sup>12</sup> Unless the contract contains such a provision the delay due to each party will not generally be apportioned.<sup>13</sup>

### § 790. Deposits.

Instead of providing in an executory contract for the payment of a liquidated sum, an actual payment may be made in order to secure performance. The situation here is rather analogous to that of a mortgage than to that of an executory agreement for a penalty. The principles, however, which govern the case are analogous to those applied in the case of executory penalties. If the deposit is unreasonable in amount and the actual damage will be negligible or capable of actual measurement the forfeiture of the deposit will not be permitted, even though this is expressly agreed.<sup>14</sup>

On the other hand, if the deposit is reasonable in amount

<sup>11</sup> *Laidlaw-Dunn-Gordon Co. v. United States*, 47 Ct. Cl. 271; *Paddock v. Stout*, 121 Ill. 571, 578, 13 N. E. 182.

<sup>12</sup> *Van Buskirk v. Board of Education*, 78 N. J. L. 650, 75 Atl. 909; *Cook & Laurie v. Denis*, 124 La. 161, 49 So. 1014. Cf. *Schmulbach v. Caldwell*, 196 Fed. 16, 115 C. C. A. 650.

<sup>13</sup> *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867, 874, 94 C. C. A. 279; *Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479, 93 N. E. 81, 37 L. R. A. (N. S.) 363. Cf. *Schmulbach v. Caldwell*, 196 Fed. 16, 115 C. C. A. 650.

<sup>14</sup> In *Cesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58, the sum of \$1,000 was deposited to secure the faithful performance of a lease. It was held that where the only breach complained of was a failure to pay a balance of \$45 on

monthly rent, the fact that the deposit was expressly designated as liquidated damages would not preclude the court from treating the provision as penalty and confining the landlord to his actual damage, especially as the landlord had asserted his right of re-entry for non-payment of the rent, the court said: "It is difficult to see why he should be entitled to have the leased premises and deposit at the same time." See also *Evans v. Moseley*, 84 Kans. 322, 114 Pac. 374; *Feinsot v. Burstein*, 161 N. Y. App. D. 651, 146 N. Y. S. 939; *Quigley v. C. S. Brackett Co.*, 124 Minn. 366, 145 N. W. 29; *Schleifer v. Henry George & Co.*, 102 N. Y. Misc. 506, 169 N. Y. S. 132; *Alvord v. Banfield*, 85 Oreg. 49, 166 Pac. 549. Compare *Barrett v. Monro*, 69 Wash. 229, 12 Pac. 369.



provision forfeiting it in case of a breach, will be enforced.<sup>15</sup> It should be observed, however, that a deposit may be made merely for security for whatever damages may be incurred—not as liquidated damages or a penalty. In such a case if actual damages exceed the deposit, they may be recovered;<sup>16</sup> and if less than the deposit, a portion of it may be reclaimed.<sup>17</sup>

### § 791. Instalment contracts.

A common form of contract requires the buyer to pay the price of land or goods in instalments, while the seller retains title as security for the payment of the full price. The buyer is ordinarily given possession. In personal property this is called a conditional sale, and the right of the seller to retain so much of the price as has been paid by a buyer in default and yet reclaim the goods has already been discussed.<sup>18</sup> In sales of land unless time is of the essence by the terms of the contract or made so by notice, the buyer in spite of delay may obtain specific performance.<sup>19</sup> But time may be of the essence or the buyer's delay may be greater than even courts of equity excuse in contracts for the sale of land, and here the cases are not in agreement. Some decisions hold that the buyer though in default may recover the instalments which he has paid, less such an amount as will make the seller whole.<sup>20</sup> Any

<sup>15</sup> *Wallis v. Smith*, 21 Ch. Div. 243; *Hansbrough v. Peck*, 5 Wall. 497; *Moyes v. Schendorf*, 238 Ill. 232, 87 N. E. 401; *Lang v. Hedenberg*, 277 Ill. 668, 115 N. E. 566; *Northcut v. Johnson*, 143 La. 447, 78 So. 731; *Maloney v. Aschaffenburg*, 143 La. 509, 78 So. 761; *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405, 71 N. E. 793; *Womack v. Coleman*, 89 Minn. 17, 103 N. W. 663, 92 Minn. 328, 100 N. W. 1; *Moore v. Durnam*, 63 N. J. Eq. 96, 61 Atl. 449; *Lawrence v. Miller*, 86 N. Y. 131; *Levy v. Freiman*, 131 N. Y. App. Div. 298, 115 N. Y. S. 996; *Mathews v. Sharp*, 99 Pa. 560; *Yoder v. Strong*, 227 Pa. 432, 76 Atl. 176; *Eakin v. Scott*, 70 Tex. 442, 7 S. E. 777; *Norman v. Vickery* (Tex. Civ.

App.), 128 N. W. 452; *Beury v. Fay*, 73 W. Va. 460, 80 S. E. 777.

<sup>16</sup> *Curtis v. Aspinwall*, 114 Mass. 187.

<sup>17</sup> *Claude v. Shepard*, 122 N. Y. 397, 25 N. E. 358; *Kaplan v. Rosov*, 164 N. Y. S. 49.

<sup>18</sup> See *supra*, §§ 734 *et seq.*

<sup>19</sup> *Infra*, § 852.

<sup>20</sup> *Brickles v. Snell*, [1916] 2 A. C. 599; *Steedman v. Drinkle*, [1916] 1 A. C. 275; *Kilmer v. British Columbia Orchard Lands*, [1913] A. C. 319; *Cornwall v. Henson*, [1900] 2 Ch. 298; *Dudley v. Hayward*, 11 Fed. 543; *McDaniel v. Gray*, 69 Ga. 433; *Gilbreth v. Grewell*, 13 Ind. 484, 74 Am. Dec. 266; *Preston v. Whitney*, 23 Mich. 260. See also *Miller v. Duntly*, 182 Ill. App. 205 (contract to sell stock); *Hickock v.*

other rule obviously permits a forfeiture. Nevertheless the great majority of American decisions deny the buyer relief.<sup>21</sup> And it may be said that this is no more than the necessary result of default by a party who has previously partly performed his contract.<sup>22</sup> Frequently there is an express provision for forfeiture.<sup>23</sup>

It is difficult to see why such a provision should affect the question since the buyer's right of return, if he ever has such a right, is given him by law necessarily in opposition to the terms of the contract. But some courts doubtless would make the buyer's right to recover depend upon the absence of such a provision.<sup>24</sup> In New York if the seller sells the property on default by the buyer without notice to the latter, he may treat

Hoyt, 33 Conn. 553 (contract to sell wine); *Sebas v. Gregory*, 91 Conn. 26, 98 Atl. 293 (contract to sell an automobile).

<sup>21</sup> *Butler v. Colson*, 99 Ark. 340, 138 S. W. 467, 468; *Glock v. Howard, etc., Colony Co.*, 123 Cal. 1, 20, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363; *Nance v. Avenall*, 28 Cal. App. 551, 147 Pac. 583; *Chrisman v. Miller*, 21 Ill. 227, 236; *Baston v. Clifford*, 68 Ill. 67, 18 Am. Rep. 547; *Fox v. Grange*, 261 Ill. 116, 103 N. E. 576 (*cf.* *Illinois Cent. R. Co. v. Steams*, 60 Ill. App. 21); *Downey v. Riggs*, 102 Ia. 88, 70 N. W. 1091; *Hillyard v. Banchor*, 85 Kan. 516, 118 Pac. 67; *Grimes v. Gould (Me.)*, 10 Atl. 116; *Keefe v. Fairfield*, 184 Mass. 334, 68 N. E. 342; *Steinbach v. Pettin-gill*, 87 N. J. L. 36; *Ketchum v. Evert-son*, 13 Johns. 359, 364, 7 Am. Dec. 384; *Green v. Green*, 9 Cow. 46; *Lawrence v. Miller*, 86 N. Y. 131; *Beveridge v. West Side Const. Co.*, 130 N. Y. App. D. 139, 114 N. Y. S. 521; *Ashbrook v. Hite*, 9 Oh. St. 357, 75 Am. Dec. 468; *Sanders v. Brock*, 230 Pa. 609, 79 Atl. 772, 35 L. R. A. (N. S.) 711; *Kane v. Jenkinson*, 10 Nat. Bkcy. Reg. 316; *Estes v. Browning*, 11 Tex. 237.

<sup>22</sup> As to the general right of one who has by his own fault precluded himself from recovering on a contract, maintaining an action for the benefit which the defendant has received, see *infra*, §§ 1473 *et seq.*

<sup>23</sup> This was held valid in *Glock v. Howard, etc., Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Williams v. Long*, 139 Cal. 186, 72 Pac. 911; *Long v. Clark*, 90 Kans. 535, 135 Pac. 673; *Jones v. Mississippi Farms Co.*, 116 Miss. 295, 76 So. 880; *Jackson v. Scott (Can.)*, 1 Ont. L. Rep. 488 (C. A.). See also *Bartlesville Oil, etc., Co. v. Hill*, 30 Okl. 829, 121 Pac. 208. But see *contra*—*Steedman v. Drinkle*, [1916] A. C. 275; *Cornwall v. Henson*, [1900] 2 Ch. 298; *Brown v. Versani*, 181 Ia. 237, 164 N. W. 601; *Allison v. Cocke*, 23 Ky. L. Rep. 1589, 65 S. W. 342.

<sup>24</sup> See *Raidt v. Smith*, 75 Wash. 365, 134 Pac. 1057, and cases cited in the preceding note. But in *Butler v. Colson*, 99 Ark. 340, 138 S. W. 467, 468, and *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363, the court held that the seller's right to declare instalments forfeited was not dependent on any express provision to that effect.

the sale as an absolute wrongful rescission, and the seller must restore any instalments received. It may be inferred from the decisions that if the seller does give proper notice the buyer could not recover instalments.<sup>25</sup>

Where as generally happens the buyer is given possession of the land the case might well be, and indeed should be, distinguished from an ordinary executory contract to buy and sell. Even in the case of personal property where there is no right to specific performance, much authority recognizes that the buyer in possession under a conditional sale is the beneficial owner, and the seller in substance a mortgagee.<sup>26</sup> If this is true of personal property, it is still more clearly true of real property. The relation of a vendor and purchaser of realty even under a wholly executory contract has been likened to the relation of mortgagor and mortgagee. This seems inaccurate,<sup>27</sup> but where the purchaser is given immediate possession and beneficial enjoyment of the land, the analogy seems a sound one. If so, the situation should be dealt with in the same way as a mortgage situation is dealt with. Where time is not stated expressly or impliedly to be of the essence this analogy is followed, though strict foreclosure with forfeiture of any payments made is sometimes allowed. The Supreme Court of the United States has said: "In case of a default in the payments there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase money, and take out execution against the property of the defendant, and, among other property, the land sold, or he may bring ejectment, and recover back the possession; but in that case the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase money, together with costs, is entitled to a performance of the contract, or the vendor may go, in the first instance, into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due or be forever thereafter foreclosed from setting up any claim against the estate."<sup>28</sup>

<sup>25</sup> *Fanchez v. Goodman*, 29 Barb. 315; *Levy v. Loeb*, 89 N. Y. 386, 390. See also the early New York decisions, *supra*, n. 21.

<sup>26</sup> See *supra*, §§ 734 *et seq.*, *infra*, § 965.

<sup>27</sup> See *infra*, §§ 928 *et seq.*

<sup>28</sup> *Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520, quoted with approval

"But generally in this country the decree is not for a strict foreclosure but for a foreclosure by sale of the property." <sup>29</sup> Where the transaction is in its essence a mortgage, agreements for forfeiture and provisions that time is of the essence should be given no more weight than similar provisions in a mortgage. Such a principle is not, however, always recognized. Not only is a defaulting purchaser in such a case generally denied the right to recover what he has paid, but he has also not infrequently been denied the right to pay with interest what is due and enforce the contract specifically. In a few instances

in *Waite v. Stanley*, 88 Vt. 407, 92 Atl. 633, 635. Strict foreclosure was allowed in Wisconsin in *Button v. Schroyer*, 5 Wis. 598; *Nelson v. Jacobs*, 99 Wis. 547, 75 N. W. 406. In *Higinbotham v. Frock*, 48 Or. 129, 83 Pac. 536, the court stated that an application for strict foreclosure was "addressed to the sound discretion of the court, and when enforced at all, will not be done without giving the defendant a reasonable time to comply with his contract."

<sup>29</sup> 1 Ames Cas. Eq. Jurisdiction, 226 n., citing: *Raymond v. San Gabriel Co.*, 53 Fed. 883, 4 C. C. A. 89, 10 U. S. App. 601; *Haley v. Bennett*, 5 Port. 452; *Chapman v. Chunn*, 5 Ala. 397; *Kelly v. Payne*, 18 Ala. 371; *Hester v. Hunnicutt*, 104 Ala. 282, 16 So. 162; *Lewis v. Boskins*, 27 Ark. 61; *Garrett v. Williams*, 31 Ark. 240; *McConnell v. Beattie*, 34 Ark. 113; *Martin v. O'Bannon*, 35 Ark. 62; *Sparks v. Hess*, 15 Cal. 186; *Keller v. Lewis*, 53 Cal. 113 (but strict foreclosure was permitted in *Fairchild v. Mullan*, 90 Cal. 190, 27 Pac. 201; *Southern Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Odd Fellows' Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109); *Andrews v. Sullivan*, 7 Ill. 327, 43 Am. Dec. 53; *Burger v. Potter*, 32 Ill. 66; *Vail v. Drexel*, 9 Ill. App. 439; *Lagow v. Badollet*, 1 Blackf. 416; *Brumfield v. Palmer*, 7 Blackf. 227; *Amory v. Reilly*, 9 Ind. 490; *McCaslin*

*v. State*, 44 Ind. 151, 99 Ind. 428; *Hamilton v. Plaut*, 81 Ind. 417, 425; *Huffman v. Cauble*, 86 Ind. 591; *Meagher v. Hoyle*, 173 Mass. 577, 54 N. E. 347; *Denton v. Scully*, 26 Minn. 325, 4 N. W. 41 (strict foreclosure—but sale allowed if more equitable); *Abbott v. Moldestad*, 74 Minn. 293, 77 N. W. 227; *Fitzhugh v. Maxwell*, 34 Mich. 138; *Walker v. Casgrain*, 101 Mich. 604, 60 N. W. 291; *Gray v. Hill*, 105 Mich. 189, 63 N. W. 77; *Loveridge v. Shurtz*, 111 Mich. 618, 70 N. W. 132; *Gaston v. White*, 46 Mo. 486; *Lewis v. Chapman*, 59 Mo. 371; *Gardels v. Kloke*, 36 Neb. 493, 54 N. W. 834, 52 Neb. 117, 71 N. W. 955; *Hendrix v. Barker*, 49 Neb. 369, 68 N. W. 531; *Brown v. Norcross*, 59 N. J. Eq. 427, 45 Atl. 605; *Champion v. Brown*, 6 Johns. Ch. 398; *Clark v. Hall*, 7 Paige, 382 (strict foreclosure allowed in *State v. Sheridan*, *Clarke Ch.* 533); *Freeson v. Bissell*, 63 N. Y. 168; *Thomson v. Smith*, 63 N. Y. 301 (semble); *Allen v. Taylor*, 96 N. C. 37, 41, 1 S. E. 462; *Battery Bank v. Loughran*, 122 N. C. 668, 30 S. E. 17; *Whitmire v. Bond*, 53 S. C. 315, 31 S. E. 306; *Brace v. Doble*, 3 S. Dak. 110, 416, 52 N. W. 586, 53 N. W. 859; *Johnson v. Kurtz*, 97 Tenn. 503, 37 S. W. 222; *Mullens v. Big Creek, etc.*, *Iron Co. (Tenn.)*, 1895), 35 S. W. 439; *Wade v. Greenwood*, 2 Rob. Va. 474, 40 Am. Dec. 759; *Yancey v. Mauck*, 15 Gratt. 300.

extreme forfeitures have been permitted where the contract made time of the essence.<sup>30</sup> In a majority of cases, however, equitable relief has been given a purchaser in possession against provisions making time essential, the situation being rightly treated as substantially the same as that of mortgagor and mortgagee, and the provision for forfeiture as ineffectual as in a mortgage.<sup>31</sup> But in a recent decision of the British Privy Council,<sup>32</sup> it was held that though a provision for forfeiture could not be enforced, specific performance must be denied. This reverses the ordinary rule of equity in regard to mortgages. As most American courts would deny the buyer the right to recover any portion of the instalments he had paid, there is the more reason why they should give the alternative right which the English court denied. In considering the right to recover instalments which have been paid, the certainty with which actual damage can be measured should be taken into account. If this is difficult there is the greater reason for not interfering with the forfeiture upon which the parties have

<sup>30</sup> *Heckard v. Sayre*, 34 Ill. 142 (specific enforcement was denied because the last instalment was tendered less than a week after it was due. Cf. *Ebert v. Arenda*, 190 Ill. 221, 233, 60 N. E. 211); *Iowa Railroad Land Co. v. Mickel*, 41 Ia. 402 (the buyer was denied specific enforcement of the contract because the second instalment was paid two days late, and the amount paid was three dollars too small); *Brown v. Ulrick*, 48 Neb. 409, 67 N. W. 168 (specific enforcement was denied a buyer who was eight months late in making proper tender though he had paid \$1,100 and had greatly improved the land); *Steele v. McCarthy*, 1 Saskatchewan, 317. In *Fox v. Grange*, 261 Ill. 116, 103 N. E. 576, the court though giving the vendee specific performance on the ground of waiver stated without qualification the vendor's right of forfeiture in the absence of waiver.

<sup>31</sup> *Cheney v. Libby*, 134 U. S. 68, 33 L. Ed. 818, 10 Sup. Ct. 498; *Butler v.*

*Colson*, 99 Ark. 340, 138 S. W. 467, 468; *Steele v. Branch*, 40 Cal. 3, 11; *Shouse v. Doane*, 39 Fla. 95, 21 So. 807; *Haas v. Coburn*, 22 Ida. 47, 124 Pac. 476; *O'Fallon v. Kennerly*, 45 Mo. 124; *Ewins v. Gordon*, 49 N. H. 444, 460; *Hall v. Delaplaine*, 5 Wis. 206, 216, 68 Am. Dec. 57; *Edgerton v. Peckham*, 11 Paige, 352. In *Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520, and *Nelson v. Hanson*, 45 Minn. 543, 48 N. W. 410, time was stated to be of the essence of the contracts in suit, and the language of the court seems to indicate that the purchaser would have been given their rights of a mortgagee. In Minnesota and North Dakota and perhaps other States a vendor may not cancel the contract for the vendee's default except after written notice giving the vendee thirty days to make good the default. See *Kryger v. Wilson*, 242 U. S. 171, 37 S. Ct. 34, 61 L. Ed. 229.

<sup>32</sup> *Steedman v. Drinkle*, [1916] A. C. 275.

agreed. "The application of this principle becomes more manifest in cases where a public interest or policy supervenes, as where, for non-compliance by stockholders in corporations engaged in undertakings of a public nature with the terms of payment of instalments due on account of their shares, by which a forfeiture of the stock and of all previous payments thereon has been incurred and declared, the courts refuse to grant relief."<sup>33</sup> If the seller reclaims the property, there is no doubt that he thereby destroys his right to sue on the contract for unpaid instalments.<sup>34</sup>

### § 792. Civil Law.

The penal obligation was known to the Roman Law and originally it seems recovery of the full penalty was permissible.<sup>35</sup> Later it was recognized that the amount named as penalty was not conclusive. If it were inadequate more might be obtained and if it were excessive the amount might be reduced.<sup>36</sup> Penal

<sup>33</sup> *Clark v. Barnard*, 108 U. S. 436, 456, 27 L. Ed. 780; citing *Sparks v. Proprietors of Liverpool Water Works*, 13 Ves. 428; *Prendergast v. Turton*, 1 You. & Col. Ch. 98; *Naylor v. South Devon Railway Co.*, 1 De G. & Sm. 32; *Sudlow v. The Dutch Rhenish Ry. Co.*, 21 Beav. 43.

<sup>34</sup> In *Waite v. Stanley*, 88 Vt. 407, 92 Atl. 633, the court said:—"Under the contract, the promise of the vendor to convey the property constituted the consideration for the vendee's promise to pay the purchase money (*Ferry v. Stephens*, 66 N. Y. 321), and since by the decree in the equity case all interest of the vendee was foreclosed, by reason of which the contract was ended, and the absolute title to the property reinstated in the vendor, there was no longer any consideration for the vendee's promise to pay the purchase price. 'A court of Chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the

other; and the one failing leaves the other without a cause.' *Redfeld v. Woodfolk*, 22 How. 318, 16 L. Ed. 370; *Washington v. Ogden*, 66 U. S. (1 Black) 450, 17 L. Ed. 203. Thus the matter stood at the time of the trial of this action at law in the court below, and, the item in dispute being then without consideration, the defendant was not liable therefor. See *Sawyer v. McIntyre*, 18 Vt. 27; *Arbuckle v. Hawks*, 20 Vt. 538; *Graff's Executrix v. Kelly's Executors*, 43 Pa. 453, 82 Am. Dec. 580; *Day v. Lowrie*, 5 Watts (Pa.), 412; *Moore v. Smith*, 24 Ill. 512."

<sup>35</sup> *Justinian's Inst.* 3, 15, 7 (Moyle's 5th ed.).

<sup>36</sup> *Hunter's Roman Law*, 3d ed. 652, citing from Dig. 44, 4, 4. "Cornelius compromised a claim against Mævius for 60 *aurei*, but Mævius inconsiderately agreed to a penalty of 100 *aurei* if he did not keep the terms of the compromise. Cornelius could not recover more than was really due—namely, 60 *aurei*; and if he demanded more, could



stipulations in a contract of sale, however, were rigidly enforced.<sup>37</sup>

In modern European Codes the subject is not dealt with on uniform principles. The French Code provides "When the contract stipulates that the party who fails to perform his obligation shall pay a certain sum as damages, neither a greater nor a less sum can be granted the other party;"<sup>38</sup> and the extensive copying of the French Code has established the same provision in other countries.<sup>39</sup> The French law prior to the enactment of the Code permitted the penalty when excessive to be reduced by the court.<sup>40</sup> Even under the Code the penalty may be modified if the obligor has performed in part;<sup>41</sup> and in any event, the court is given a limited power to permit delayed performance of the obligation, thereby saving the penalty.<sup>42</sup> The German Civil Code has a more complete protection against excessive penalties. It provides—"If a forfeited penalty is disproportionately high, it may on motion of the debtor be reduced by a judgment to a proper amount. In judging as to the adequacy, every rightful interest of the creditor,—not only the property interest,—is to be considered. After payment of the penalty a reduction is excluded."<sup>43</sup> So in the Swiss Federal Code of Obligations, the judge is given power to reduce penalties which he regards as excessive.<sup>44</sup>

§ 793. A condition may involve a penalty or forfeiture.

A condition may be as penal in its effects as a promise to pay a penalty. Not only is this true in conveyances,<sup>45</sup> but in contracts. For instance, if a building contract provided that the builder should build a house and finish it by October 1st,

be defeated on the ground of bad faith (*exceptio doli mali*). Thus a penalty might be reduced."

<sup>37</sup> Hunter's Roman Law, 652.

<sup>38</sup> Civil Code, Art. 1152.

<sup>39</sup> See, e. g., Civil Code of Italy, Art. 1214; Civil Code of Spain, Art. 1154.

<sup>40</sup> 1 Evans' Pothier on Obligations (2d Am. Ed.), p. 162, and this principle is preserved in the Code of Louisiana, § 2127.

<sup>41</sup> Civil Code of France, Art. 1231.

<sup>42</sup> Civil Code of France, Art. 1244, and see Fuzier-Herman et Darras, Code Civil, annoté vol. 3, p. 90, ¶ 7.

<sup>43</sup> German Civil Code, § 343.

<sup>44</sup> Art. 163 (Art. 182 of Code of 1881).

<sup>45</sup> See Sanitary District v. Chicago &c Trust Co., 278 Ill. 529, 116 N. E. 161.

and there was a separate stipulation that failure to do so should entail a forfeiture of the whole price on the building, every court would hold this stipulation a penalty and unenforceable. The transaction may, however, take this form; the builder might promise, as before, to build, and the owner of the premises contract to pay him \$10,000 if he completed the house by the first of October. The substance of the two bargains is the same; it is only the form which differs, and relief against the effect of penalties should depend as little as possible upon form. The loss of the builder's labor and materials for a slight default also involves as real a forfeiture as is provided for in a mortgage. The doctrine giving relief from penalties and forfeitures originated in courts of equity, and if form had been a controlling situation, it would never have been granted, for in form the penal obligation was perfect. It may be said that in the second case supposed, the price fixed is not merely for the house but for the chance of having a house on October 1st. This may be true but it may also be true as matter of substance in the case as first put. Whether it is true in a particular case is a question of fact. If the happening of the condition very largely enhances the value of the promisee's performance, the failure to perform it should largely diminish the promisee's rights; but if by the terms of the contract the consequences of failing to fulfil the condition is that the promisee is deprived of all rights whatever, though he has materially enriched the promisor, the provision is obviously penal in character. Still more clearly where the performance of the condition is not in itself of material value will this reasoning be applicable. The presentation of an architect's certificate is in itself of no value, it is only useful because it proves that a building has been properly completed. To deny recovery altogether to the builder who has failed to comply with a condition requiring an architect's certificate as a prerequisite to the recovery of the price for the building is a plain forfeiture if the house has in fact been well built. But even in connection with direct stipulations for damages or penalties, it has been seen that the tendency of modern courts is to uphold the agreements of the parties unless clearly unconscionable. The same disposition is even more evident in dealing with conditions. Such relief as is granted



is also generally given either by a strained construction of the contract <sup>46</sup> or by allowing recovery on the basis of quasi-contract rather than by enforcement of the contract in spite of admitted non-performance of a condition. Nevertheless in some cases, though a condition precedent has confessedly not been performed, recovery is allowed on the contract itself, when the consequences of enforcement of the condition would result in a severe forfeiture or penalty, especially if a contingency has occurred which renders performance impossible and which presumably was not in the contemplation of the parties when they made the agreement.<sup>47</sup>

**§ 794. Excuse for non-performance of a condition requiring a certificate of an architect or engineer.**

Almost all contracts for building or engineering work of any importance provide that payment shall be made only when a certificate has been obtained from a supervising architect or engineer that the work has been performed as required by the specifications in the contract. In accordance with principles previously considered <sup>48</sup> the production of the certificate will

<sup>46</sup> "Conditions providing for disabilities and forfeitures are to receive when the intent is doubtful a strict construction against those for whose benefit they are introduced." *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337, quoted in *Pyle v. Pyle*, 260 Pa. 532, 103 Atl. 918. See also *supra*, § 620.

<sup>47</sup> In speaking of a condition in an insurance policy the New York Court said in *Matthews v. American Central Ins. Co.*, 154 N. Y. 449, 463, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. Rep. 627:

"The insured was bound by contract to do certain acts, as conditions precedent to the right to recover, and was under a legal obligation, if there were obstacles in the way, of making a reasonable effort to remove them. (*Howland v. Edmonds*, 24 N. Y. 307, 308; *Porter v. Kingsbury*, 71 N. Y.

588; *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792.) If, after due diligence, they had proved insurmountable for a time, the delay would have been excusable, and performance at the earliest practicable moment thereafter would have been sufficient, but to excuse non-performance it must appear that the act to be done could not, by any reasonable means, have been accomplished. Mere difficulty of performance is not enough. (*Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543, 551, 37 Am. Rep. 594.)" In the numerous cases on insurance policies classed under waiver, the unwillingness of the court to give a condition its literal effect when a forfeiture of the rights of the insured would thereby be caused, is frequently emphasized.

<sup>48</sup> *Supra*, § 677.

be excused if the failure to obtain it is due to the promisor's own fault. This will be the case where by collusion with the architect or engineer the owner induces him to refuse to give a certificate which has been earned.<sup>49</sup> It may be supposed, however, that without any collusion on the part of the promisor the architect or engineer fraudulently, maliciously, or otherwise, refuses to examine the work or refuses to exercise an honest judgment, and will not give a certificate. In England the builder is without relief in such a case.<sup>50</sup> The builder has taken his chance, it is said, of being able to cause the condition precedent to happen. It is not the promisor's fault that the condition has failed, and he may therefore take advantage of the failure. But in the United States recovery is generally allowed under these circumstances without production of a certificate.<sup>51</sup> In connection with these cases may be considered

<sup>49</sup> *Smith v. Howden Union* (Q. B. D.), 2 Hudson on Building Cont. (4th ed.) 156; *Batterbury v. Vyse*, 2 H. & C. 42; *American-Hawaiian, etc., Co. v. Butler*, 165 Cal. 497, 133 Pac. 280; *St. Louis, etc., R. Co. v. Kerr*, 153 Ill. 182, 38 N. E. 638; *Walsh v. North American Cold Storage Co.*, 260 Ill. 322, 103 N. E. 185; *Crawford v. Wolf*, 29 Ia. 567; *Hebert v. Dewey*, 191 Mass. 403, 410, 77 N. E. 822; *Smith v. White*, 5 Neb. 405; *Whelen v. Boyd*, 114 Pa. 228, 6 Atl. 384; *Thaler v. Greisser Construction Co.*, 229 Pa. 512, 79 Atl. 147; *Mills v. Paul* (Tex. Civ. App.), 30 S. W. 558. See also *Linch v. Paris, etc., Elevator Co.*, 80 Tex. 23, 15 S. W. 208; *Markey v. Milwaukee*, 76 Wis. 349, 45 N. W. 28. If the promisor improperly induced the decision of the third party it is immaterial that the latter was innocent of fraud. *Forest City Box Co. v. Sims*, 208 Fed. 109, 125 C. C. A. 337. So where the owner fails to employ an architect, *Feldman v. Goldblatt*, 133 N. Y. S. 945, 75 Misc. 656, or discharges him, *Catanzaro v. Jackson*, (Ala. 1916), 73 So. 510, he cannot insist on the condition.

<sup>50</sup> *Clarke v. Watson*, 18 C. B. (N. S.)

278; *Smith v. Howden Union* (Q. B. D.), 2 Hudson on Building Contracts (4th ed.), 156. See also *In re Noth and Cardiff Corporation*, [1918] 2 K. B. 146.

<sup>51</sup> (In many of the following cases there is merely a dictum supporting the text.) *North American Ry. Const. Co. v. R. E. McMath Surveying Co.*, 116 Fed. 169, 54 C. C. A. 27; *Utah Construction Co. v. St. Louis & Equipment Co.*, 254 Fed. 321; *Hatfield Special School Dist. v. Knight*, 112 Ark. 83, 164 S. W. 1137; *Ferguson v. Christensen*, 59 Colo. 42, 147 Pac. 352; *Michalis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *McDonald v. Patterson*, 186 Ill. 381, 57 N. E. 1027; *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514; *Hebert v. Dewey*, 191 Mass. 403, 411, 77 N. E. 822; *Marsch v. Southern New Eng. R. Corp.*, 230 Mass. 483, 120 N. E. 120; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Chism v. Schipper*, 51 N. J. L. 1, 16 Atl. 316; *Bradner v. Roffsell*, 57 N. J. L. 32, 412, 29 Atl. 317; *Bean v. Miller*, 69 Mo. 384; *Justice v. Elwert*, 28 Or. 460, 43 Pac. 649; *Perry v. Hunt*, 62 Or. 256, 125 Pac. 295; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139.

ons under insurance policies which in terms require the  
cate of a third person as a condition of recovery. The  
l of the third person to consider the matter fairly and to  
a certificate if the facts warrant it, has been held no ex-  
n a number of cases—in the United States as well as in  
nd.<sup>52</sup> There are indeed contrary decisions.<sup>53</sup>

### Distinction between certificates in building contracts and under insurance policies.

e distinction between a condition in an insurance  
requiring a certificate, and a similar condition in a  
ng contract has been thus stated: "A provision like  
ne before us in this kind of contract [a building contract]  
the substance of the consideration on one side is valuable  
rty in the form of labor and materials, is materially  
ent from the provision in the policies of insurance to  
we have referred. In these contracts for insurance a  
sum is paid on one side to obtain indemnity from the  
le consequence of a risk which is very likely to cause  
ge. The compensation is to be paid only for genuine  
resulting from the risk insured against. Satisfactory  
of their character, as coming within the policy, is of the

re the architect withdraws from  
ment under the contract. Hal-  
Waukesha Springs Sanitarium,  
s. 311, 104 N. W. 94, 110 Am.  
838. And under a contract for  
of goods, inspection by a third  
for which the contract provides,  
inding if the agreed inspector  
exercise an honest judgment.

*v. Laurens Milling Co.*, 84  
299, 66 S. E. 294.

*orsley v. Wood*, 6 T. R. 710;  
*ion Ins. Co. v. Pherson*, 5 Ind.  
*hnson v. Phoenix Ins. Co.*, 112  
9, 17 Am. Rep. 65; *Audette v.*  
*St. Joseph*, 178 Mass. 113, 59  
38; *Lane v. St. Paul Ins. Co.*, 50  
227, 52 N. W. 649, 17 L. R. A.  
*gan v. Commercial Union Ins.*  
Can. S. C. 270. See also Colum-  
*Co. v. Lawrence*, 10 Pet. 507, 9

L. Ed. 512; *Ætna Ins. Co. v. People's*  
*Bank*, 62 Fed. 222, 8 U. S. App. 554,  
10 C. C. A. 342; *Daniels v. Equitable*  
*Fire Ins. Co.*, 50 Conn. 551; *Leadbetter*  
*v. Ætna Ins. Co.*, 13 Me. 265, 29 Am.  
Dec. 505; *Kelly v. Sun Fire Office*, 141  
Pa. 10, 21 Atl. 447, 23 Am. St. Rep.  
254; *Oswalt v. Hartford Fire Ins. Co.*,  
175 Pa. 427, 34 Atl. 735.

"*O'Neill v. Massachusetts Benefit*  
*Assoc.*, 63 Hun, 292, 18 N. Y. S.  
22; *Lang v. Eagle Fire Co.*, 12 N. Y.  
App. Div. 39, 46, 42 N. Y. S. 539.  
See also *American Central Ins. Co. v.*  
*Rothchild*, 82 Ill. 166; *German-Amer-*  
*ican Ins. Co. v. Norris*, 100 Ky. 29,  
37 S. W. 267, 66 Am. St. Rep. 324;  
*Home Fire Ins. Co. v. Hammang*, 44  
Neb. 566, 576, 62 N. W. 883; *Schmurr*  
*v. State Ins. Co.*, 30 Or. 29, 46 Pac.  
363.

very essence of the contract. On that depends the obligation of the insurer to pay a very large sum for which only a small consideration is given. In view of the ease with which fraud may be practiced, the parties sometimes prescribe a method of establishing the validity of the claim, which they make essential to its recognition. They say, in effect, that the policy shall only apply to claims established in this way, and they thereby make the production of the prescribed certificate of the very essence of the contract. It is only to contracts which are construed as showing such a strict agreement that this rule is applied."<sup>54</sup> Doubtless it is not without importance that parties have clearly agreed upon a possible forfeiture or penalty, but the history of relief in mortgages, penal bonds and penal damages indicates that the importance may easily be overestimated.

#### § 796. Effect of the architect's death.

A more striking case perhaps is where a particular architect specified in the contract dies, especially if his death occurs after the builder has substantially completed his work. There can be no doubt that in such a case American courts would allow recovery.<sup>55</sup> The reason given in the American courts for allowing recovery where the condition has neither been complied with nor prevented by any action of the promisor is that the situation which has arisen was not within the contemplation of the parties. This may be true but it seems it should rather be recognized as a reason for relief, equitable in its nature, against the forfeiture which would be caused by strict enforcement of the condition, than as a justification for construing plain language as meaning something different from what it says. A promisor frequently uses broad language in a condition for the purposes of protecting himself from all possible contingencies; that the contingency which actually occurs is not one which he had in mind when framing the

<sup>54</sup> *Hebert v. Dewey*, 191 Mass. 403, 412, 77 N. E. 822.

<sup>55</sup> *Hebert v. Dewey*, 191 Mass. 403, 411, 77 N. E. 822. If the condition refers in general terms to any architect employed by the owner, the death of

one merely involves the appointment of a successor, who thereupon falls within the terms of the condition. *Meacham v. Jamestown, etc.*, R. Co. 211 N. Y. 346, 105 N. E. 653.

tion seems immaterial, as a pure question of construction, language of the condition is wide enough to cover the on.<sup>56</sup>

### Unreasonable but not fraudulent refusal of certificate.

The American courts have gone beyond the limits suggested in the preceding sections and have held that any unreasonable refusal of the certificate by the architect or engineer as performance of the condition and the builder becomes bound to recover without production of any certificate.<sup>57</sup>

*Hebert v. Dewey*, 191 Mass. 77 N. E. 822, Knowlton, C. J., it is plain that, in making the contract, it was understood between the parties that the architect would perform in good faith in the performance of his part of his duty. In legal contemplation the contract is as if their understanding in this particular had been incorporated into it, as one of its terms. Without such an agreement, after the performance of the contract, the architect wilfully and fraudulently refused to act, or dies, or becomes disabled, and there is no provision for the case, the question arises whether the contractor is entitled to receive the contract price, the fact of performance being shown in some other way, whether the entire contract falls to the ground, and the parties are left to their rights under a *quantum*.

It is a general rule that if an architect enters into a contract that fails is of the essence of the contract, and enters into the consideration, in such a case that there can be no substantial performance under the changed conditions, the whole contract will fail and the parties may have reasonable compensation for what they have relied upon it. *Butterfield v. Swadlow*, 153 Mass. 517, 27 N. E. 667, 15 Am. St. Rep. 654. A. 571, 25 Am. St. Rep. 654. No provision in this case for the enforcement of their rights, in reference to the construction of the building

called for by the contract, is of a different kind. It is a part of the machinery provided for the ascertainment and adjustment of their rights in reference to the matters to which the contract relates. It is provided to be used only upon an implied condition that it will be available for use. If, through the death or incapacity of the architect, or his wilful refusal to act, it becomes impossible to adopt this method of determining the rights of the parties, other means may be adopted, on the grounds that this no longer remains as an essential term of the agreement. In all substantial particulars the contract is complete without the provision for obtaining a final certificate, and, in the case supposed, it should be treated as if the provision were stricken from the contract.

<sup>57</sup> *Scully v. United States*, 197 Fed. 327; *Anderson v. Imhoff*, 34 Neb. 335, 51 N. W. 854; *Nolan v. Whitney*, 88 N. Y. 648; *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608; *Thomas v. Stewart*, 132 N. Y. 580, 586, 30 N. E. 577; *Macknight Flintic Stone Co. v. City of New York*, 160 N. Y. 72, 86, 54 N. E. 661; *Whelen v. Boyd*, 114 Pa. 228, 6 Atl. 384; *Sullivan v. Byrne*, 10 S. C. 122; *Norfolk, etc., Ry. Co. v. Mills*, 91 Va. 613, 22 S. E. 556; *Johnston v. Bunn*, 114 Va. 222, 76 S. E. 310; *Washington Bridge Co. v. Land & River Imp. Co.*,

In connection with these cases may be considered decisions on contracts for the sale of land calling for a title satisfactory to the purchaser's attorney, and holding that a marketable title need not be accepted, if in fact the attorney was dissatisfied.<sup>58</sup>

The weight of American authority in regard to building certificates, however, supports the proposition that incompetency or unreasonableness does not invalidate an honest decision on the part of the architect; but many cases qualify this by saying that in case of "gross mistake" on the part of the architect or engineer, the certificate is excused.<sup>59</sup> The

12 Wash. 272, 40 Pac. 982; *Taft v. Whitney Co.*, 85 Wash. 389, 148 Pac. 43; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139; *Wendt v. Vogel*, 87 Wis. 462, 58 N. W. 764.

<sup>58</sup> *Hudson v. Buck*, 7 Ch. D. 683. In *Wilhelm v. Wood*, 135 N. Y. S. 930, 933, 151 N. Y. App. Div. 42, it was said: "The defendants in making their proposition to accept certainly had a right to make any condition precedent which they thought proper. They had a right to make their acceptance depend upon any fact which they might name, and, having elected to make their acceptance to depend upon the approval of their own attorney, they did not undertake to guarantee that their attorney was a competent lawyer, or that he would, upon any given state of facts, approve. They simply undertook to take over the lease of the gas company's property if their attorney approved of the legality of the lease and the franchises, and their only obligation in the matter was not to interfere with the securing of this approval. His duty was measured by his duties to his clients, and the plaintiff had no claim upon him, other than that he should not be a party to a conspiracy to deprive the plaintiff of his rights under the contract. It was his duty, no doubt, to his clients, to advise them to the best

of his ability upon the facts as they presented to him, but it was his opinion as to the legality of the transaction which was made the condition of its performance on the part of the defendants, and no court or jury had any right to make any other or different condition. The plaintiff's attorney accepted this condition, and he and his associates expended their money in the transaction upon their faith that they would be able to satisfy Mr. Tomlinson of the legality of the entire transaction." With these decisions should be contrasted cases where the purchaser's own satisfaction or approval is stipulated for. Here the construction that reasonable satisfaction only is required is almost inevitable. *Roberts v. Kimmons*, 65 Miss. 332, 334, 3 South. 736, 737; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195; *Moot v. Business Men's Inv. Assoc.*, 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666; *Dean v. Williams*, 56 Wash. 614, 106 Pac. 130.

<sup>59</sup> *Chicago, etc., R. Co. v. Price*, 13 U. S. 185, 34 L. Ed. 917, 11 Sup. Ct. 290; *J. H. Sullivan Co. v. Wingerath*, 203 Fed. 460, 121 C. C. A. 584; *Frisco Lumber Co. v. Hodge*, 218 Fed. 779, 134 C. C. A. 456; *Kennedy v. United States*, 24 Ct. Cl. 122; *Hatfield Special School Dist. v. Knight*, 112 Ark. 83, 164 S. W. 1137; *Dingley v. Greene*, 5

such decisions allow no such excuse.<sup>60</sup> It is obvious that the principle of construction can justify the American decisions. The courts which render them are excusing the builder for not performing the condition, rather than awarding him the contract because he has performed it, or because the situation which has arisen is not within the meaning of the condition. The law of justice requires relief against the condition where a forfeiture will be caused, without fault on the part of the builder, and the condition should be admitted; but in considering what facts warrant such relief, it would be well to observe the analogy of the decisions in cases of quasi-contract. If the architect or engineer arrived at his conclusion under a clear mistake as to material facts, relief seems to be warranted; but where his knowledge of the facts of the case is correct, though his judgment may be unreasonable, it is a question of the change of the terms of the contract for the court to permit the judgment of a jury to be substituted for that of the architect or engineer for which the contract provided. To deny recovery on the contract wherever a jury finds the architect or engineer has been unreasonable, is doing nothing more than this. Equity has certainly never given relief from forfeiture of contracts on any such broad basis. Any relief against forfeiture as may be caused by the expert's decision in a case should be given on the theory of quasi-contract.<sup>61</sup>

**4. A builder may be liable though he has received an architect's certificate.**

The mere fact that an architect's certificate is made a condition precedent to the liability of the owner, does not estab-

33; *George S. Chatfield Co. v. First Baptist Church*, 44 Minn. 22, 89 Conn. 172, 93 Atl. 133; *Deakman*, 84 Ill. 130; *Gil-Courtney*, 158 Ill. 432, 41 N. E. 16, 43 So. 300; *McGregor v. J. A. Ware Const. Co.*, 188 Mo. 611, 87 S. W. 981; *Sheyer v. Pinkerton Const. Co. (N. J.)*, 59 Atl. 462; *Elliott Contracting Co. v. Portland*, 88 Oreg. 150, 171 Pac. 760.

*First Baptist Church*, 44 Minn. 22, 46 N. W. 146; *Standard Construction Co. v. Brantley Granite Co.*, 90 Miss. 16, 43 So. 300; *McGregor v. J. A. Ware Const. Co.*, 188 Mo. 611, 87 S. W. 981; *Sheyer v. Pinkerton Const. Co. (N. J.)*, 59 Atl. 462; *Elliott Contracting Co. v. Portland*, 88 Oreg. 150, 171 Pac. 760.

<sup>60</sup> *Smith v. Howden Union (Q. B. D.)*, 2 Hudson on Building Cont. (4th ed.) 156.

<sup>61</sup> See *infra*, § 1475.

lish necessarily the fact that the builder has fulfilled his main obligation to build according to the plans and specification and in a workmanlike manner. The owner may have protected himself doubly: first, by the builder's promise, and second, by a condition requiring an architect's certificate before payment is due. In such a case even though the condition requiring a certificate is fulfilled, a builder will still remain liable for breach of his promise.<sup>62</sup> Very commonly, however, by the terms of the building contract, the certificate is in the nature of an award binding both parties. This award is made a condition precedent to the builder's right of recovery but when made is conclusive on both parties, in the absence of collusion or fraud or such other reason as in the particular jurisdiction is held sufficient excuse for the non-performance of the condition.<sup>63</sup> "To make such a certificate conclusive requires plain language in the contract; it is not to be implied."<sup>64</sup> An award by an architect like an award by any other arbitrator may be made a condition precedent to liability on a promise.<sup>65</sup>

<sup>62</sup> *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. Ed. 811, 27 Sup. Ct. 535; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449. See also *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310; *Central Trust Co. v. Louisville, etc., Ry. Co.*, 70 Fed. 282; *Fontano v. Robbins*, 18 App. D. C. 402, 22 App. D. C. 253; *Adlard v. Muldoon*, 45 Ill. 193; *Hennebique v. Boston Cold Storage &c. Co.*, 230 Mass. 456, 119 N. E. 548; *Bond v. Mayor, etc., of Newark*, 19 N. J. Eq. 376; *Memphis, etc., R. R. Co. v. Wilcox*, 48 Pa. St. 161.

<sup>63</sup> As to what amounts to sufficient excuse see the decisions cited in the previous sections where the certificate was held conclusive on both parties; also, *e. g.*, the following cases where the certificate was held conclusive: *Sweeney v. United States*, 109 U. S. 618, 27 L. Ed. 1053, 3 Sup. Ct. 344; *Martinsburg, etc., R. Co. v. March*, 114 U. S. 549, 29 L. Ed. 255, 5 Sup.

Ct. 1035; *Chicago, etc., R. Co. v. Price*, 138 U. S. 185, 34 L. Ed. 917, 11 Sup. Ct. 290; *Sheffield, etc., R. Co. v. Gordon*, 151 U. S. 285, 38 L. Ed. 164, 14 Sup. Ct. 343; *Mayor & City Council of Baltimore v. Poe*, 132 Md. 637, 10 Atl. 360; *Wyckoff v. Meyers*, 44 N. Y. 143.

<sup>64</sup> *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 309, 51 L. Ed. 811, 27 Sup. Ct. 535. See also *Central Trust Co. v. Louisville, etc., Ry. Co.*, 70 Fed. 282, 284.

<sup>65</sup> See *infra*, §§ 1719 *et seq.* Sometimes it is merely reference to arbitration not a valid award which is the condition, though this is more usual in insurance policies than in building contracts. In *Second Soc. of Universalists v. Royal Ins. Co., Ltd.*, 221 Mass. 518, 525, 109 N. E. 384, the court said of such a condition: "This is a valid provision. It is not an arbitration of the whole controversy, but only a stipulation that the amount of the damage



Where a debt has arisen, a condition relating to the time of payment which becomes impossible is dispensed with.

Even in England where the courts have been most strict in enforcing conditions according to their strict terms, it has been held that where by the transfer of title to property, a debt for the price has arisen, liability will not be excused because the contract fixed a time for payment of the price and it has become impossible of performance without fault of the seller. Thus, where goods are shipped under a contract which provides that payment shall be made on arrival of the goods or at a fixed time after their arrival, the buyer is liable for the price, if title passed to him on shipment, though the goods never arrive, being lost in transit.<sup>66</sup> And where a conditional interest was sold and the title had passed, the buyer was held liable for the price after the property had been delivered, though payment was by the contract to be made on delivery of possession, and possession had never been delivered.<sup>67</sup>

It is ascertained summarily. It is a condition precedent and is not obnoxious to the principle that contracts to be enforced by the courts of their jurisdiction are not void. *Reed v. Washington Ins. Co.*, 138 Mass. 572; *Lamson Condensed Store Service Co. v. Prudential Ins. Co.*, 171 Mass. 433, 434, 100 E. 943.

It is to be noted, also, that although the amount of liability or loss must be ascertained by reference, the return of the property or the making of a valid award is a condition precedent to any action in law or equity to recover for such loss. It is 'the reference to these disinterested men and the award' by them which is the condition precedent. Here the instant policy differs from insurance contracts which have been enforced by the courts. Many forms of policies treat the award as a condition precedent. That was the requirement in *Hutchinson v. Liverpool*

& L. & G. Ins. Co., 153 Mass. 143, 144, 26 N. E. 439. See, for example, also *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 34 L. Ed. 419, 10 Sup. Ct. 945; *Commercial Union Assurance Co., Ltd., v. Dalsell*, 210 Fed. 605, 127 C. C. A. 241; *Scott v. Avery*, 5 H. L. Cas. 811, 845, 851; *Caledonian Ins. Co. v. Gilmour*, [1893] A. C. 85, 90, 96; *Spurrier v. LaClosche*, [1902] A. C. 446; *Jureidini v. National British & Irish Millers Ins. Co., Ltd.*, [1915] A. C. 499, 505, 506; *Wolff v. Liverpool & London & G. Ins. Co.*, 21 Vroom, 453; *Early v. Providence & Washington Ins. Co.*, 31 R. I. 225, 76 Atl. 753, 140 Am. St. Rep. 750; *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633, 30 N. W. 350; *Vernon Ins. Co. v. Maitlen*, 158 Ind. 393, 63 N. E. 755."

<sup>66</sup> *Fragano v. Long*, 4 B. & C. 219; *Alexander v. Gardner*, 1 Bing. (N. C.) 671.

<sup>67</sup> *J. S. Potts Drug Co. v. Benedict*,

"If parties intend that a debt shall be contingent, as in *respondentia* or bottomry contracts, then it will be so held by the Court. If, on the contrary, they intend that the debt shall be absolute, and fix upon the future event as a convenient time for payment merely, as where a drover purchases cattle, promising to pay for them on his return from market, overlooking the contingency that he may never return, then the debt will not be contingent; and, if the future event does not happen as contemplated, the law will require payment to be made within a reasonable time. The parties having neglected to provide for such a contingency, the law in this, as in many other cases, supplies the omission by implying such a promise as is necessary to do justice between the parties,—such as we may fairly presume would have been made in fact, if the contingency had been thought of. In each case, the intention of the parties to make the debt contingent or otherwise, must be gathered from the language used, the situation of the parties, and the subject-matter of the contract, as presented by the evidence."<sup>68</sup> Cases where the risk of loss is thrown on a conditional buyer of chattels and (in some jurisdictions) on one who has contracted to buy real estate may also be considered in this connection;<sup>69</sup> since the buyer is there charged with the payment of a debt though a condition precedent to payment under the terms of the contract has not been complied with. So a party to a negotiable instrument whose liability is conditional on demand upon a prior party and notice of dishonor to himself may on occasion become liable when these conditions for good reason have not been complied with.<sup>70</sup>

156 Cal. 322, 104 Pac. 432, 25 L. R. A. (N. S.) 609.

<sup>68</sup> *DeWolfe v. French*, 51 Me. 420, 421. See also *Hogan v. Globe Mut., etc., Assoc.*, 140 Cal. 610, 74 Pac. 153; *Ahlgren v. Walsh*, 173 Cal. 27, 158 Pac. 748, Ann. Cas. 1918 E. 751; *Rose v. McLeod*, 2 Bay, 108; *Langdell, Summ. Cont.*, § 36. *Cf.* *Johnson v. Lyon*, 75 Mich. 477, 42 N. W. 993; *Bigler v. Hall*, 54 N. Y. 167, 171, and

see criticism of the latter case *infra*, § 1946, n.

<sup>69</sup> See *infra*, §§ 928, 965.

<sup>70</sup> See *infra*, §§ 1168, 1187. *First Nat. Bank v. McConnell*, 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. 336. Here, however it may be said that the possible qualifications of the condition are implied in the original contract.

**Effect of a condition requiring valuation—Transfer of property.**

Common form of contract to buy and sell makes the price the one that which a certain valuer or valuers shall fix. The agreement of valuation is in such a case an express condition, a condition implied in fact, qualifying the obligation of the buyer to pay the price. Instead of promising to pay a specified price or a reasonable price, he promises to pay such price only as the valuers shall fix. In the nature of the case this promise cannot be performed unless the valuation first takes place. A condition has sometimes been called a necessary condition or an inherent condition.<sup>71</sup> The valuation may also be a condition precedent to the transfer of the property in the contract.

This, however, is not necessarily the case.<sup>72</sup> Many sales are made without a fixed price, the law construing the contract as providing for a reasonable price. When a man sells a barrel of flour or a suit of clothes without bargaining for the price the title to the goods may pass and the goods are consumed before the price is determined. So a seller may transfer the property where the contract provides for valuation although the price has not yet been fixed by the valuers. The question is one of intention.<sup>73</sup>

If an immediate transfer of the property was agreed upon, the buyer being credited for the price, the property will, thereupon, pass. If, however, the seller's promise was executory,

see, L. J., in *Ex parte Collins*, 12 Ch. 367, 372.

iston on Sales, § 167.

There are, indeed, a few express cases which are at variance with the statement in the text that the property may pass. See *Hardware Co. v. Hawes*, 122 N. D. 50 S. E. 964, and cases cited. They are based upon a misunderstanding of the Roman Law. In that law it was held that until the price was fixed by valuation the sale was not complete. This doctrine, however, was not a rule of the Roman Law, but a rule of which exists in the Common Law in the first place, for reasons

peculiar to Roman jurisprudence, there could be no sale without a fixed price. In the second place, no mere agreement of sale under the Roman Law transferred title to the property. Not only delivery but actual payment of the price was essential. Consequently, a sale in the Roman Law meant an executory contract, not a transfer of the property; and when the Roman lawyers say that the sale is null where no valuation has been made, they are not referring to the question of transfer of the property at all, but to the question of whether a valid contract to sell exists.

it will generally be subject to a condition that the price be paid simultaneously with the transfer of the property. If such condition exists, whether expressed or implied, it is obvious that no liability on the part of the seller can arise until the price is not only fixed by the valuation, but is also tendered. One may suppose a case, however, where the promise of the seller though executory is not subject to such a condition. For instance, if the seller agreed to deliver on a fixed date, the buyer to have thirty days' credit for the price, which should be determined by valuation. Even in such a case if it became evident before the time for the delivery of the goods that the valuation was not going to take place for any reason the seller would be excused from performing his promise. Frequently it will not be apparent from the terms of the bargain at what moment the parties intended the property to pass, and for this reason resort must be had to rules of presumption. In England it is a rule of presumption that where the seller is bound to do some act in reference to the goods for the purpose of ascertaining the price, the property does not pass until such thing be done.<sup>75</sup> This rule prevails in substance in many of the United States,<sup>76</sup> and where it prevails it seems that the conclusion is justified that "strong proof would no doubt be required to show that an immediate sale was intended for the transaction should be considered *prima facie* as an agreement to sell by analogy to that rule."<sup>77</sup> This rule of presumption, however, has been abolished in some of the United States,<sup>78</sup> and has not been included in the American Uniform Sales Act. Accordingly, in jurisdictions where the rule is not in force, either because of the passage of the Sales Act or otherwise, the broad general presumption would be applicable that where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods presumably passes to the buyer when the contract is made.<sup>79</sup> It may be argued that this is not an unconditional contract until the valuation is made, but the condition of valuation

<sup>75</sup> See *infra*, § 875.

<sup>76</sup> English Sale of Goods Act, § 18, rule 3. See Williston on Sales, § 266.

<sup>77</sup> Williston on Sales, § 269.

<sup>78</sup> Benjamin, Sale (5th Eng. ed. 145.

<sup>79</sup> Williston on Sales, § 269.

<sup>80</sup> Williston on Sales, § 264.

ms properly attached to the obligation to pay the price  
ner than to the contract to sell the goods. The qualification  
the seller's promise is simply that dependency which habit-  
ly exists in a contract to sell, namely, that failure of the  
ver, actual or prospective, to fulfil his obligation will excuse  
seller from his obligation.<sup>80</sup>

# 01. Failure of valuation without fault of either party.

f the valuation fails without fault of either party, it must  
urally follow that an obligation conditional upon such valua-  
a cannot be enforced. A question may indeed be raised as  
the meaning of the condition, and this has been suggested  
the Civil Law, namely, whether the contract in naming a  
ticular valuer fairly means more than to designate a "rea-  
able man" and, therefore, whether it is not within the terms  
the contract to substitute another reasonable man for the one  
cially designated. Both the Roman Law<sup>81</sup> and our law  
e answered this question in the negative, and with reason.  
must be assumed that the parties laid weight on the par-  
lar individuality of the valuer. Accordingly if the valuer  
er dies,<sup>82</sup> or refuses to act,<sup>83</sup> the buyer cannot be com-  
ed to pay the price because of the condition in his obliga-  
a, and the seller, similarly, if he has not already transferred  
property, cannot be compelled to do so, either because  
promise to transfer is itself expressly conditional, or  
ause the present or prospective failure on the part of the  
er to pay the price excuses the counter-obligation to transfer  
property in the goods. If already transferred to the buyer  
ore it appears that the valuation cannot be made, either  
ty to the bargain should have the right to rescind it if the  
er party can be put in the same position which he was in

See *infra*, §§ 812 *et seq.*

Justinian's Institutes, 3, 24, 1;  
e, 4, 38, 15. See Moyle, Contract  
ale, 70. So Pothier, Contract of  
, § 24, and the French Civil Code,  
1592.

Firth v. Midland R. R. Co., L. R.  
Eq. 100.

Thurnell v. Balbirnie, 2 M. & W.

786; Elberton Hardware Co. v. Hawes,  
122 Ga. 858, 865, 50 S. E. 964; Stern  
v. Farah, 17 N. Mex. 516, 133 Pac.  
400. See also Cooper v. Shuttleworth,  
25 L. J. Ex. 114; Vickers v. Vickers,  
L. R. 4 Eq. 529; Milnes v. Gery, 14  
Ves. Jr. 400; Wilks v. Davis, 3 Mer.  
507; Hutton v. Moore, 26 Ark. 382;  
Fuller v. Bean, 34 N. H. 290.

before the bargain was made.<sup>84</sup> It may, however, happen that the buyer has made use of the goods or otherwise has become unable to restore them. In such a case the seller is entitled on principles of quasi-contract to recover the fair value of the goods.<sup>85</sup>

### § 802. How far the valuation is conclusive upon the parties.

In the absence of fraud or mistake, the price fixed by agreed valuers is conclusive upon the parties.<sup>86</sup>

In the Civil Law "if the valuer named fixed an outrageously unfair price, it is very generally held that it could be rectified by recourse to an action."<sup>86a</sup>

### § 803. Failure of valuation owing to the fault of either party.

In any case where from its nature a contract requires some action by one party or the other, or the coöperation of both, there is an implied promise to perform the act or to give the coöperation even though the promise is not expressed.<sup>87</sup> Accordingly if either party was to select a valuer or notify a man selected for a valuer, or submit property to valuation, and fails to do so, he has broken his contract. He is, therefore, liable

<sup>84</sup> Benjamin, *Sale* (5th Eng. ed.,) 145.

<sup>85</sup> *Clarke v. Westrope*, 18 C. B. 765; *Alberton Hardware Co. v. Hawes*, 122 Ga. 858, 865, 50 S. E. 964. See also *Deyo v. Hammond*, 102 Mich. 122, 60 N. W. 455, 25 L. R. A. 719. In that case plaintiff sold the defendant a horse for \$800 cash, and an agreement by the defendant to pay an additional \$100 if the horse could trot as fast as one owned by the defendant within ninety days; the test to be made by one M. The trial did not take place owing to the sickness of the horses. It was held, nevertheless, that the defendant was liable to pay the additional \$100, it appearing from the evidence that the horse sold could trot faster than the other one, although no test had been made by M. or any one else since the sale. In this case it is

to be observed that the defendant kept the horse beyond the period of ninety days, and also that the agreement itself showed the parties considered an additional \$100 a reasonable amount if the horse had the speed which the evidence showed it to possess. The decisions in this note make it evident that there is no difficulty in title being transferred though the valuation does not and cannot take place.

<sup>86</sup> *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Wilcox v. Young*, 66 Mich. 687, 33 N. W. 765.

<sup>86a</sup> Moyle, *Sale in the Civil Law*, 70. So Pothier, *Contract of Sale*, § 24. But Bechman, *Der Kauf*, II, § 217, holds otherwise.

<sup>87</sup> See *infra*, § 1293.

damages. It may be difficult to fix upon any actual damage, but it must be assumed that if the valuers had acted properly they would have fixed a valuation identical with the market value or real value of the property. Presumably for this reason it has even been said that if a party to the contract is the cause of a valuer's failure to act, the other party is entitled to redress,<sup>88</sup> but there seems to be a clear breach of contract in such a case.<sup>89</sup> Specific performance will not be given in breach of a contract.<sup>90</sup> This is in accordance with the general principle of equity denying specific performance to all kinds of contracts for arbitration.<sup>91</sup> The case may be further supported, however, that possession without title or that title without possession has passed to the buyer, and that subsequently the seller wrongfully fails to perform, or prevents performance, so that the valuation cannot take place. In such a case the seller can only maintain suit for damages, but is entitled to all the other appropriate remedies allowed to an unpaid seller.<sup>92</sup> Whether the property nor possession has passed to the buyer, the seller can generally maintain only an action for damages,<sup>93</sup> with a possible exception that if the goods could not readily be sold for a reasonable price, the seller might be allowed to recover the goods as the buyer's and sue for a reasonable price.<sup>94</sup> Insurance policies an appraisalment or valuation of the insured is frequently made a condition precedent to any right of recovery. This condition may, however, be excused by the misconduct of the company or its appraiser.<sup>95</sup> It will be noticed

*Barton Hardware Co. v. Hawes*, 108 N. E. 858, 865, 50 S. E. 964; *Stern v. Gery*, 17 N. Mex. 516, 133 Pac. 400. See *Humaston v. Telegraph Co.*, 20 Wall. 20, 22 L. Ed. 279; *Uniform Sales Act*, § 10; *Williston on Sales*,

*Wheeler v. Vickers*, L. R. 4 Eq. 507; *Wilks v. Davis*, 3 Meriv. 507; *Humaston v. Telegraph Co.*, 20 Wall. 20, 22 L. Ed. 279; *Davila v. United Fruit Co.*, 101 N. E. 602, 103 Atl. 519.

See *infra*, § 1421.

As to the nature of these remedies, see *Williston on Sales*, §§ 501-593.

<sup>88</sup> As to the exceptional cases where equity specifically enforces an agreement for arbitration or valuation, see *infra*, § 1421, n.

<sup>89</sup> See *Uniform Sales Act*, § 63 (3), and *infra*, § 1365.

<sup>90</sup> In *Brock v. The Dwelling-House Ins. Co.*, 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, it was held this condition was excused by the unreasonable action of the appraiser appointed by the company. The court said (p. 593): "It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable, and virtually

that the situation in such a case is analogous to that in a sale where title to the goods has passed and they have been used by the buyer. The insurance contract has become binding by the performance of the consideration on the part of the insured that is, by the payment of the premium; and the loss having taken place, it is impossible to remit the parties to their original position. The plaintiff is, therefore, entitled to recover the amount of his loss as estimated by a jury.

#### § 804. Promises to pay when able.

Analogous to the cases which have been considered, and to promises performable if the promisor is satisfied with the promisee's performance,<sup>96</sup> are promises to pay money when the promisor is able to do so. Is such a promise to be construed as meaning when the promisor reasonably ought to be able to pay, as some courts have construed a condition of satisfaction to mean reasonable satisfaction,<sup>97</sup> or is there an implied obligation to use reasonable efforts to become able; or, on the other hand, may it be said that what the promisor "might, could or should have done," is not in question?<sup>98</sup> Most courts have been disposed to take this view.<sup>99</sup>

Some courts, however, either construe the promise to mean

amounts to a refusal to proceed with the appraisal, the fact that the appraisal was not concluded before suit brought will not bar an action on the policy." *McCullough v. Insurance Co.*, 113 Mo. 606, 21 S. W. 207; *Bishop v. Insurance Co.*, 130 N. Y. 488, 29 N. E. 844; *Uhrig v. Insurance Co.*, 101 N. Y. 362, 4 N. E. 745; *Bradshaw v. Insurance Co.*, 137 N. Y. 137, 32 N. E. 1055. Compare *Cooper v. Shuttleworth*, 25 L. J. Ex. 114.

<sup>96</sup> See *supra*, § 44.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Work v. Beach*, 13 N. Y. S. 678.

<sup>99</sup> *Cole v. Saxby*, 3 Esp. 159; *Davies v. Smith*, 4 Esp. 36; *Tell City Co. v. Nees*, 63 Ind. 245; *Stainton v. Brown*, 6 Dana, 248; *Eckler v. Galbraith*, 12 Bush, 71; *Denney v. Wheelwright*, 60

Miss. 733; *Everson v. Carpenter*, 17 Wend. 419; *Re Knab*, 78 N. Y. S. 292, 38 N. Y. Misc. 717; *Nelson v. Bonnhorst*, 29 Pa. 352; *Salinas v. Wright*, 11 Tex. 572. In *Work v. Beach*, 13 N. Y. S. 678, the defendant had promised to pay about \$15,000 "when able." Three years afterwards action was brought, and it was proved that during the interval the defendant had received a salary of \$15,000 a year, out of which he saved nothing. The court held the defendant not liable.

It is interesting to compare this decision with the New York case holding that a condition requiring satisfaction is met by showing that the promisor reasonably ought to have been satisfied. See *supra*, § 44.



promise to pay in a reasonable time, or imply an obligation to use reasonable means to become able.<sup>1</sup>

There is no doubt that a promise to pay when able if it does not create liability earlier, becomes enforceable when the ability occurs;<sup>2</sup> and when once the condition has happened, and the promisor thus becomes liable to pay, his subsequent inability does not excuse him.<sup>3</sup> The principle that prevention of the happening of the condition excuses the promisee from proving that it has happened, must apply to cases of this sort as well as to conditions generally. Therefore, if it can be said that one who promises to pay when able has prevented himself from becoming able, the happening of the condition will be excused. It should be considered as prevention is a more troublesome question. Any expenditures made for the very purpose of remaining unable would certainly fall within the category. It perhaps not going too far to say further that the parties in such a case, though presumably contemplating a continuance of expenditures commensurate with the promisor's station in life and past mode of living, do not contemplate expenditure beyond that, and such expenditure will, therefore, amount to prevention of performance of the condition.

### 5. Substantial performance.

In many jurisdictions it is held that even though an express condition is not complied with, a plaintiff who has substantially performed may recover the contract price promised for his performance, less whatever amount may be necessary to compensate the defendant for failure to comply with the condition qualifying his obligation. This is not an application of the principle *de minimis non curat lex*. Nowhere would a

*Munoz v. Dautel*, 19 Wall. 560, 18 Ed. 161; *Starr Piano Co. v. ...*, 8 Ala. App. 449, 62 So. 549; *Kinkaid v. Hershey*, 35 Ia. 340; *Kinkaid v. Higgins*, 1 Bibb, 396; *DeWolff v. ...*, 51 Me. 420; *Crooker v. ...*, 65 Me. 195, 20 Am. Rep. 687; *... v. Tipton*, 10 Oh. St. 88, 75 Am. 498; *Noland v. Bull*, 24 Oreg. 33 Pac. 983. In *Smithers v. ...*, 41 Fed. 101, a note "payable

at my convenience and upon this express condition that I am to be the sole judge of such convenience and time of payment," was held payable after a reasonable time.

<sup>1</sup> *Flather v. Economy Slugging Machine Co.*, 71 N. H. 398, 52 Atl. 454, and see cases *supra*, n. 99.

<sup>2</sup> *Denney v. Wheelwright*, 60 Miss. 733, 744.

departure from full performance of a condition be regarded as important if the departure were an inconsiderable trifle having no pecuniary importance. But the principle in question recognizes that the plaintiff's departure from full performance has been of such pecuniary consequence that the injury to the defendant must be deducted.<sup>4</sup> This doctrine seems to have been adopted from the rule governing dependent promises where no express condition qualifies the promise of the defendant, and his only excuse is the failure of the plaintiff to perform his promise. In such a case if the plaintiff has substantially performed, the defendant is liable.<sup>5</sup> But there no violation is done

<sup>4</sup> For cases of this sort see—Cope v. Beaumont, 181 Fed. 756, 758, 104 C. C. A. 292; Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247; Evans v. Howell, 211 Ill. 85, 71 N. E. 854; Woodward v. Fuller, 80 N. Y. 312; Nolan v. Whitney, 88 N. Y. 648; Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238 (*cf.* Mahoney v. Oxford Realty Co., 133 N. Y. App. Div. 656, 118 N. Y. S. 216); Moore v. Carter, 146 Pa. 492, 502, 23 Atl. 243; Lynch v. Paris, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208; Manning v. School District, 124 Wis. 84, 102 N. W. 356. See also Smith v. Scotts Ridge School Dist., 20 Conn. 312; Wiley v. Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342. Cases where substantial performances of conditions in subscription contracts was held sufficient are collected in 48 L. R. A. (N. S.) 803 n.

<sup>5</sup> See *infra*, § 842. The importance of this distinction is brought out in Henry v. Jones, 164 Iowa, 364, 366, 145 N. W. 909. "The precedents relied upon by the appellant are of the familiar class, where the contractor agrees to accept payment for his work only upon the estimates or certificate of an engineer or architect, an agreement which we have held to be valid and binding. Under such contract it has also been held that these estimates are the measure of the contractor's

right of recovery. Mitchell v. Kavanagh, 38 Iowa, 286; American Bonding & Trust Co. v. Gibson County, 14 Fed. 871 (76 C. C. A. 155, 7 Ann. Cas. 522); McNamara v. Harrison, 81 Iowa, 486, 46 N. W. 976; Edwards v. Louisiana County, 89 Iowa, 499, 56 N. W. 654; Miller v. Mason, etc., Ry. Co., 13 Iowa, 412, 108 N. W. 302.

"The authority of these decisions and their application to all cases of like character will not be questioned but the contract now before us is not of that kind. It nowhere requires the contractor to receive payment upon the architect's estimate or certificate but there is an absolute undertaking by defendant to pay the stipulated instalments according to the stage of progress of the work; no mention being made of the architect except the reference to his 'acceptance' when the work was completed. Nor is there any provision by which the architect is given authority to act as arbiter of any differences arising between the contractor and owner, or to determine what damages, if any, either party may sustain because of any failure of the other to observe the conditions of the contract. Nor is there any requirement of any certificate of approval or acceptance by such architect. Under these circumstances, it appearing that the job has been completed substantially as agreed, we have

expressed intention of the parties as the defendant has made his promise conditional on the plaintiff's performance, any excuse he may have is given him by the law rather than from his own bargain. The obvious reason for enforcing the defendant's promise (where that is done) in spite of the plaintiff's failure to comply with an express condition is to prevent the forfeiture of the plaintiff's labor and materials which would be caused by a strict enforcement of the condition.<sup>6</sup>

that the owner may not plead his own or the architect's failure to obtain approval thereof as a defense to an action for the contract.

*Boeller v. Heints*, 137 Wis. 169, 18 N. W. 543, 24 L. R. A. (N. S.) The court said: "One is liable to go astray in studying this subject by carrying indiscriminately to cases elsewhere, unless he applies that the right to recover for substantial performance of an entire building is widely distinguishable from the right generally. The exception is a matter of judicial creation, having in view the inequity of permitting a person to suffer great loss to the enrichment of another, in a situation where, in every nature of things, no opportunity exists for the former, practically and reasonably, to restore the building to his former position, as in case of a building constructed upon the premises of another which that owner must necessarily receive because it is being incorporated into and an inseparable part of his property. The rule is regarded differently in some jurisdictions than in others, and in the absence of efforts to give a remedy to the plaintiff without unduly injuring the defendant we find a well defined classification of holdings according to jurisdiction.

*Arch Cooley v. First Nat. Bank* Minneapolis, 86 Minn. 385, 388, 90 N. W. 789, the court said: "The rule of substantial performance of building

and similar contracts, where of necessity the owner of the land upon which the structure is built retains the whole benefit of the labor and material furnished in the erection thereof, is well settled in this state. It is this: Where a contractor has in good faith made substantial performance of the terms of the contract, but there are slight omissions and defects, which can be readily remedied, so that an allowance therefor out of the contract price will give the other party in substance what he bargained for, the contractor may recover the contract price, less the damages on account of the omissions. But the rule does not apply where the deviations from the contract are such that an allowance out of the contract price would not give the other party essentially what he contracted for. *Bixby v. Wilkinson*, 25 Minn. 481; *O'Dea v. City of Winona*, 41 Minn. 424, 43 N. W. 97; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Madden v. Estrich*, 46 Minn. 538, 49 N. W. 301; *Taylor v. Marcum*, 60 Minn. 292, 62 N. W. 330; *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682; *Cornish, Curtis & G. Co. v. Antrim, etc., Dairy Ass'n*, 82 Minn. 215, 84 N. W. 724.

"This rule of substantial compliance, however, does not apply to contracts for the issuing of municipal bonds to aid in the construction of a railway; for they are not within the reason of the rule. In such cases, whether the

It seems better, however, to avoid hardship of this sort by allowing recovery on a *quantum meruit* on the theory of quasi-contract<sup>7</sup> than to set aside an agreement of the parties; since when confessedly enforcing an obligation imposed by law, the court may fairly fix such boundaries as justice requires.<sup>8</sup> But neither in an action on the contract nor on a *quantum meruit* does there seem any justification for relieving a builder from an express condition requiring an architect's certificate when the architect acted reasonably in refusing to give his certificate, until the contract has been not only substantially but

bonds are delivered or not, neither the railroad nor any part thereof ever becomes the property of the municipality; but the ownership thereof remains unimpaired in the railroad company. It parts with nothing. *Memphis K. & C. Ry. Co. v. Thompson*, 24 Kan. 170, 182. The issuing and delivery of the bonds in such a case as this one are, and can only be, authorized by the vote of a majority of the electors of the municipality, and no officers thereof can modify or waive the conditions upon which the electors vote to authorize the delivery of the bonds. Therefore there can be no implied contract, from the conduct of the parties or otherwise, to accept performance as made for full performance as stipulated in the contract. Such an implied contract seems to be the basis of the doctrine of substantial performance of ordinary building contracts. *Elliott v. Caldwell*, *supra*. Again, where a majority of the voters of a town, whether they own any property therein or not, are authorized to, and do conditionally, incumber all of the property within the limits of the town to provide a bonus to a railroad company, strict performance of all of the conditions should be exacted of it.

"We are not to understand by this that any inconsequential or trifling departure from the terms of the contract, such as would fall within the

maxim, 'de minimis,' would defeat the right to the bonds; but we do hold that, to entitle the railroad company to the bonds, full and complete performance of the conditions of the contract must be shown, and that substantial performance, within the rule applicable to ordinary building contracts, is not sufficient."

<sup>7</sup> See *infra*, §§ 1473 *et seq.*

<sup>8</sup> The injustice of the doctrine in question may be seen from considering the facts of one of the cases supporting it. In *Nolan v. Whitney*, 88 N. Y. 648, a builder was allowed to recover though the defendant's obligation was conditional on an architect's certificate that the work was properly done, and the plaintiff had not got such a certificate and the jury found in effect that he was not entitled to it for they allowed a judgment from the contract price of \$200 for defects in the plastering. If the plaintiff had been denied recovery without the certificate he would not have lost all right. He would have been obliged to rectify the defective plastering, and would then have got the price of the work. Under the existing New York law a builder may do his work pretty well, declining to comply with reasonable requirements of the architect and, nevertheless, recover a contract price expressly made conditional on compliance with such requirements, less such deduction as the jury thinks reasonable.

performed, unless full performance is no longer possible without a degree of expense wholly incommensurate with advantage which the owner would gain thereby.<sup>9</sup>

*Bush v. Jones*, 144 Fed. 942, C. A. 582, Archbald, J., said on 944, "Equally well recognized, ever, is it that the production of a certificate as a condition precedent to a recovery is not necessary if it is capriciously or arbitrarily withheld. But where this is alleged incumbent on the contractor, in order to bring himself within the condition, if he does not produce a certificate, to show why he cannot, until he successfully does so he has made out a case. This is sustained by the highest authorities, to some of which it may not be without profit to refer. Thus in *Martinsburg & Potomac R. R. v. March*, 114 U. S. 109, 3 Sup. Ct. 1035, 29 L. Ed. 255, the payment was not to be due until six months after a certificate from the architect that the contract had been fully performed, and in a suit by the contractor it was held that the declaration was demurrable, there being no certificate, nor any facts stated which would entitle him to sue in the absence of a certificate. This ruling is in line with precedents of the same court in *Berg v. United States*, 97 U. S. 398, 3 Sup. Ct. 1106, and *Sweeney v. United States*, 109 U. S. 618, 3 Sup. Ct. 344, 3 L. Ed. 1053; and is cited with approval in *Hamilton v. Insurance Co.*, 107 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 19; *Chicago & Santa Fe R. R. v. United States*, 138 U. S. 185, 11 Sup. Ct. 290, 3 L. Ed. 917, and *United States v. Smith*, 175 U. S. 588, 20 Sup. Ct. 44, 4 L. Ed. 284; and it must therefore be regarded as the settled law of the federal courts. So in *Pittsburg Coal Co. v. Sharp*, 190 Pa. 256, 42 A. 385, which was also a suit on a contract, in which it was proved that payments were to be made

only on certificate of the architect, the plaintiff was not able to produce such certificate and it was held that the burden was upon him, in default of it, to show by proper evidence that which would excuse or dispense with it. This he proceeded to do by evidence that he had done the work in all particulars as called for by the contract, and that he had made frequent requests of the architect for the final certificate, which he neglected and refused to give, and by collusion with the defendant wrongfully withheld; and, the question having been submitted to the jury with appropriate instructions, a recovery by the plaintiff was sustained. In *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573, where payment, as here, was to be made from time to time on estimates of the architect, and final payment, at a certain time after the contract was completed, on certificate from the architect that the work had been done to his satisfaction, it was held that without a certificate or a waiver of it by the owner no recovery could be had. 'Had the plaintiff shown,' says Minshall, J., 'that he had made application to the architect for the requisite certificate, and that he had obstinately and unreasonably refused to certify, he might then have established his case by other evidence.' Pursuing this thought, it is further said that, upon an averment, supported by evidence, that the architect had fraudulently or unreasonably refused his certificate the contractor might recover by showing a substantial performance of the work as required by the contract; but that in the absence of such a showing against the architect a recovery could not be had without a certificate. In *National Contracting*

Sometimes an attempt is made to avoid the difficulties of the situation by applying doctrines of waiver or election.<sup>10</sup> But

*Co. v. Commonwealth*, 183 Mass. 89, 66 N. E. 639, everything was to be done in the manner and according to the plans and specifications and the requirements of the engineer under them; with regard to which it was declared that the contractor was bound to allege that he had performed his part of the contract according to such requirements, or to set forth facts excusing him therefrom, and that in the absence of these the complaint was demurrable." The court also cites in support of this view *Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514; *McNamara v. Harrison*, 81 Iowa, 486, 46 N. W. 976; *Beharrell v. Quimby*, 162 Mass. 571, 39 N. E. 407; *Guthat v. Gow*, 95 Mich. 527, 55 N. W. 442; *Johnson v. Howard*, 20 Minn. 370; *Hudson v. McCartney*, 33 Wis. 331; *Coorsen v. Ziehl*, 103 Wis. 381, 79 N. W. 562; and criticises *Crane Elevator Co. v. Clark*, 80 Fed. 705, 26 C. C. A. 100; *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129; *McKnight Flintic Stone Co. v. City of New York*, 160 N. Y. 72, 54 N. E. 661.

<sup>10</sup> *Wiley v. Athol*, 150 Mass. 426, 435, 23 N. E. 311. "But although conditions precedent must be performed, and a partial performance is not sufficient, yet when a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the latter may be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received, and may be compelled to rely upon his claim for damages in respect of the defective performance. *White*

*v. Beeton*, 7 H. & N. 42; *Behn v. Burness*, 3 B. & S. 751; *Jonassohn v. Young*, 1 B. & S. 296; *Pust v. Dowie*, 5 B. & S. 20; *Carter v. Scargill*, L. R. 10 Q. B. 564; *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 448; *Norrington v. Wright*, 115 U. S. 188, 29 L. Ed. 366, 6 Sup. Ct. 12; *Heilbutt v. Hickson*, L. R. 7 C. P. 438. See *Maryland Fertilizing Co. v. Lorentz*, 44 Md. 218; *Sampson v. Somerset Iron Works Co.*, 6 Gray, 120; *Kenworthy v. Stevens*, 132 Mass. 123; *Benjamin on Sales* (4th ed.), 547; *Leake*, Con. 664. But see *Harris v. Westholme*, 12 D. L. R. (Canada) 640.

"The foundation of this rule undoubtedly is, that it would be unfair that a party should receive and keep a part of what he has bargained for, and pay nothing for it because he has not received the whole. The technical reason given is, that a covenantor or promisee must be held to have dispensed with the performance of a condition precedent, as such, if, with knowledge that the condition was not being fully performed, he treats the contract as continuing, and takes the benefit of a part performance. There are difficulties in the application of the rule, particularly in determining what constitutes such a part performance as will change the condition precedent into an independent agreement. It seems that the performance must be of a substantial part of the contract, and that the acceptance must be under such circumstances as to show that the party accepting knew, or ought to have known, that the contract was not being fully performed." Therefore in *Massachusetts* the plaintiff to recover on the contract must allege full performance or a waiver. An allegation of substantial performance is insufficient, though recovery on a

by taking or keeping possession of one's own real estate is not necessarily a surrender of any rights, though such act involves deriving benefit from a builder's work.<sup>11</sup> There is no doubt that the basis of recovery is much confused by law. Probably in most American jurisdictions the actual results obtained are not so dissimilar as might be at first sight, though in some States partial performance is held to entitle to recovery on the contract in spite of failure to perform the condition precedent, while in others the plaintiff's only remedy is on a *quantum meruit*.

Where the rule of substantial performance prevails it is essential that the plaintiff's default should not have been wilful;<sup>12</sup> the defects must not be so serious as to deprive the property of its value for the intended use nor so pervade the whole that a deduction in damages will not be fair compensation.

#### Relief from conditions is not wholly a matter of interpretation.

Though courts in holding a promisor liable in spite of the non-performance of a condition, which the promisor has not intended from happening, generally purport to reach the result which they achieve by construction of the contract,

a *quantum meruit* would be allowable if the conditions were brought in that form, and in the absence of substantial performance. *See* Burns, 201 Mass. 74, 87 N. E. 570; *Pennessy v. Preston*, 219 Mass. 1, 100 N. E. 570.

*See supra*, § 724.

*Elliott v. Caldwell*, 43 Minn. 357, 10 N. W. 845, 9 L. R. A. 52; *Anderson v. Gle*, 79 Minn. 433, 82 N. W. 158; *Anderson v. Todd*, 8 N. Dak. 158, 10 N. W. 599; *VanClief v. VanVechten*, 101 N. Y. 571, 29 N. E. 1017; *Desmond Co. v. Friedman-Doscher Co.*, 101 N. Y. 486, 56 N. E. 995; *Mitchell v. Bre Realty Co.*, 126 N. Y. App. Div. 111, 111 N. Y. S. 322; *Morgan v. e*, 230 Pa. 165, 79 Atl. 410; *Wey v. Stock*, 133 Wis. 107, 113 N. W. 443. But see *Palmer v. Meriden*

*Britannia Co.*, 188 Ill. 508, 59 N. E. 247.

<sup>11</sup> *Coffin v. Black*, 67 Ark. 219, 54 S. W. 212; *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840; *Schindler v. Green*, 149 Cal. 752, 87 Pac. 626; *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495; *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734; *Hobart v. Reeves*, 73 Ill. 527; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682; *Cornish, etc., Co. v. Antrim, etc., Assoc.*, 82 Minn. 215, 84 N. W. 724; *Phillip v. Gallant*, 62 N. Y. 256; *MacKnight Flintic Stone Co. v. New York*, 31 N. Y. App. Div. 232, 52 N. Y. S. 747 (but see s. c. 160 N. Y. 72, 54 N. E. 661).

they are unquestionably doing something more than ascertaining the meaning of the language which the parties use. They are disregarding the condition altogether; though as matter of English its meaning is perfectly plain, because the particular contingency which has arisen was presumably not intended by the parties to be covered; and where, indeed, the only reason the court has for supposing that the parties did not have in mind the contingency is that the terms of the contract if literally applied produce a harsh and unreasonable result. When, for instance, an architect whose certificate is made a condition precedent to the builder's right of payment dies, it is said that the condition is excused because the parties could not have had the possibility of the architect's death in mind when they entered into the contract. Very likely this is true, but the reason which leads the court to believe it is true is not anything in the language of the condition—the meaning of the words is perfectly plain. What influences the court is the fact that it is so unfair and harsh to make the condition applicable in view of the situation which has arisen, that the belief is reasonable. Where language is of doubtful meaning, unquestionably a fair meaning rather than a harsh one is properly chosen on ordinary principles of interpretation.<sup>14</sup> It is reasonable to suppose in such a case that the parties meant what was fair rather than what was not. Where, however, the language of the contract is not ambiguous, and the court refuses to apply it in a particular instance because it works hardship, the court under the disguise of construction is in fact giving relief from the terms of the contract on principles analogous to those which have influenced courts of equity in relieving from forfeiture. Such relief disguised under the mask of construction is common in insurance cases. Thus where a policy contained the common provision that the insured should keep a set of books and keep them with an inventory in a fire-proof safe, and in case of loss produce the books and inventory, adding, "and in the event of the failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss," the insured was allowed to prove

<sup>14</sup> See *supra*, § 620.



A fire took place and the books were taken from the safe they had been put for the night, and removed in order to save them from the chance of destruction, and that in the inventory was either left in the safe and destroyed, or was otherwise lost. The court held that "fire-proof safe" does not mean necessarily proof against any fire that might take place, and undoubtedly this construction was proper. A fire-proof safe is what generally goes by that name, though not proof against any possible fire.<sup>15</sup> But as to the condition stated above, the court said: "We are of opinion that the condition to produce the books and inventory, referred to in the policy, means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the negligence, or design of the insured."<sup>16</sup> As the court held under any other interpretation the insured could not recover if the books were destroyed by any other cause than fire or were stolen. Nevertheless it may be urged that under the terms of the contract the insurer did not attempt to consider reasons for non-production, but required the positive production of the books and inventory before paying. Nothing more reasonable than for a promisor who wishes to protect himself by a condition to impose one which will certainly have legal effect even though in some cases the condition may work undue hardship. On the natural construction of the condition in question it would seem that the insurer did not care to take the risk of discussing reasons alleged for the non-production of the books, preferring rather to throw on the insured the duty of producing them at his peril. This construction works such hardship, however, that the court declines to give the words their natural meaning.<sup>17</sup> Many illustrations could be gathered from American decisions on insurance policies.

*Hold Safe Co. v. Huston*, 55 U. S. 404, 39 Pac. 1035, 28 L. R. A. 21 Sup. Ct. Rep. 326.

see *supra*, § 618.

*Terpool, etc., Insurance Co. v.*

*Kearney*, 180 U. S. 132, 45 L. Ed. 460, 21 Sup. Ct. Rep. 326.  
<sup>17</sup> See numerous decisions on the "iron safe clause" collected in 2 Cooley, Ins., pp. 1813 *et seq.*

**§ 807. Conditions are enforced more strictly if no forfeiture is caused.**

From what has been said, it may be expected, and such is the case, that contracts similarly worded are sometimes given different effects. Where the owner of premises promises to pay for a building if an architect's certificate is furnished, the builder may recover on the contract without furnishing the certificate if the architect dies. Where, however, a seller and buyer agree to sell and buy goods if a valuer fixes the price, neither party can recover from the other if the agreed valuer dies before the buyer has become owner of the goods. It has been said that the reason for the decision in the latter case is that a sale is impossible without a fixed price. As has been seen, this is not true.<sup>18</sup> Sales are constantly made without any price being agreed upon by the parties. The law fixes a reasonable price in such a case, just as in the case of the architect, if his certificate was required to determine not only the satisfactory completion of the work, but also, as often happens, to fix the price to be allowed for extra work or the deductions for omitted work, the court would fix the reasonable amount of additions or deductions if the architect should die. Nor is the distinction that the valuer is chosen as a particular individual, whereas the architect represents merely any good architect who may be employed by the owner. If a particular architect was named, and was ready and willing to do the work, neither of the parties to the contract could substitute another equally competent person. The only difference in the cases is that in the contract for valuation, the transaction is wholly executory on both sides, and if it is not carried out, neither party will lose anything but the chance of benefit from the contemplated exchange, whereas in the building contract the builder will forfeit the price of his work and materials if the condition is enforced with equal literalness. In the latter case, therefore, the American courts at least hold that if because of the death or incapacity or improper conduct of the architect it becomes impossible to adopt the agreed "method of determining the rights of the parties, other means may be adopted

<sup>18</sup> See *supra*, § 800.

the grounds that this no longer remains as an essential part of the agreement." <sup>19</sup> But in the former case, though the meaning of the words is the same when the agreed method is the whole transaction fails. Even if the property in the hands has been transferred before the failure of the means of completion, the buyer may, it seems, avoid the transaction by returning the property, and if this is impossible, the liability of the buyer will be quasi-contractual—not contractual. <sup>20</sup> Other matters are doubtless of importance in considering whether a condition shall be excused besides the forfeiture and its literal enforcement will cause. Where the risk of forfeiture was taken by a party to a contract with the very contingency in view which has happened, relief by rescission is well-nigh impossible and equitable relief from the obligation from the contract will not generally be granted where such forfeiture as there may be is imposed by operation of a condition rather than by a collateral stipulation. In such a case it will generally be supposed that the price has been fixed at an amount sufficient to compensate for the loss. Though a promise to pay ten thousand dollars for a house if finished by October 1st, might be a means of enforcing a bargain identical in purpose with one which provided by a collateral stipulation that ten thousand dollars or the full value of the house should be forfeited if the house were not finished by October 1st, some courts at least would enforce the former bargain, though they would deem the collateral stipulation penal and void. Undoubtedly the precise day may sometimes be of vital importance. A contract to build a grandstand from which spectators might view an inaugural parade on March 4th, might properly contain a promise to pay for it if finished by March 4th, but otherwise not. It could be observed, however, that in such a case even a collateral stipulation for liquidated damages equal to the whole price if the structure were not finished in time, might be supported. Certainly it must be possible under some circumstances for parties to bargain that one who undertakes certain work shall run the risk of its successful completion,

Hebert v. Dewey, 191 Mass. 403,  
77 N. E. 822.

<sup>20</sup> See *supra*, § 801.

and shall receive pay only in case of success; but if any limitation is to be put on the power of the parties to throw, whenever they choose, upon one of them the whole risk of his inability to complete performance from any cause, there is no way of dealing with the matter on principle except by determining (1) whether the price paid or promised was in fact commensurate with the risk, or whether the price was determined by the ordinary value of the performance; and (2) whether the damage to the promisee caused by breach of the promise might fairly be supposed to be commensurate with the punitive consequences which would follow literal enforcement of the contract. If the price fixed was simply the ordinary value of similar performance, and the actual damages caused by a slight breach would be only slight, to throw the risk of total loss for slightly defective performance on the promisor is to inflict a penalty upon him whatever the form may be in which the parties choose to put their contract.<sup>21</sup>

<sup>21</sup> In *Miller v. Mason, etc., Railway Co.*, 132 Iowa, 412, 417, 108 N. W. 302, the court said: "Under the contract plaintiff could have compensation only when the work was done to the approval of the chief engineer. It is not claimed that any such approval was ever given, or that it ought to have been given. As to a part of the compensation at least, there was no obligation of the defendant to make payment until the well was completed. And yet, without showing that the approval of the engineer was given, or ought to have been given, and in the face of the fact that the well was never completed, the court authorized the jury to give plaintiff compensation to as full an extent as though the work had been done to the approval of the engineer, and the well fully completed, so that the defendant had a well, instead of a hole in the ground with some useless casing in it, which had to be plugged up with a post.

"We are not concerned now about any conflict in the evidence as to whose

fault it was that the well was not completed. If there was any question of that kind it should have been submitted to the jury. There was at least some evidence that plaintiff disregarded the instructions of the engineer as to putting down the casing and thereby barred himself from any right to recover under the terms of the contract. That parties may contract with reference to the approval of work to be done under their agreement so that the one rendering services cannot recover unless the services rendered are approved as satisfactory by such person, is well settled. *McNamara v. Harrison*, 81 Iowa, 486, 46 N. W. 976; *Ross v. McArthur*, 85 Iowa, 203, 53 N. W. 125; *Edwards v. Louisa County*, 89 Iowa, 499, 56 N. W. 656; *Inman Mfg. Co. v. American Cereal Co.*, 122 Iowa, 737, 100 N. W. 860. There was no allegation nor proof that the failure of the engineer to give a certificate was due to mistake or fraud. A party cannot abandon his remedy under a contract and sue for compensation for services rendered in disregard of

**Impossibility does not excuse breach of condition precedent.**

long as the basis of contractual obligation is the expressed of the parties, the boundaries of a promisor's liability be fixed by the terms of his promise. Where, therefore, promises B to do something if a certain contingency happens B renders some performance, there is no breach of promise, therefore, no liability unless that contingency happens at performance is rendered, even though this result is no no fault of the promisee and could not have been pre- d by him.<sup>22</sup> This principle finds its most frequent ation in the law of insurance. Inability to comply the conditions of a policy deprives the insured of all upon the policy, or more strictly precludes him from ing any right to enforce the insurer's promise.<sup>23</sup> And

tract. *Etna Iron & Steel* v. Kossuth County, 79 Iowa, 40, 215; *Parker v. Scott*, 82 Iowa, N. W. 1073. In cases anal- to the one before us it has been at one who undertakes to bore a well can only recover when complied with the provisions of tract. *Jackson v. Creswell*, 94 713, 61 N. W. 383; *Barnes v.*, 111 Iowa, 426, 82 N. W. 947; v. Trapp, 127 Iowa, 742, 104 333. Plaintiff relies on cases in it is held that one who has some provision of the contract which he is rendering services nevertheless recover the value ices rendered; but it will be on examination that these are here the party who has broken ntract has nevertheless con- some substantial benefit in nce of the contract on the other o it, and he is allowed to recover ue of the benefit thus con- less the damages resulting from ach. See *Pixler v. Nichols*, 8 106, 74 Am. Dec. 298; *McClay* ge, 18 Iowa, 66; *Jemmison v.* 29 Iowa, 537; *Wolf v. Gerr*, 43

Iowa, 339; *Whitesell v. Hill*, 101 Iowa, 629, 70 N. W. 750, 37 L. R. A. 830. In the case before us it appears without question that the defendant received no benefit whatever from the plain- tiff's services. After the well was abandoned by plaintiff, it was in such condition that no use could be made of it."

<sup>22</sup> *Cutter v. Powell*, 6 T. R. 320. In speaking of a life insurance policy, Earl, Commissioner, said, in *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276, 284, 4 Am. Rep. 675: "Payment was a condition precedent to the continuance of the policy, and no mere accident or act of God, however controlling, could continue the policy in force after the pay day without pay- ment. This could be done only by the agreement or consent of the defendant, properly given, or by some act which would estop the defendant from deny- ing payment."

<sup>23</sup> *Want v. Blunt*, 12 East, 183; *Worsley v. Wood*, 6 T. R. 710; *Tait v. New York Life Ins. Co.*, 1 Flippin, 288; *Johnson v. Maryland Casualty Co.*, 73 N. H. 259, 60 Atl. 1009, 111 Am. St. Rep. 609; *Evans v. United*

still less is hardship an excuse. Thus where the payment of a premium by a certain day is made an express condition of the continuance of insurance, illness or insanity of the insured will not excuse his delay in payment.<sup>24</sup> A number of courts have refused to apply this principle in cases involving impossibility of performing a condition in a policy because of war. There are, however, contrary decisions.<sup>25</sup> And if the cases allowing recovery are to be supported they must rest, as Mr. Justice Bradley of the United States Supreme Court rested them, on equitable relief from forfeiture.<sup>27</sup>

*States Life Ins. Co.*, 64 N. Y. 304. Inability to prove compliance with the condition is, therefore, fatal to recovery. In *McGowin v. Menken*, 223 N. Y. 509, 119 N. E. 877, it appeared that an insurance policy was issued on the life of T, payable on his death to his wife "if living," otherwise to his estate. Both T and his wife were lost by the sinking of the *Lusitania*. As there is no presumption in the common law of survivorship where two persons perish in a common disaster, and as it could not be proved that the wife survived her husband, his estate was held entitled.

<sup>24</sup> *Klein v. New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765; *Pitts v. Hartford, etc., Ins. Co.*, 66 Conn. 376, 34 Atl. 95, 50 Am. St. Rep. 96; *Hipp v. Fidelity, etc., Ins. Co.*, 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319, *Grand Lodge v. Jesse*, 50 Ill. App. 101; *Scheiber v. Protected Home Circle*, 146 Ill. App. 574; *Sleight v. Supreme Council*, 121 Iowa, 724, 96 N. W. 1100; *Home Ins. Co. v. Wood*, 139 Ky. 657, 72 S. W. 15; *Yoe v. Benj. C. Howard, etc., Assoc.*, 63 Md. 86; *McCann v. Supreme Conclave*, 119 Md. 655, 87 Atl. 383, 46 L. R. A. (N. S.) 537; *Wheeler v. Connecticut L. Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594; *Brotherhood of R. Trainmen v. Dec*, 101 Tex. 597, 111 S. W. 396.

<sup>25</sup> *Hamilton v. New York Mutual Life Ins. Co.*, 9 Blatch. 234; *New York Life Ins. Co. v. Clopton*, 7 Bush, 17, 3 Am. Rep. 290; *Statham v. New York Life Ins. Co.*, 45 Miss. 581, 59; *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741; *Cohen v. New York Mutual Life Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614, 3 Am. Rep. 218.

<sup>26</sup> *Tait v. New York Life Ins. Co.*, Fed. Cas. 13,726; *Worthington Charter Oak Life Ins. Co.*, 41 Conn. 372; *Dillard v. Manhattan Life Ins. Co.*, 44 Ga. 119, 9 Am. Rep. 167.

<sup>27</sup> In *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 24, 32, he said: "The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which would be unjust or inequitable to revive." Though refusing to allow recovery on the policy, the court enforced a quasi-contractual right to the surrender value of the policy, though no such right was reserved in the contract. The opinion reads: "The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain."

With these cases of impossibility to perform a condition a life insurance contract may be compared cases under adding contracts, or for sale at a valuation, where an architect or valuer whose judgment was a condition precedent to ability is prevented by death or otherwise, without fault of the promisor, from complying with the condition. It will be seen that wherever it is possible to avoid a harsh result of construction, courts have adopted that course. But no ordinary principles of construction will explain all the cases where relief has been given.<sup>28</sup>

reviving the policies. At the very blush, it seems manifest that the law requires that they should have some compensation or return for the money already paid, otherwise the contract would be the gainers from their loss and that from a cause for which the other party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a northern state, to be paid for by instalments, and the instalments to be made until all the instalments were paid, with a condition that in the event of the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the court to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another person, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by some ability, have been avoided. But it was caused by an event beyond the control of either party,—an event which made it unlawful to pay. In such case,

whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

"And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy."

<sup>28</sup> See, as to impossibility of performing a dependent promise, *infra*, § 838.

### § 809. Impossibility of performing conditions subsequent.

If a condition subsequent in the law of property is void, or impossible to be performed, the estate, having vested, remains undisturbed.<sup>29</sup> If a true condition subsequent may be found in the law of contracts the rule should be the same; and it is true that in a sale on credit with a right reserved to return the goods and thereby divest liability for payment of the price, the buyer remains liable though it becomes impossible without his fault to perform the condition. The risk of accidental loss is on him.<sup>30</sup> It should be observed, however, that here the condition divesting the promisee's right is to be performed by the promisor. Moreover, though a debt arises when title to the goods passes, it is not generally true that a right of action would arise until the lapse of a reasonable time for determining whether the buyer wished to return the goods. In effect he binds himself in the alternative, either to pay or to return the goods. If one alternative becomes impossible the obligation becomes single. Where, however, a right of action becomes vested under a contract which provides that suit must be brought within a certain time, the case is not so clear. Whether the right of action is cut short depends on the action or failure to act of the promisee. Even in such a case, however, it has been held that where a right of action has once vested (as on an insurance policy) the impossibility of suing within the time prescribed in the policy will prevent the condition from operating to divest the insured's right.

<sup>29</sup> *Doe v. Church Wardens*, 6 Q. B. 107; *Scovill v. McMahon*, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350; *Morse v. Hayden*, 82 Me. 227, 19 Atl. 443; *Mutual Benefit Life Ins. Co. v. Hillyard*, 37 N. J. L. 444, 470, 18 Am. Rep. 741.

<sup>30</sup> *Foley v. Felrath*, 98 Ala. 176, 13 So. 485, 39 Am. St. Rep. 39; *Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208; *Chase v. Union Stone Co.*, 63 How. Pr. 336; *Carter v. Wallace*, 32 Hun, 384. See also *Plunger Elevator Co. v. Day*, 184 Mass. 130, 68 N. E. 16. A contrary decision is *Head v. Tatterall*, L. R. 7 Ex. 7. In *Chase v. Union*

*Stone Co.*, *supra*, goods had been purchased with the privilege of exchanging at any time, and it was held that when the buyer returned them in the exercise of his privilege and they were destroyed by fire in transit, the loss was his, as the property had not yet been vested in the seller. Compare with this case *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280, where the court held the death of a pony which was the subject-matter of the bargain did not prevent the buyer from exercising the right provided for therein of rescinding in case of dissatisfaction.



action.<sup>31</sup> Such a condition, however, though a true condition subsequent so far as concerns a right of action on the promise may, it seems, be made by the contract a condition precedent of a particular suit. There seems no reason why parties may not promise to perform, only if action is brought within a certain time. Bringing the suit within this time is a condition of the plaintiff's right to recover. He has secured a right of action as soon as the necessary facts occur which enable him to bring suit; but for the enforcement of a particular suit that he brings the fact that the time limit has not elapsed is a necessary element. It seems a question of construction whether in a given contract the parties have provided merely that a right of action shall cease or have provided that it is a necessary prerequisite of any action which may be brought that it shall be brought within a given

*Memmes v. Hartford Insurance*  
13 Wall. 158, 20 L. Ed. 490; *Earn-  
v. Sun Mutual Aid Society*, 68  
465, 12 Atl. 884, 6 Am. St. Rep.  
In *Stoneham v. The Ocean, Ry.,  
Insurance Co.*, 19 Q. B. D. 237,  
policy of insurance covered death  
by accident happening within  
United Kingdom, and was made  
subject to a condition that in case of  
accident notice thereof must be  
given to the insurers within seven  
days. The assured was accidentally  
killed within the United Kingdom.  
It is impossible to give notice within  
seven days. In an action on the policy,  
it was held that notice was not a con-  
dition precedent to the right to recover,  
the insurers were liable. The  
court said (p. 239):

"The policy is expressed to be made  
subject to certain conditions; the words  
used are that these conditions shall be  
regarded as conditions precedent to  
liability, but, 'Provided also that  
the policy shall be subject to the  
conditions indorsed hereon, which shall  
be considered as incorporated herein.'  
of these conditions . . . pro-  
vided that for the purpose of identify-

ing the assured notice shall be given  
in all cases of change of residence, oc-  
cupation or name. That clause does  
not state that the giving of notice  
shall be a condition precedent to liabil-  
ity. It is followed by a condition  
[which states that for change of em-  
ployment without notice] . . . this  
policy shall become absolutely void  
and the premium paid for the same  
shall be forfeited to the company.  
This clause shows that where the fail-  
ure to comply with a condition is to  
exonerate the company from liability,  
the intention that the policy shall bear  
that construction is made clear by ex-  
press words." So in *Eliot National  
Bank v. Beal*, 141 Mass. 566, 6 N. E.  
742, a condition in a bond which pro-  
vided "that no suit at law shall be  
brought or founded upon it, unless the  
same be commenced within the period  
of twelve months" after termination  
of the employment of one for whose  
faithful conduct the bond was given,  
was held excused by the death of a  
surety on the bond during the pendency  
of an action against him which  
compelled a new action to be brought  
after a lapse of twelve months.

time.<sup>32</sup> Where a condition is precedent in effect and subsequent in form only, as in the case of a penal bond, impossibility of performing the condition will necessarily prevent liability on the promise,<sup>33</sup> for the reasons stated in the preceding section.

### § 810. Impossibility of performing the condition of a bond.

It has been thought that in case of impossibility to perform the condition of a bond "the law has stuck at the mere formal view of a bond as a contract to pay the penal sum subject to be avoided by the performance of the condition accordingly if the condition is impossible either in itself or in law the obligation remains absolute."<sup>34</sup> In support of this statement cases are cited where the condition, at the outset is evidently impossible, illegal or absurd—

"If a man be bound in an obligation, &c., with condition

<sup>32</sup> In *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 19 L. Ed. 257; *Brown v. Hartford Ins. Co.*, 7 R. I. 301; *Wilkinson v. John Hancock Mutual Life Ins. Co.*, 27 R. I. 146, 61 Atl. 43; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99, it was held that the plaintiff must at his peril bring suit on an insurance policy in spite of supervening impossibility. In *Wilkinson v. John Hancock Mutual Life Ins. Co.*, *supra*, at page 150, the court said, quoting from the earlier Rhode Island decision, "The statute of limitation has no application, in any of its provisions, to the clause in question; and, indeed, the only argument against the clause is that it sets up for the contract a different law of limitation from that which the statute imposes. We have held that the contracting parties have a right to do this in reference to a policy of fire insurance; and we know no right that we have, from consideration of general equity, to import into their contract qualifying terms, which they have not seen fit to adopt." To the same effect are, *McElroy v. Continental Ins. Co.*, 48 Kan. 200, 29

Pac. 478; 2 May Ins. (4th Ed.), p. 115 sec. 483; *Ward v. Penn. Fire Ins. Co.*, 82 Miss. 124, 33 Southern Rep. 84; *Fey v. I. O. O. F. Mutual Ins. Soc.*, 120 Wis. 358, 98 N. W. Rep. 206, 207; *Mead v. Phoenix Ins. Co.*, 68 Kan. 432, 75 Pac. 475, 104 Am. St. Rep. 412, 64 L. R. A. 79. While these cases are not exactly in point, we think they are instructive and direct us towards the conclusion at which we have arrived, viz: that the terms of the contract, taken in their ordinary sense, are binding; and hence, when the cause of action arises, when the sum specified in the contract becomes payable according to its terms, the beneficiary must procure suit to be brought by a person competent to sue within two years thereafter, or the contract is ended."

<sup>33</sup> Bacon, Abr. CONDITIONS (Q). See also *Brown v. London*, 30 L. J. Q. P. (N. S.) 225; *Gray v. Gardner*, 1 Mass. 188; *Brown v. Dillahunty*, 3 Sm. & M. 713, 43 Am. Dec. 491. Cf. *Rose v. McLeod*, 2 Bay, 108.

<sup>34</sup> Wald's Pollock on Contracts (3d ed.), 556.

the obligor do go from the church of St. Peter in West-  
r to the church of St. Peter in Rome within three hours,  
then the obligation shall be void. The condition is void  
impossible and the obligation standeth good." "If a  
e bound with a condition to enfeoff his wife, the con-  
s void and against law, because it is against the maxim  
and yet the bond is good." <sup>35</sup> "When the condition  
obligation is so insensible and uncertain that the mean-  
not be known, there the condition only is void and the  
ion good." <sup>36</sup> But the law was otherwise in regard to  
ening excusable impossibility. A bail bond conditioned  
elivery of the person bailed at a certain day, was ex-  
y death of that person.<sup>37</sup> The reason of the distinction  
o be this: In the first class of cases the bond was but  
h act unless construed as the equivalent of an uncon-  
l covenant to pay the penal sum. The impossible  
on could not sensibly be taken as itself amounting to  
ant. In the second class of cases, however, the court  
ed the instrument as amounting in effect to a covenant  
orm the condition with an agreement to pay the penal  
case of failure to do so.<sup>38</sup> The impossibility of the con-  
s dealt with, therefore, in the same way as impossibility  
enant.<sup>39</sup>

**Effect of agreement in contract excluding excuses.**

order to increase the certainty of their relations, parties  
ntract not infrequently agree that the contract shall be  
ed or a condition shall be enforced according to its  
without regard to possible defences. In a building  
t, for instance, it may be provided that the architect's  
ate shall be final and shall not be set aside "for any  
or for any pretense, suggestion, charge, or insinuation  
d, collusion, or confederacy." Such an agreement has

Lit. 206b.  
p. Touchst. 373.  
n's Abr. CONDITIONS (Q);  
e. Sowgate, Wm. Jones, 29,  
nfra, § 1944. Cases must be  
shed where the impossibility  
subjective, e. g., where the

condition is to be performed by a  
stranger who refuses to act. Here the  
obligor is liable. Rolle Abr. 1, 452 L.  
pl. 6; Shepp. Touchst. 392.

<sup>35</sup> See *supra*, §§ 670, 774.

<sup>39</sup> Rolle's Abr. 450.

been upheld so far as to preclude a builder from asserting fraud on the part of the architect;<sup>40</sup> but the court intimates that such a provision would not avail against collusion or fraud of the defendant himself. It seems clear that no agreement of the parties can preclude this defence, for fraud in the inception of the agreement renders voidable the very agreement not to set up fraud, and, aside from this technical but sound argument, such an agreement would obviously be against public policy.<sup>41</sup>

The commonest application of the principle under discussion is in case of life insurance policies, providing that the policy shall be incontestable either at once, or within a certain time after issue. The law is clearly settled that if a fixed reasonable period, as one or two years, is allowed by the policy to the insurer to discover such defences to the policy as may exist, the provision is binding and effective even in spite of fraud of the insurer.<sup>42</sup> A short but not unreasonable statu-

<sup>40</sup> *Tullis v. Jacson*, [1892] 3 Ch. 441.

<sup>41</sup> In *Pearson v. Dublin*, [1907] A. C. 351, in an action of deceit for furnishing defective plans, a contract was set up which contained a clause to the effect that the contractors must not rely on any representation made in the plans or elsewhere but must ascertain the facts for themselves. Lord Loreburn, L. C., said, at page 353; "It seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them. I will not say that a man, himself innocent, may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents." In *Industrial, etc., Trust v. Tod*, 180 N. Y. 215, 73 N. E. 7, there was in suit an agreement of bondholders not to charge trustees under a reorganization agreement except for wilful default; and the trustees were by the instrument given final power to construe its mean-

ing. The court held this provision must be qualified by inserting "in good faith." To go beyond this was to go beyond the limits fixed by public policy.

The Swiss Federal Code of Obligations, Art. 100, provides that a stipulation in advance to free an obligor from the responsibility for fraud in a serious fault is void.

<sup>42</sup> *Weil v. Federal Life Ins. Co.*, 208 Ill. 425, 106 N. E. 246; *Indiana Nat. Life Ins. Co. v. McGinnis*, 180 Ind. 101, 101 N. E. 289, 45 L. R. A. (N. S.) 19; *Goodwin v. Provident, etc., Assurance Association*, 97 Iowa, 226, 234, 66 W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; *Supreme Court v. Updegraff*, 68 Kans. 474, 75 Pac. 477; *Kansas Mutual Life Ins. Co. v. Whitehead*, 123 Ky. 21, 93 S. W. 609; *Reagan v. Union Mutual Life Ins. Co.*, 181 Mass. 555, 558, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 68; *Harris v. Security Life Ins. Co.*, 200 Mo. 304, 154 S. W. 68; *Vetter v. Massachusetts Nat. Life Association*, 100 N. Y. App. Div. 72, 51 N. Y.

itations is thus agreed upon. But a provision that such policy shall be incontestable from the date of issue is invalid so far as the defence of fraud is concerned.<sup>43</sup> .

*Murray v. State Ins. Co.*, 22 R. I. 300, 53 L. R. A. 742; *Phila. Life Ins. Co. v. Arnold*, 188 U. S. 418, 81 S. E. 964; *Clement v. Work Insurance Co.*, 101 Tenn. S. W. 561, 42 L. R. A. 247, 70 Rep. 650. <sup>43</sup> *Reagan v. Union Mutual Life Ins. Co.*, 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659. The contrary decision of *Duvall v. Mutl. Ins. Co. of Montana*, 28 Ida. 356, 154 Pac. 632, is indefensible.

## CHAPTER XXVI

### NON-PERFORMANCE OF A COUNTER-PROMISE AN EXCUSE FOR BREACH OF PROMISE

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**§ 812. The problem suggested in this chapter is confined to bilateral contracts.**

The promisor in a unilateral contract sufficiently insures himself against becoming liable without getting the counter-performance he seeks, for until he gets that counter-performance there is not only no right of action against him, but no contract has arisen. In a bilateral contract, however, unless the promisor qualifies his promise by a condition that the other party to the contract shall perform, or offer to perform, before his own promise becomes enforceable, he is bound to perform if the words of the transaction are alone considered, irrespective of the non-performance of the counter-promise. Each party on this assumption will have a right of action on the promise of the other party.

**§ 813. Various methods of dealing with the problem.**

As the literal tenor of the language of a contract is not necessarily conclusive, various methods may be suggested of adjusting the rights of parties who have entered into a bilateral contract consisting of counter promises each in terms unconditional.

1. The promises may be enforced according to their tenor with no effect as a defence being given in an action on one promise to the non-performance of the other.

2. It may be said that in spite of the unqualified terms of the promises, liability upon one promise is conditional and dependent on the performance of the other, in accordance with rules of construction based on the supposed or imputed though not expressed, intention of the parties.

3. It may be said that a party materially in default himself cannot recover damages from the other party because of a doctrine which suggests both contributory negligence and requirement of equity. One who is himself guilty of a wrong for breach of a contract it may be said should not seek to hold his co-contractor liable. A doctrine of this sort is frequently applied by courts of equity. A complainant whose own attitude is unconscientious is frequently denied relief.<sup>1</sup>

<sup>1</sup> Thus one who violates a mutually restrictive covenant cannot complain in equity of a similar violation by

another. *Smith v. Spencer*, 81 N. E. 389, 87 Atl. 158.



It may be said that in a bilateral contract not only are promises consideration for one another but that the parties contemplate that the performance also shall be exchanged for the other; in other words, that in a bilateral contract a double exchange is contemplated, first of promises and later performances; and that just as a failure to give a promise on one side would entail invalidity of the counter promise, so a failure to give performance on one side should on this view deprive the party in default of a right to enforce performance on the other side.

This view is, it seems, the best supported by reason and is the one which best explains the decisions of the courts, for although the second theory is that more often stated in terms of judicial opinions, some of the actual results reached cannot be well explained by it, and not a few recent decisions emphasize the fourth view.<sup>2</sup> Even where the words "failure

Ward v. Textile Commission, 199 N. Y. App. Div. 109, 112, 123 S. 918: "The law is now well settled that a promise or agreement by one party to a contract, not under which he is to do or refrain from doing some thing before the other party to the contract is to be obligated to perform the consideration for the contract, and may be shown by parol, that failure to fulfill the promise constitutes a failure of consideration, and thus releases the other party from performance." Bookstaver v. Jayne, 60 N. Y. 235, 17 L. R. A. (N. S.) 807, 50 N. Y. 840, n.

Gray v. Lowery, 163 Cal. 256, 260, 129 Cal. 1004, similarly the court said: "This case therefore comes under the rule stated in Richter v. Land & Stock Co., 129 Cal. 372, 129 Cal. 40, as follows: 'In all executory contracts the several obligations of the parties constitute to each other, and the consideration of the contract; and a failure to perform con-

stitutes a failure of consideration—either partial or total, as the case may be—within the meaning of section 1689 of the Civil Code.' See, also, Sterling v. Gregory, 149 Cal. 121, 85 Pac. 305, and Cleary v. Folger, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187." Grotheer v. Panama-Pacific Land Co., (Cal. App. 1919), 181 Pac. 667.

In Fullam v. Wright & Colton Wire Cloth Co., 196 Mass. 474, 478, 82 N. E. 711, Braley, J., said: "The failure of the plaintiffs to meet this requirement of [the contract in regard to] delivery resulted in a total failure of consideration which justified the defendant in a complete repudiation of the sale."

In Poussard v. Spiers, 1 Q. B. D. 410, Blackburn, J., said, in speaking of the effect of a failure by the plaintiff to keep a promise that his wife should sing in opera, "the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune." See also Rosenthal Paper Co. v. National &c. Paper Co., 175

of consideration" are not used the fundamental idea implied therein is often expressed.<sup>3</sup> In adopting this view, it is not necessary to reject the second in every case. When A and B promise respectively to buy and sell stock in a corporation on May 1, the natural meaning of such language in the year 1500 may have been that the promises were independent. Four hundred years later that is not the natural construction. The customary methods of doing business of the kind by contract, and the fact that conditional performances are understood by the parties, and, therefore, determine the meaning of their language. But whether or not it is possible to imply a condition as matter of fact by ordinary rules of construction, the general and far-reaching principle of justice should also be observed that performance on one side should not be required, if the other party is materially in default in the performance which he was to give in exchange.

#### § 814. Meaning of failure of consideration.

It has been said that: "Strictly speaking, there can be no such thing as a 'failure of consideration.' Either the promisee receives the consideration he has bargained for, or he does not. If he does not receive the consideration, there is no contract; if he does receive the consideration there can be no 'failure of consideration thereafter.'" <sup>4</sup> Though the expression thus criticised may be sometimes loosely used, it is not inaccurate. It is used not infrequently where mistake or fraud excuses the performance of a promise, as where a purchaser promises to pay for a supposed patent which is in fact void,<sup>5</sup> or for a horse which, unknown to the parties or at least to the buyer, is not in existence at the time of the bargain. But the fact that there is fraud or mistake will not prevent it from also being true

N. Y. App. D. 606, 162 N. Y. S. 814, 818.

<sup>3</sup> "It does not turn upon any question of condition precedent. The only question is, whether if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against the other party." Pollock, C. B., *Hoare v. Rennie*, 5 H. & N. 19. "His persistent refusal to

deliver the consideration [i. e., to perform his promise] may be treated at law as well as in equity as a justification for non-performance by the defendants." *Bryne v. Dorey*, 221 Mass. 399, 404, 109 N. E. 146.

<sup>4</sup> *Harriman on Contracts* (2d ed.) § 524. Copied in 9 Cyc. 369.

<sup>5</sup> See *supra*, § 137.

there is failure of consideration. The failure may also supervene after the bargain, and it is immaterial so far as the variety of the term is concerned, whether the failure is due to fraud, mistake, impossibility or wilful breach of promise. A charge of inaccuracy against the term is due to the assumption that the consideration that fails is the consideration for the promise, whereas it is the consideration for a performance.<sup>6</sup> The fundamental meaning of consideration is a price or exchange for something and it is as accurate terminology to speak of the consideration for a conveyance or other executed act as to speak of the consideration for a promise. The requirements for legally sufficient consideration in one or the other may differ, but that is another matter.<sup>7</sup> Failure of consideration then will exist wherever (one who has either given or promised to give some performance fails without his fault to receive the agreed exchange for that performance.) Thus a buyer who has paid \$500 in return for an agreement to transfer a horse to him, fails to receive the consideration or exchange for his \$500 if the horse is not transferred. The \$500 is not the consideration for the seller's promise, but it is the consideration for the horse. The reason why the horse was not transferred may be due to excusable impossibility (as if the horse should die before the title was transferred), or it may be due to breach of duty on the part of the seller. In either case the buyer may recover his payment.<sup>8</sup> In the situation given, it is immaterial whether the \$500 was paid as consideration for a unilateral contract or as performance of the buyer's part of a contract originally bilateral.

An analogous situation arises in bilateral contracts where the promises are still executory. If the buyer has not yet paid the price for the horse at the time of its death, the correctness of the assumption is often admitted. Thus in *United States Fidelity Co. v. United States Fidelity Co.*, 512, 525, 59 L. Ed. 696, 35 Ct. Rep. 298, it is said: "Conceding that there was not, technically, a failure of consideration, because his promise and not its performance was the consideration (United States Rubber Mfg. Co. v. Conrad,

80 N. J. L. 286, 293), still the substance of the matter is the same, so far as concerns the measure of the detriment to the promisee."

<sup>7</sup> See *supra*, § 101.

<sup>8</sup> See *Palmer v. Guillo*, 224 Mass. 1, 112 N. E. 493; also *Grotheer v. Panama-Pacific Land Co.*, (Calif. App. 1919), 181 Pac. 667.

sideration or exchange for the payment has failed, and similarly, if the seller wrongfully breaks his promise to transfer the buyer is not getting the exchange or consideration for the payment which he had agreed to make. And as the seller might reclaim the price if it had already been paid, *a fortiori* he is excused from keeping his promise to pay it, if not yet paid. If the time for the seller's performance had not arrived at the time when the payment of the price became due, but it was then evident that when the time for the seller's performance should come due, he would be either unable to perform or would refuse to perform, though the exchange or consideration for the buyer's performance would not yet have failed, it would be evident that there would subsequently be a failure of consideration. Such prospective failure of consideration should have the same effect in excusing a promisor as a failure of consideration which has actually taken place.<sup>9</sup>

#### § 815. Differences in effect of the different theories.

It is obvious that the first of the theories suggested in a preceding section,<sup>8</sup> that of mutual independency of the promises will produce striking differences in effect from any of the other views. The others, however, may seem substantially identical in their results with one another, and it is true that most cases would be similarly decided whichever of these others were adopted. Nevertheless there are important differences not only in theory, but in consequences which follow from the adoption of one or the other. Especially is the difference between the second view on the one hand to be distinguished from the third and fourth on the other.

Under the doctrine of implied conditions the court must seek the intention of the parties. It is trying to construe the contract, that is, to find its meaning at the time it was made; and having found that meaning, to enforce the contract according to that meaning whatever circumstances may afterwards arise. It can logically make no difference whether the plaintiff has partly performed his contract or not. It can make no difference that the defendant's performance, which apparently might

<sup>9</sup> See *infra*, § 874.

<sup>8</sup> § 813.

be due under the terms of the contract until after the plaintiff has, as subsequently turns out, become due before.

In short, upon the theory of construction the rights of the parties must be adjusted by a rule adopted at the time of the contract and thereafter unflinchingly carried out; while under the other two rules the equities of the situation as they arise are properly taken into account. Since the court in applying the first is not concluded by the construction of the contract, it may admit that the defendant's promise is absolute but nevertheless decide that just as fraud is a defence to an absolute promise, so the failure of the plaintiff to perform his agreement is also a defence, called in the Civil Law *exceptio non adimpleti contractus*.

The third and fourth theories suggested are more nearly logical. The fourth theory, however, suggests the only satisfactory basis on which to rest the defendant's excuse when the plaintiff makes default. In one class of cases, moreover, a different result is produced, according as one or the other view is adopted. Though it is generally true that in bilateral contracts the parties plan a double exchange—an exchange of performances as well as a promise—this is not true in one class of contracts—aleatory contracts. In such contracts under the second view suggested, breach of contract by the plaintiff does not excuse the defendant whereas under the third view there would be an excuse.<sup>10</sup> For an understanding of the existing law governing the dependency of promises in bilateral contracts, the historical development of the subject must be considered.

## 6. Under the early law mutual promises were independent.

It was settled law for centuries that mutual promises unless containing express conditions were independent. This had mainly become established as to mutual covenants by the year 1500 and probably earlier, and remained unquestioned both as to covenants and simple contracts until the time of Lord Mansfield.<sup>11</sup>

<sup>10</sup> See *infra*, § 888.

<sup>11</sup> 10b., plac. 7, Fineux, C. J., said: "If one covenant with me to serve

§ 817. Lord Mansfield introduced the doctrine of mutual dependency.

In 1744, Willes, J., expressed his dislike "of those cases though they are too many to be now overruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other; as where there are two covenants in a deed, the one for repairing and the other for finding timber for the reparations; this notion plainly tending to make two actions instead of one, and to a circuity of action and multiplying actions, both which the law so much abhors." He added, "If, therefore this were a new point, I should be inclined to be of opinion that, though, where there are mutual covenants relative to one another in the same deed, a plaintiff is not obliged, in an action brought for the breach of them, to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non-performance of the covenant to be performed on the part of the plaintiff; but this has been so often determined otherwise, that it is too late now to alter the law in this respect."<sup>12</sup> Nevertheless, in spite of three centuries of opposing precedents, Lord Mansfield thirt-

me for a year, and I covenant with him to give him 20*l.*, if I do not say for said cause, he shall have an action for the 20*l.* although he never serves me; otherwise, if I say he shall have 20*l.* for said cause. So if I covenant with a man that I will marry his daughter, and he covenants with me to make an estate to me and his daughter, and to the heirs of our two bodies begotten; though I afterwards marry another woman, or his daughter marry another man; yet I shall have an action of covenant against him, to compel him to make this estate; but if the covenant be that he will make the estate to us two for said cause, then he shall not make the estate until we are married. And such was the

opinion of the Court. And Rede, J. said it was so without doubt. And to the same effect are *Brocas's Case*, Leon. 219; *Nichols v. Raynbres*, Hobart, 88*b*; *Gower v. Capper*, Crok. El. 543; *Bettisworth v. Campion*, Yel. 133; *Spanish Ambassador v. Gifford*, Rolle, 336; *Thorp's Case*, March, 7; *Ware v. Chappell*, Style, 186; *Gibbons v. Prewd*, Hardres, 102; *Beany Turner*, 1 Lev. 293; *Cole v. Shallett*, Lev. 41; *Blackwell v. Nash*, 1 Strang. 535; *Martindale v. Fisher*, 1 Wils. 8; *Anonymous*, 1 Lev. 87; *Pordage Cole*, 1 Wm. Saund. 319; *Thomas v. Cadwallader*, Willes, 496.

<sup>12</sup> *Thomas v. Cadwallader*, Willes, 496.

later decided that performance of one covenant might be dependent on prior performance of another, though there was no express condition. He did not follow Willes's suggestion that the plaintiff's breach of a promise must be alleged and proved by the defendant as an excuse, but held the plaintiff must allege and prove his own performance as a condition. The case in which he first so decided <sup>13</sup> was one where the facts made it easy to reach this conclusion. The defendant had wanted to give up his business to the plaintiff on credit, and the plaintiff had covenanted to give security for the debt by payment. To treat these covenants as independent would obviously make the covenant to give security practically useless, and Lord Mansfield held that the plaintiff could not sue without alleging and proving the giving of security. In giving the judgment of the court, Lord Mansfield said: "There are three kinds of covenants: 1. Such as are called independent and independent, where either party may recover damages from the other for the injury he may have received by breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, if the prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third kind of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and bound to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his obligation, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act." <sup>14</sup> He added, "that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the

*Angston v. Preston*, 2 Doug. 689, frequently quoted, as, e. g., in *Rosenthal v. Paper Co. v. National &c. Paper Co.*, 226 N. Y. 316, 123 N. E. 766.

<sup>14</sup> See also *Jones v. Barkley*, 10 B. & C. 684.

Lord Mansfield's words are still

order of time in which the intent of the transaction requires their performance."

§ 818. *Boone v. Eyre.*

It was not long before Lord Mansfield had forced upon his attention that injustice and not justice might result if in every case of mutual promises complete performance of the promise first due was regarded as a condition precedent to any liability on a counter covenant which by its terms was to be performed later. A case arose<sup>15</sup> where the defendant had covenanted to pay five hundred pounds and an annuity in consideration of the conveyance to him of a plantation and the negroes thereon, accompanied by a covenant by the seller that he had good title, and that the defendant should quietly enjoy the property. In an action for non-payment of the annuity the defendant pleaded that the plaintiff did not have legal title to the negroes on the plantation. In a brief opinion Lord Mansfield said: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual considerations, the one precedent to the other, but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." The sentence of this opinion that where mutual covenants were only to a part of the consideration, and where the breach may be paid for in damages it shall not be pleaded as a condition precedent became one of the stock quotations on the subject; and the case became the basis of the doctrine that after part performance by the plaintiff, a subsequent failure to perform on his part might not preclude his recovery on the defendant's counter promise.<sup>16</sup> In commenting upon *Boone v. Eyre*, Pollock, C. B.

<sup>15</sup> *Boone v. Eyre*, 1 H. Bl. 273, n.

<sup>16</sup> Ashhurst, J., added, according to a statement by Lord Kenyon in *Campbell v. Jones*, 6 T. R. 570, 573: "There is a difference between executed and executory covenants; here the covenants are executed in part, and the de-

fendant ought not to keep the estate because the plaintiff has not title to a few negroes." *Boone v. Eyre*, 2 Wm. Bl. 1312, was an action between the same parties, brought for later instalments of the annuity. The defendant pleaded breaches of covenants.



in a later decision:<sup>17</sup> "It is remarkable that, according to rule, the construction of the instrument may be varied *matter ex post facto*; and that which is a condition precedent to the deed is executed may cease to be so by the subsequent act of the covenantee in accepting less; as . . . the defendant . . . might have objected to the transfer, if the plaintiff had no good title to the negroes, and refused to pay."<sup>18</sup>

### **Pordage v. Cole.**

After Lord Mansfield's time it was not seriously disputed that mutual covenants generally had some relation of dependence upon the other,<sup>19</sup> and Lord Kenyon before the close of the eighteenth century said: "Suppose the purchase-money of an estate was £40,000 it would be absurd to say that the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who perhaps might be an insolvent person. The old cases cited by the plaintiff's counsel have been accurately stated; but the determination seems outrage common sense."<sup>20</sup> Substantially the case decided by Lord Kenyon, was the early decision of *Pordage v. Cole*,<sup>21</sup> which was cited as authority by the plaintiff's counsel

on behalf of the plaintiff. Walker, plaintiff, said, "As to the four covenants, the matter contained therein is a matter of covenant, for if founded in fact) the defendant cannot bring his action; but it is a rule that covenant cannot be pleaded against covenant." Glyn, defendant, "would not deny the principle laid down by Walker, but its application to the present case. This is not a case of mutual covenants, where one is a consideration for the other; but here, the performance of the plaintiff's covenant is a condition precedent to the performance of those of the defendant. But *per De Grey*, C. J. Where the participle 'doing,' 'performing,' is prefixed to a covenant by another person, it is clearly a mutual covenant, and not a condition pre-

cedent: *Hunlock and Blacklowe*, 2 Saund. 155.

"See also *Carpenter v. Cresswell*, 4 Bing. 409; *Rose v. Poulton*, 2 B. & Ad. 822; *Fearon v. Aylesford*, 14 Q. B. D. 792."

<sup>17</sup> *Ellen v. Topp*, 6 Exch. 424.

<sup>18</sup> See criticism of this expression *infra*, § 826.

<sup>19</sup> For cases decided shortly thereafter, see *Duke of St. Albans v. Shore*, 1 H. Bl. 270; *Phillips v. Fielding*, 2 H. Bl. 123; *Goodisson v. Nunn*, 4 T. R. 761; *Morton v. Lamb*, 7 T. R. 125.

<sup>20</sup> *Goodisson v. Nunn*, 4 T. R. 761.

<sup>21</sup> 1 Wm. Saund. 319l. There was indeed in this case a circumstance on which reliance was afterwards placed that the money was payable at a fixed day while no time was stated for the conveyance of the land; but the

in the argument of the case before him. The plaintiff was there allowed to recover the price of an estate in spite of his failure to allege that he had conveyed or tendered the land. It was said that the defendant had his action of covenant against the plaintiff to recover the price, so that each party had a mutual remedy against the other. The decision was entirely in line with the early authorities on mutual promises but might be supposed to have been completely overruled by the later decisions to which allusion has been made. Serjeant Williams, however, in his edition of Saunders' Reports of 1798 annexed as a note to *Pordage v. Cole*, a statement of the principles, as he conceived them, governing the dependency of mutual promises. These rules remained for years the recognized statement of the law and acquired by their adoption by the courts, judicial authority. The curious consequence also followed that *Pordage v. Cole* itself was brought by the note attached to it, to the recollection of lawyers who had forgotten the numerous other overruled cases going on the same principle, and was galvanized into new life.<sup>22</sup> But if it still can be regarded as having any authority in England, it has none in the United States.

### § 820. Serjeant Williams' Rules.

Serjeant Williams' rules were as follows:<sup>23</sup>

1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a con-

court does not mention this as a reason for its decision.

<sup>22</sup> In *Mattock v. Kinglake*, 10 Ad. & E. 50, Patteson, J., said: "*Pordage v. Cole* is directly in point. We must overrule if we decide in favor of the defendant." And in *Simpson v. Crippen*, L. R. 8 Q. B. 14, Blackburn, J. said: "I prefer to follow *Pordage v.*

*Cole*." See also *Sibthorp v. Brunel*, 3 Exch. 826. In view of the fact that *Pordage v. Cole* was one of the decisions which, as Lord Kenyon rightly said, "outraged common sense," such remarks are extraordinary. Cf. *Marsden v. Moore*, 4 H. & N. 500; *Bankart v. Bowers*, L. R. 1 C. P. 484.

<sup>23</sup> 1 Wm. Saund. 319l.

on precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act. 2. But when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. 4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 5. Where two acts are to be done at the same time, as, where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can A maintain an action without showing performance of, or offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

## 21. Comment on Serjeant Williams' first two Rules.

Serjeant Williams' rules were substantially adopted from earlier judicial statements. The first two rules are borrowed from Lord Holt's opinion in *Thorp v. Thorp*<sup>24</sup> with the change that Serjeant Williams inserts a sentence at the end of his first rule which finds no place in Lord Holt's judgment. Serjeant Williams also inserts in his first rule the words, "or part of it," and the words, "or may happen." The effect of these insertions is that if any part of the performance on one side is to precede performance on the other, a right of action will arise, not only for any failure to render such part performance, but for failure to perform the whole covenant, in case of the default of the other covenantor. Also if by the terms of the contract it is possible that the whole or part of the performance on one side may be due before performance on the other, the covenant is absolute and independent, though

<sup>24</sup> 12 Mod. 455. See *supra*, § 671.

it turns out subsequently that performance of this covenant does not fall due until after performance by the other party. Thus if A covenants to sell goods to B on their arrival from abroad, and B covenants to pay \$1000 on March 1st as the price of them, the obligation to transfer the goods would be absolute, because they might arrive prior to March 1st, and even though they did not arrive until after that date, the seller would be bound to transfer them without getting the price. This modification of Lord Holt's rule was undoubtedly made to account for the decision in *Pordage v. Cole* itself, where such were the facts, though it does not appear that the court regarded the possibility that performance on one side might or might not become due before performance on the other as affecting the result. Likewise Serjeant Williams says if no time is fixed in a contract for the performance of the promisee's act, the promises are independent. This rule still occasionally finds judicial support,<sup>25</sup> though a simple concrete case would

<sup>25</sup> In *Busch v. Stromberg-Carlson Telephone Mfg. Co.*, 217 Fed. 328, 328, 133 C. C. A. 244, subscribers agreed to take and pay for bonds of a corporation at times specified in the underwriting, if not sold to others before that time. Just before the defendant signed the underwriting, the corporation, at the demand of the defendant and other St. Louis directors, agreed to build a plant at St. Louis costing about \$1,000,000, and the defendant thereupon raised his subscription from \$50,000 to \$100,000. This agreement fixed no time for the erection of the plant, and was neither embodied nor referred to in the underwriting and the plant was never built. The court said: "Where acts are stipulated to be done at specified times by one covenant of a contract, and acts are stipulated to be done without fixing any time for their performance by another covenant thereof, the latter covenant does not condition the former, is independent of it, and a breach of the latter, while it may raise a cause of action, is no defence to an action for a

breach of the former. The same rule generally governs where acts are stipulated by one covenant to be done at different times from those fixed by another covenant for the performance of other acts. In *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 570, 14 Sup. Ct. 928, 932, 38 L. Ed. 822, the Supreme Court said: In the learned note of Serjeant Williams to the early case of *Pordage v. Cole*, 1 Saund. 320a, it is said that if a day be appointed for payment of money, a part of it, etc.

"And this is still the law and the reason of such a case and of this case. *Goldsborough v. Orr*, 8 Wheat. 211, 223, 5 L. Ed. 600; *Emigrant Co. v. County of Adams*, 100 U. S. 61, 70, 25 L. Ed. 563; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112, 115, 1 N. W. 827; *Clark on Contracts* (1894), page 655, 656. The court below rightly held that the contract of the telephone company to build the plant and its breach was no defence to the action against Mr. Busch for his breach of his agreement to take and pay for the

how far removed it is from modern ideas. If one makes a contract with his tailor to make a suit of clothes and promises to pay on January 1, as no time is fixed for the making of the clothes, the promises are independent, and the tailor may sue for the money though he never has made the clothes and a reasonable time for doing so has elapsed. So said Serjeant Williams, and such may have been the law once, but it is not so now. Serjeant Williams' second rule follows as a necessary consequence from his first.

### Comment on Serjeant Williams' Rules 3, 4, and 5.

The third and fourth rules were taken from Lord Mansfield's opinion in *Boone v. Eyre*.<sup>27</sup> It is not perfectly clear what they

are. Two entirely different situations are suggested by

the first. The first situation, and that at which these rules are apparently aimed, are where A covenants to do two or more things, and B in consideration thereof covenants to do one

thing. Here Serjeant Williams says that breach of one of A's covenants, since it goes to but part of the consideration (and the money paid for in damages) will not preclude recovery on B's covenant. But it is obvious that the propriety of this result depends on the comparative importance of the covenant

breached at the times he promised to do so. Whatever may be said of the propriety reached in this case, the reason for the result, though that of Serjeant Williams, cannot be supported. It would be equally applicable if the defendant's covenant was the price of the building, or of the price of bonds, yet a breach would surely not compel payment for a building which was never completed and a reasonable time for building had elapsed merely because the time was fixed in the contract for completion.

As a general rule, it may be said by law, that a covenant on the part of the vendee, to pay the purchase-money at a particular date, and the vendor to convey at some intermediate period, as for instance, after the title is obtained from the Govern-

ment, are not dependent upon each other, and that the purchaser must pay the money when due, and rely upon the covenant of the agreement for his remedy. But can this be the rule where it manifestly appears that there is a valid, outstanding title, superior to the claim of the vendor, or which, as long as it is permitted to stand, would prevent the vendor from procuring a patent for his land, and deprive him of the power to convey according to the conditions of his bond? This would involve that circuity of action and multiplicity of suits, so much discountenanced by our laws, and so repugnant to the genuine and fundamental principles of our system of procedure." *Taul v. Bradford*, 20 Tex. 261, 263.

<sup>27</sup> 1 Hen. Bl. 273n.

which A has broken and the covenant which he has not broken. If A covenants to give a horse and bridle to B, and B covenants to pay \$500 it may be just to allow A to recover on B's covenant, though he has not transferred the bridle as he agreed, but to allow him to recover if he were in default on his covenant to transfer the horse is a result that will not commend itself. On this rule Pollock, C. B., said in a later case:<sup>28</sup> "It cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. The residue must be the substantial part of the contract; and in the case of *Boone v. Eyre*, two or three negroes had been accepted and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it."<sup>29</sup>

The other situation suggested by these rules of Serjeant Williams is where A has partly performed a single covenant for a continuing performance, but after such part performance is in default. Whether he should nevertheless recover here should depend on the extent of his part performance, and the materiality of the breach which he has committed.<sup>30</sup> The fourth rule is borrowed from Lord Mansfield's opinion in *Kingston v. Preston*,<sup>31</sup> and is an accurate statement of the law of concurrent conditions.

### § 823. Criticism of the general theory of Serjeant Williams' Rules.

Serjeant Williams was but following judicial authority when he dealt with the question of dependency in mutual

<sup>28</sup> *Ellen v. Topp*, 6 Exch. 424.

<sup>29</sup> This extract was quoted with approval by Lord Collins in *General Billposting Company, Ltd., v. Atkinson*, [1909] A. C. 118, 121. See also *Rosenthal Paper Co. v. National & Co. Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

<sup>30</sup> Thus Lord Ellenborough said in *Davidson v. Gwynne*, 12 East, 381, "The principle laid down in *Boone v.*

*Eyre* has been recognized in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated by damages."

<sup>31</sup> 2 Doug. 689, Lofft. 194.

promises as one of interpretation. It was not easy for the courts at the end of the eighteenth century to renounce altogether the previously accepted view that unless a covenant or promise was conditional it must be enforced irrespective of the plaintiff's default. It was easier to achieve the desired result by finding conditions even though none were in terms stated. Accordingly, to Serjeant Williams, and to the judges long after his time, the change in the law effected by Lord Mansfield was regarded as simply an increased liberality of construction. That there was an increased liberality of construction need not be denied; and the importance of a fair construction of a contract which shall give effect to the intention of the parties not only as it may be expressed in words, but as it may be inferred from the whole contract as applied to the matter in hand, is obvious. But however liberal construction may be, all the situations which may arise where one party is guilty of a breach of contract, or threatens one, cannot satisfactorily be disposed of by reference to the intention of the parties.<sup>32</sup>

#### 24. Intent of the parties controls if expressed.

It is a commonplace of the decisions that whether promises are dependent upon one another is determined by the intent of the parties.<sup>33</sup> No doubt where the parties express an

In *Bradford v. Williams*, L. R. 7 Ch. 259, 261, Martin, B., said: "I take the words 'condition precedent' unfortunate. The real question, apart from all technical expressions, is, what in each instance is the substance of the contract."

In *Loud v. Pomona Land, etc.*, 153 U. S. 564, 38 L. Ed. 822, 14 Sup. Ct. 928, the court said: "If parties make proper, they may agree that the performance of one to maintain an action against the other shall be conditioned dependent upon the plaintiff's performance of covenants entered into as part. On the other hand, they may agree that the performance by the defendant shall be a condition precedent to

the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract?" To the same effect *Parke, B.*, said: *Graves v. Legg*, 9 Exch. 709: "The general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument." See also *Roberts v. Brett*, 11 H. L. C. 337; *Seeger v. Duthie*, 29 L. J. C. P. 253, 30 *ibid.* 65; *Bettini v. Gye*, 1 Q. B. D. 183; *Pollak v. Brush Elec. Assoc.*, 128 U. S. 446, 455, 32 L. Ed. 474, 9 Sup. Ct. 119; *Fulenwider v. Rowan*, 136 Ala. 287, 34 So. 975; *McCormick v. Badham*, 191 Ala. 339,

intention, that intention will govern. "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent." <sup>34</sup>

### § 825. Fictitiously imputed intentions.

The troublesome case is where they have expressed no intention, and this case is very common. Parties do in their contracts ordinarily express an intention as to what things shall be done by each party, but they very commonly express no intention whatever as to whether the obligation of one party shall be dependent on performance by the other. Frequently they even say nothing indicating the order of time in which performances are to take place. To say in such a case that the dependency of a promise is to be determined by the intention of the parties is open to several objections. In the first place it is an obvious fiction. <sup>35</sup> It is better to state

67 So. 609; *Hewitt v. Berryman*, 5 Dana, 162; *Con P. Curran Printing Co. v. St. Louis*, 213 Mo. 22, 111 S. W. 812; *Grant v. Johnson*, 5 N. Y. 247, 255; *Glenn v. Rossler*, 156 N. Y. 161, 50 N. E. 785; *Rosenthal Paper Co. v. National &c. Paper Co.*, 226 N. Y. 313, 123 N. E. 766, 175 N. Y. App. D. 606, 162 N. Y. S. 814; *Oliver v. Oregon Sugar Co.*, 42 Oreg. 276, 70 Pac. 902; *Ink v. Rohrig*, 23 S. Dak. 548, 122 N. W. 594; *National Cable & Mfg. Co. v. Filbert*, 31 S. D. 244, 140 N. W. 741; *Toellner v. McGinnis*, 55 Wash. 430, 104 Pac. 641, 24 L. R. A. (N. S.) 1082.

<sup>34</sup> Per Blackburn, J., in *Bettini v. Gye*, 1 Q. B. D. 183.

<sup>35</sup> This is sometimes recognized by the courts. *E. g.*, Blackburn, J., in *Bettini v. Gye*, 1 Q. B. D. 183, 188, relying on language of Parke, B., in *Graves v.*

*Legg*, 9 Exch. 709, said: "But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent." Professor Langdell clearly recognised the fictitious character of



law in terms of reality, for misapprehension is sure to be  
 ed by fiction. Thus it is not infrequently argued by  
 ts as a reason for holding promises independent that if  
 parties had wished to make them conditional they could  
 y have said so.<sup>36</sup>

his argument, however, is destructive of the whole theory  
 onditions implied in law. It assumes that whenever  
 ndency is not stated in terms it is purposely left out. On  
 assumption the law would logically revert to the position  
 ld prior to Lord Mansfield's time,—that unless expressly  
 itional all promises are absolute and independent; whereas  
 presumption in bilateral agreements unless some reason  
 oe shown to the contrary, is that the promises are depend-  
 7 The truth is, if the intention of the parties is to be  
 ght into the doctrine of conditions implied in law in most  
 s, it can only be an intention which the court assumes  
 parties would have had if they had considered the matter,  
 had made some provision regarding it. The only justi-  
 on for such an assumption is the fairness of dependency,  
 ompared with independency, of promises in bilateral con-  
 s, and this being so it is better to drop any talk about  
 tion of the parties where they express none and rest doc-  
 s of implied dependency solely on their fairness—a quite  
 cient basis.

ention attributed to the parties.  
 d he says: "Conditions which  
 ounded upon an actual intention  
 be termed express conditions;  
 which are founded upon an im-  
 intention may be termed implied  
 ons."

ee for example, *Fearon v. Ayles-*  
 12 Q. B. D. 539, 549.  
*Bank of Columbia v. Hagner*, 1  
 55, 464, 7 L. Ed. 219. "In con-  
 of this description, the under-  
 s of the respective parties are  
 s considered dependent unless a  
 ary intention clearly appears.  
 fferent construction would in  
 cases lead to the greatest injus-  
 and a purchaser might have pay-  
 of the consideration money

enforced upon him, and yet be disabled  
 from procuring the property, for which  
 he paid it. Although many nice dis-  
 tinctions are to be found in books,  
 upon the question, whether the cove-  
 nants or promises of the respective  
 parties to the contract, are to be con-  
 sidered independent, or dependent;  
 yet it is evident, the inclination of  
 courts has strongly favored the latter  
 construction, as being obviously the  
 most just. The seller ought not to be  
 compelled to part with his property  
 without receiving the consideration;  
 nor the purchaser to part with his  
 money, without an equivalent in re-  
 turn." See also *McCormick v. Bad-*  
*ham*, 191 Ala. 339, 67 So. 609; *World's*  
*Fair Min. Co. v. Powers*, 12 Ariz. 285,

**§ 826. Intention must relate to the time of the formation of the contract.**

A more serious objection to reducing the whole question of dependency to an imputed intention is that intention real or fictitious must relate to the time when the contract was entered into. Properly to adjust the rights of the parties in the mutual performance of bilateral contracts demands that the situation should be examined in the light of the events which subsequently take place whether foreseen or foreseeable at the formation of the contract or not.<sup>38</sup> Seeking the intention of the parties as the sole governing principle led Serjeant Williams to declare a promise independent if one performance or part of it might by the terms of the contract under some circumstances precede performance of the counter promise; and a few unjust decisions have been made in consequence.

The proper point of view is indicated in *Poussard v. Spiers*, where the court left to the jury the question whether the plaintiff's failure to perform was of material consequence and whether, under the circumstances, it was reasonable to refuse further performance from the plaintiff. The difficulty of reconciling such an attitude with the view that the matter depends upon the construction of the parties is indicated by the remark in an earlier case,<sup>42</sup> of Pollock, C. B.: "It is remarkable that according to this rule the construction of the instrument may be varied by matter *ex post facto*." Such a rule of construction is wholly inadmissible, as has been pointed out in a later decision by the House of Lords.<sup>43</sup> But if it is once understood that another question besides that of con-

100 Pac. 957; *Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

<sup>38</sup> See *infra*, § 875, *et seq.*

<sup>39</sup> This is not infrequently quoted, though less frequently applied; see *Loud v. Pomona Land Co.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; *Glaser v. Dannelley*, 23 N. Mex. 593, 170 Pac. 63.

<sup>40</sup> See *infra*, § 837.

<sup>41</sup> 1 Q. B. D. 410. See also *Dimech v. Corlett*, 12 Mo. P. C. 199; *Bettini v. Gye*, 1 Q. B. D. 183.

<sup>42</sup> *Ellen v. Topp*, 6 Exch. 424.

<sup>43</sup> *Wallis v. Pratt*, A. C. 394, 400. Lord Shaw there said of this expression "whoever heard in a commercial contract of construing the meaning of two business men by a principle of the kind. . . . I think it is a safer thing to construe this document as it was originally meant to be construed—that is to say, according to the evident intention of the contracting parties at the time the bargain was made. Where the question is properly one of

ction is involved, Pollock's statement is in substance not explicable but sound, though the form of it is open to criticism.

**7. Implied conditions if based on intention must be given strict effect.**

the intention of the parties were the only principle concerning the matter under discussion, and the rights of the parties were, therefore, based wholly on a construction of the contract, promises which were held impliedly conditional should necessarily be dealt with in the same way as promises which are expressly conditional. The court could only say that it was implied as of an express condition: "As the parties have made this a conditional contract, we are not to inquire into its materiality." <sup>44</sup> Even after part performance by the plaintiff a slight breach of condition would excuse the defendant if the law governing so-called implied conditions is based wholly on the assumption that the parties intended the defendant's obligation to be conditional on prior performance by the plaintiff. <sup>45</sup> Such a point of view promotes a technical determination of cases. Because the enforcement of conditions frequently leads to forfeitures and penalties courts have always been indisposed to construe contracts as conditional,

construction, as it was in *Wallis v. Lord Shaw's* criticism is sound. Also *Behn v. Burness*, 3 B. & S.

*Banco De Sonora v. Bankers', etc.*, 124 Ia. 576, 583, 100 N. W. 532, Am. St. Rep. 367. See also *per* *Al. C. J.*, in *Stavers v. Curling*, 3 N. C. 355.

It is for this reason that courts sometimes been reluctant to enforce conditions. Thus in *Boone v. 1 Hen. Bl. 273*, n., Lord Mansfield said of a breach in failing to offer a good title to the slaves on a motion "if this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." And in *Jonassohn v. Young*,

4 B. & S. 296, Crompton, J., said, of an alleged breach of promise by the defendant in supplying inferior coal and detaining the vessel sent for it: "The argument for the defendant must go this length, that the supply of one chaldron of coal of an inferior quality, or the unnecessary detention of the defendant's vessel for one hour, would entitle him to put an end to the contract." The same argument is put forward by Best, J., in *Winstone v. Linn*, 1 B. & C. 460; by Dallas, C. J., in *Fothergill v. Walton*, 8 Taunt. 576; by Littledale and Coleridge, JJ., in *Franklin v. Miller*, 4 A. & E. 599; and in *Petersburg Fire Brick & Tile Co. v. American Clay M. Co.*, 89 Ohio, 365, 106 N. E. 33, 36.

unless the language is too clear to be mistaken;<sup>46</sup> and has frequently disregarded plainly expressed conditions, because of their unwillingness to deprive a promisee of all rights on account of some trivial breach of condition. But the theory of mutual dependency of the promises in a bilateral contract is based on fundamental principles of justice, and if the court conceives of its action in enforcing such dependency as due not to the will of the parties but to the inherent justice of the situation, there is no difficulty in so applying and molding the principle of failure of consideration as to protect the defendant without subjecting the plaintiff to the risk of unjust forfeiture. Therefore promises will be regarded as mutually dependent whenever it is possible to do so.<sup>47</sup>

<sup>46</sup> *Antonelle v. Lumber Co.*, 140 Cal. 309, 315, "Assuming that the stipulation was a condition precedent, it is well settled that such conditions are not favored by the law, and are to be strictly construed against one seeking to avail himself of them. (*Front Street R. R. Co. v. Butler*, 50 Cal. 574, 577; *Deacon v. Blodget*, 111 Cal. 416, 418.) More particularly does this follow, when a strict construction of such condition would work a forfeiture; a result which the law will always endeavor to prevent." It is for this reason that in *Newson v. Smythies*, 3 H. & N. 840, Pollock, C. B., says: "It is a general rule that covenants are to be treated as independent, rather than as conditions precedent, especially where some benefit has been derived by the covenantor."

<sup>47</sup> In *Telfener v. Russ*, 162 U. S. 170, 180, 40 L. Ed. 930, 16 Sup. Ct. Rep. 695, the court said:—"In *Bank of Columbia v. Hagner*, 1 Pet. 455, 464, 7 L. Ed. 219, this court, speaking by Mr. Justice Thompson of the distinctions made in covenants or promises of parties to a contract for the purchase and sale of real property, whether they were to be considered as independent or dependent, said: 'It is evident that the inclination of courts has strongly

favored the latter construction being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence in such cases, if either a vendor or vendee wish to compel the other to fulfill his contract, he must make part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. And an averment to that effect is always made in the declaration upon the contracts containing independent undertakings, and the averment must be supported by proof.'"

In *Stockstill v. Byrd*, 132 La. 403, So. 446, 447, the court said: "The courts at the present day incline strongly against the construction of promises as independent; and, in the absence of clear language to the contrary, promises which form the consideration for each other will be held to be concurrent or dependent, and not independent, so that a failure of one party to perform will discharge the other, and so that one cannot maintain an action against the other without

**28. Promises called absolute are generally not strictly so.**

Promises when not held conditional are said to be independent and absolute; and so long as the only principles governing the matter are those of construction based on the real or supposed intention of the parties, no other conclusion is possible. In fact, however, no promise in a bilateral contract the performance of which on one side is agreed upon as the equivalent exchange for performance on the other side, is wholly independent. Though performance of one promise may be the first, it is still true that the later performance is the agreed exchange, and if the court is satisfied that the agreed exchange will not be forthcoming, the first performance is excused.<sup>48</sup> Moreover, if suit is not brought for the first performance until after the second is due, tender of the second performance may become a condition of liability for the prior performance.<sup>49</sup> It is indeed possible to say, and some courts do say, that it is an implied condition of A's promise that B shall remain apparently able and willing to perform his promise when the time comes. This is of course inconsistent with any assertion that A's promise is independent. Moreover, it surely is evident that when such a statement is made, the court is not taking the intention of the parties, or applying any ordinary rules of interpretation or construction. It is dealing with an unexpected situation for which the contract makes no provision in the way most conformable with justice. As this is a fact it is better to say so. While fiction may have been necessary to aid the law in taking a step forward, when the step has been taken the fiction should be discarded; for otherwise it is liable to be treated as fact instead of fiction, and to be the basis of reasoning by analogy to wrong results.

**29. Order of time of performances.**

Undoubtedly the most important element in determining the liability of one party to a bilateral contract when the other party has not performed, is the relative order of performances

in giving the performance or tender of performance on his part." See to similar effect *Phillips &c. Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *McCormick v. Badham*, 191 Ala. 339, 67 So. 609, 611.  
<sup>48</sup> See *infra*, §§ 875 *et seq.*  
<sup>49</sup> See *infra*, § 887.

fixed by the contract. Assuming that two performances are intended as equivalent exchanges for one another, in view of business customs, the intention is fairly inferable that the relative order which is fixed by the contract must be observed. In a contract of service, for instance, a real intention may doubtless be inferred that the service shall be rendered before the promised payment is made.

In the Civil Law the plaintiff's own breach of contract is regarded as a dilatory defence, and in the Common Law also. In the same situation must generally at least give rise to the same results; that is, the party whose performance is delayed subsequently is not necessarily excused permanently by delay in performance on the other side; but he is excused temporarily until the prior performance has been rendered. But it should be observed that what was originally in effect a dilatory defence becomes an absolute one when so long a period of time has elapsed as to make a substantial breach.<sup>60</sup> Where, however

<sup>60</sup> In *McCormick v. Badham*, 191 Ala. 339, 67 So. 609, the court said, "The parties 'must be held to have intended the performance of their respective acts, in the order of time indicated by their covenants.' *Nesbitt v. McGehee*, 26 Ala. 748. The precedence of covenants 'must,' as said by Lord Mansfield in his quotation in *Nesbitt v. McGehee*, 'depend on the order of time in which the intent of the transaction requires their performance.'

"'Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time: and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other.' *Phillips Const. Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341; *Loud v. Pomona Land Co.*, 153 U. S. 564, 14 Sup. Ct.

Rep. 928, 38 L. Ed. 822." In *Southern Pacific R. Co. v. Allen*, 112 Cal. 456, 461, 44 Pac. 796, the court said: "The case is, therefore, strictly within the well-established rule that, 'if a day be appointed for payment of money, or a part of it, or for doing another act, and the day is to happen *may* happen before the thing which is the consideration of the money, the act is to be performed, an action may be brought for the money, or for not doing such other act, *before performance*; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent.' [Donovan Judson, 81 Cal. 334, 22 Pac. 68; *Front Street, etc., R. Co. v. Butler*, 81 Cal. 574; *Platt v. Gilchrist*, 3 Sand. 12; *Loud v. Pomona, etc., Co.*, 153 U. S. 564, 576, 38 L. Ed. 822; *Coleman v. Rowe*, 5 How (Miss.) 460, 37 Am. Dec. 164; *Couch v. Ingersoll*, 2 Pic. 292, 301; *Bean v. Atwater*, 4 Conn. 310, 10 Am. Dec. 91; *Edgar v. Boies*, 11 Serg. & R. 445, 450.]" In *Gail v. Gail*, 127 N. Y. App. Div. 892, 89

tract provides for a number of performances on each of varying importance, it cannot be inferred that there is any actual intention that if default was made in some performance of slight importance, the subsequent performance should not be rendered. There is indeed a clear intention that if both performances are rendered, the performance first in order of time under the contract shall be first performed; but there is no clear intention expressed as to what shall happen if default is made in the prior performance; and in the absence of a clearly expressed intention, the consequence is that for even permanent default in prior performance of slight importance subsequent performance should be wholly unaffected and cannot be accepted.<sup>51</sup>

Therefore, unless an actual intention is clearly to be inferred from the consequence of non-performance of a prior performance

the court said: "Whether or not the contract and reciprocal agreements of the parties to a contract are dependent upon the performance is determined by the intention of the parties at the time in which by the terms of the contract their performance is required. (Grant v. ... 5 N. Y. 247; Glenn v. Rossler, ... 161, 167, 50 N. E. 785.) If it appears that their performance of the whole or a part of the agreement of the contract is to precede the performance by the other party, then that part of the contract which the former seeks to enforce, then the right of the former to enforce as to the latter performance of the contract is dependent upon his prior performance of his part of the contract tender thereof. (Grant v. ... supra.)" See also Fulenwider v. Rowan, 136 Ala. 287, 34 So. 2d 100; Renard Mfg. Co. v. Kingston, 22 Ga. App. 280, 95 S. E. 2d 100; Lang v. Hedenberg, 277 Ill. 368, 118 N. E. 566; Kehler Flour Mills v. Linden, 230 Mass. 119, 119 N. E. 2d 100; Massachusetts Biographical v. Russell, 229 Mass. 524, 118 N. E. 2d 100; Kinney v. Federal Laundry

Co., 75 N. J. L. 497, 68 Atl. 111; Gourde v. Healey, 176 N. Y. App. D. 464, 163 N. Y. S. 637; McCurry v. Purgason, 170 N. Car. 463, 87 S. E. 244, Ann. Cas. 1918 A, 907; Coos Bay R. Co. v. Nosler, 30 Oreg. 547.

<sup>51</sup> In the following cases, for instance, default in prior performance was held not to excuse liability for breach of a promise of subsequent performance. Mersey Steel & Iron Co. v. Naylor, 9 A. C. 434. In Mayo v. American Malting Co., 211 Fed. 945, 128 C. C. A. 443, under a contract for the sale of malt in instalments during the ensuing year the seller agreed that he would not quote prices on malt to other persons in the buyer's State. It was held that a sale of malt to another party in such State did not entitle the buyer to refuse to take the malt thereafter, as agreed, unless he was thereby prevented from selling the malt purchased by him at a satisfactory price. The court said (p. 947): "It is not every breach of a term or provision of a contract which will justify its rescission by the other party. If the breach did him no hurt, it was immaterial."

is to be non-liability of the other party for subsequent performance, the situation is better dealt with on the theory of failure of consideration. The court can then take into account the comparative magnitude of the default.

### § 830. Order of performances when one or both take time.

When the performance of mutual promises cannot be performed at the same instant they must either be performed without reference to one another or one must be performed prior to the other. Unless the contract or usage otherwise indicates, if both promises need time for their performance it seems that it is the duty of each party to proceed without waiting for the other to perform, since neither party can demand that the other's performance shall come first.<sup>52</sup> Nevertheless the promises are not absolute and independent in a strict sense; for should one party go forward with his performance and the other in violation of his duty should fail for a considerable time to perform, there can be no doubt that the former would be excused from continuing to perform.

If one performance is capable of execution in a moment of time while the other is not, the implication of law in the absence of agreement to the contrary is that the performance which takes time must be rendered first. The typical contract of this sort is a contract of service. The employee must render the service before the payment for it is due. In the nature of things there is no reason why this should be true, but usage is inveterate that the employee shall trust the employer for compensation rather than the employer promise first and trust the employee for the performance of his undertaking; and parties must be understood to contract with reference to the usage. Perhaps the origin both of the usage and of the law is that the employers have been in a position to establish both.<sup>53</sup> The rule is the same in a contract

<sup>52</sup> See *Rochester Distilling Co. v. N. Y.* 423; *Alexander v. Hoffman* 92 Conn. 43, 101 Atl. 500. *W. & S.* 382; *Diefenback v. Stark*,

<sup>53</sup> *Mixer v. Mixer*, 2 Cal. App. 227, Wis. 462, 14 N. W. 621, 43 Am. R. 83 Pac. 273; *Thayer v. Wadsworth*, 719. See further, *infra*, § 1028. 19 Pick. 349; *Tipton v. Feitner*, 20



uction. Unless the contract expressly so provides no the price is due until the completion of the work.<sup>54</sup>

### When performance on one side requires an indefinite time.

Contract sometimes provides for performance on one to begin immediately, or at a fixed day, and to continue presently or for an indefinite time while the performance on the other side is stipulated to be rendered at a day. Thus a contract to forbear or to refrain from litigation may require an indefinite time for performance the compensation may be promised on a fixed date the performance should have begun but before it can be completed. The promises here are not strictly independent. The promise on the one side to forbear if occurring before the payment is made, will excuse the obligation to pay.<sup>55</sup> And on the other hand long continued delay in making the payment the promise to forbear had been duly kept, will justify refusal to continue to keep it.<sup>56</sup> So in the case of a promise of support for life in consideration of a promissory note payable at a fixed day, the maker of the note "could not be required to make payment unless the maintenance contracted had been furnished, and the defendants [the payees] were required to furnish it except for compensation in the stipulated."<sup>57</sup>

*Wart v. Newbury*, 220 N. Y. N. E. 984.

*Es v. Somerville*, 1 Port. 437; *Textile Commission Co.*, 139 App. D. 109, 123 N. Y. S. 918. The decision of *Judson v. Bowden*, 162, seems opposed to the view which is rightly criticised in *Langbein v. Con.*, § 129.

*Whe v. Dorey*, 221 Mass. 399, N. E. 146. See also *Bennett v. Walter*, 257 Ill. 572, 101 N. E. 733. Similarly *Gail*, 127 N. Y. App. Div. The plaintiff sued for payments under the contract by which she had agreed to transfer certain real estate

which had belonged to her late husband, and the defendant's son had agreed to make monthly payments to her during her life. Some payments had been made, but the plaintiff refusing to transfer the real estate the defendant had ceased paying. The court said (pages 898, 899): "The transfer of plaintiff's interest must be made by her within a reasonable time after the execution of the contract, or certainly within a reasonable time after demand by defendant. . . ."

"The time at which she was to comply with and perform her part of the agreement had, therefore, arrived before defendant's default in his pay-

### § 832. Readiness and willingness.

Where a defendant's obligation is subject to a condition precedent, the plaintiff must allege and prove that he (1) performed the condition precedent, or (2) was excused from performance by prevention, waiver or the prospective unwillingness or inability of the defendant to perform in his turn.<sup>58</sup> This principle which is applicable to express conditions precedent,<sup>59</sup> has also been applied to dependent promises where no condition precedent is expressed, and this is natural since the theory of dependency has been developed under the guise of implied conditions. So that the party whose performance is first in order of time must make the allegation and proof above stated.<sup>60</sup>

Where conditions are concurrent, the allegation of tender need not be of absolute tender. A tender conditional on contemporaneous performance by the defendant is sufficient. It has sometimes been said that in such a case readiness and willingness on the part of the plaintiff is a sufficient allegation; or that even this is not part of the plaintiff's case.<sup>61</sup>

Though in suits for specific performance a different rule prevails in many jurisdictions;<sup>62</sup> to maintain an action at law the plaintiff must not only be ready and willing but he must

ments to her of which she now complains. Her right to insist on further performance by defendant of his part of the agreement was dependent, therefore, on her doing as she had agreed."

<sup>58</sup> A common situation of the second type occurs where the plaintiff has made an unconditional offer of performance which has been refused.

<sup>59</sup> See *supra*, § 674.

<sup>60</sup> *Moha v. Hudson Boxing Club*, 164 Wis. 425, 160 N. W. 266, L. R. A. 1917 B. 1238.

<sup>61</sup> Chalmers, *Sale of Goods Act* (5th ed.), p. 66: "In an action for non-delivery, it seems the buyer need not give evidence that he was ready and willing to pay, till the seller shows he was ready to deliver. *Wilks v. Atkinson*, [1815] 1 Marsh. 412. 'The averment of the plaintiff's readiness

and willingness to perform his part of the contract will be proved by showing that he called on the defendant to accomplish his part.' Notes to *Cutter v. Powell*, 2 Smith Lead. Cas. (9th ed.), p. 18; (11th ed.), p. 15. Conversely, in an action for non-acceptance, the seller need not prove any tender of delivery. It is enough to show that he was ready and willing to deliver. *Jackson v. Allaway*, [1844] 6 M. & G. 942; *Baker v. Firminger*, [1859] 28 L. J. Ex. 130.'" The decisions cited by Judge Chalmers do not warrant the conclusion that readiness and willingness without demand upon or notice to the other party is sufficient. The statement is, however, made in *Long v. Addix*, 184 Ala. 236, 63 So. 962.

<sup>62</sup> See *infra*, §§ 834, 844.

have manifested this before bringing his action, by some offer of performance to the defendant; for otherwise both parties might be ready and willing and each stay at home waiting for the other to come forward.<sup>63</sup> And while the situation is possible of each of two parties having a right to specific performance against the other, it is not possible that each shall have a right to damages for a total breach of the contract.

It is one of the consequences of concurrent conditions that a situation may arise where no right of action ever arises against either party. Since a conditional tender is necessary to put either party in default, so long as both parties remain inactive, neither is liable and neither has acquired a right of action. Moreover, the possibility of putting either party in default will cease if the delay is too long. It may be supposed by the terms of the contract the concurrent performances were to be rendered on a day fixed, or it may be supposed that no time was stated for the performance. Under the first

\* In *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080, the court said: "Where by the terms of the contract the acts of the parties are to be concurrent, it is the duty of him who seeks to maintain an action for a breach of the contract, either by way of damages for the non-performance, or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party."

In *Eastern Oregon Land Co. v. Moody*, 198 Fed. 7, 18, 119 C. C. A. 135, the court said: "In *Englander v. Rogers*, 41 Cal. 420, there was an action for the recovery of a deposit on the purchase price of real estate. The covenants of the vendor and vendee were mutual and dependent, and it was held that neither could put the other in default except by actually tendering a performance on his own part. The court says: 'To entitle the plaintiff to maintain the action on the contract set out in the complaint, he should have averred a tender of the unpaid portion of the purchase money, or some

sufficient excuse for the omission to tender it. The only allegation of the complaint on this point is that the plaintiff has been ready and willing during all the time aforesaid, and has offered to accept and take the conveyance, pursuant to said agreement, and to pay the balance of said purchase money.' It is not an averment that he tendered the purchase money. To constitute a valid tender in such a case, the party must have the money at hand, and immediately under his control, and must then and there not only be ready and willing but produce and offer to pay it to the other party on the performance by him of the requisite condition." See also *Phillips v. Sturm*, 91 Conn. 331, 99 Atl. 689; *Cornett v. Best*, 151 Mo. App. 548, 132 S. W. 35; *Jenderson v. Hansen*, 50 Mont. 216, 146 Pac. 473; *Leuders v. Fahlberg Saccharine Works*, 150 N. Y. S. 635; *Burlington Paper Stock Co. v. Diamond*, 88 Vt. 160, 92 Atl. 19, 21; *Bendon v. Parfit*, 74 Wash. 645, 134 Pac. 185.

supposition if time was of the essence of the contract both parties will be discharged unless one or the other takes the initiative and makes a conditional tender at or about the time stated in the contract. Even though time is not of the essence or if no time is mentioned in the contract for its performance the lapse of an unreasonable time must necessarily deprive the parties of the possibility of thereafter making an effective tender.<sup>64</sup> The requirements for a plaintiff whose right is subject to a concurrent condition are qualified in the same way as the requirements of one whose right is subject to a condition precedent; namely,—“The necessity of a formal tender or demand is obviated by the acts of the party sought to be charged, as by his express refusal in advance to comply with the terms of the contract in that respect, or where it appears that he has placed himself in a position in which performance is impossible.”<sup>65</sup>

### § 833. What amounts to an offer to perform.

It is said that the strict rules of tender<sup>66</sup> are not applicable to a conditional offer to perform a concurrent condition; that what is essential is that it shall appear to the court and shall have been made clear to the other party to the contract that the exchange agreed upon would be carried out immediately if the latter would do his part. This requirement involves both ability on the part of the plaintiff to perform and a clear indication of that ability to the other party. The actual production of the money or other thing which the plaintiff offers to give is said to be unnecessary.<sup>67</sup> This must be rested, how-

<sup>64</sup> See *infra*, § 1970.

<sup>65</sup> *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080. And see *supra*, §§ 677, 767.

<sup>66</sup> See *infra*, §§ 1808 *et seq.*

<sup>67</sup> *Dunham v. Pettee*, 8 N. Y. 508; *Gourd v. Healy*, 206 N. Y. 423, 99 N. E. 1099, 176 N. Y. App. D. 464, 163 N. Y. S. 637; *Thomas Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 100 N. E. 461; *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586; *Catlin v. Jones*, 52 Or. 337, 97 Pac. 546; *James*

*Higgins Co. v. Torvick*, 55 Or. 274, 101 Pac. 22.

In *Raudabaugh v. Hart*, 61 Ohio 73, 88, 55 N. E. 214, the court said: “The case of *Smith v. Lewis*, reported in 24 Conn. 624, and again in 26 Conn. 110, is authority for the proposition that the word ‘tender,’ as used in connection with such a transaction, does not mean the same thing as when used with reference to the offer to pay money where it is absolutely due, but only a readiness and willingness

, on the ground of waiver, for generally the defendant, e is not going to perform, will indicate that fact in some , and thereby excuse a more particular tender.<sup>68</sup> Even t be supposed that a conditional offer of performance ade with ability to produce, but without actual production he money or goods necessary for performance and the ndant declines the offer, without giving a reason for his sal or in terms refusing to perform himself, the same princi- seems applicable. Unless actual production is then de- ded no doubt such an offer suffices, but, it does not seem imaginative to say that the failure of the defendant to e the ground of his objection was such deceptive conduct o induce the plaintiff to believe that the objection was ed on some other ground than the technical defect of the der.<sup>69</sup> On the other hand, if at the time for performing ual promises to buy and sell stock, the parties met, and seller having a certificate in proper form in his pocket : "I am ready and able to perform immediately and r to do so," to which the buyer, having the money in his ket, replied, "I am likewise ready and able and also offer perform," it is clear that neither party has as yet acquired ght of action against the other by putting him in default ill not be able to do so without production of the certif- e or the money and the actual tender of it. And it seems in any case, if it is insisted upon, a strict tender may equired.

#### 4. Tender is not necessary in equity unless time is of the essence.

time is of the essence, or where the contract, enforcement hich is sought, is an option, it is necessary for one who nes to maintain a suit for specific performance, to perform tender performance within the time fixed in the contract. e rule in equity is the same as the rule at law,<sup>70</sup> except that

orm in case of the concurrent rmance by the other party, with out ability to do so, and notice to other party of such readiness." quotation from *Smith v. Lewis* is

also made in *Clark v. Weis*, 87 Ill. 438, 441, 29 Am. Rep. 60.

<sup>68</sup> See *supra*, § 744.

<sup>69</sup> See further, *supra*, §§ 744, 767.

<sup>70</sup> *Kelsey v. Crowther*, 162 U. S. 404,

perhaps a conscientious and diligent effort which was unsuccessful without fault of the complainant, though the lack of success was not due to any conduct of the defendant which could be called prevention, may suffice in equity.<sup>71</sup> Where, however, time is not essential, the situation in equity is different from that at law, as a court at law can give only an unconditional judgment, but a court of equity can make its decree conditional on some performance by the plaintiff. Therefore it is sufficient if a plaintiff in equity alleges in his bill readiness and willingness to perform, though the lack of tender may affect the matter of costs. The decree will protect the defendant's substantial rights by making any order for his performance conditional on concurrent action by the plaintiff;<sup>72</sup> and as this protection is possible at any time until

16 S. Ct. 808, 40 L. Ed. 1017; *Martin v. Morgan*, 89 Cal. 203, 25 Pac. 350, 22 Am. St. 240; *Levy v. Lyon*, 153 Cal. 213, 94 Pac. 881; *Phelps v. Illinois Cent. R. Co.*, 63 Ill. 468; *Durant v. Comegys*, 3 Idaho, 204, 28 Pac. 425; *Kimball v. Tooke*, 70 Ill. 553; *Billick v. Davenport*, 164 Iowa, 105, 145 N. W. 470; *Jones v. Noble*, 3 Bush, 694; *Harvey v. Bross*, 216 Mass. 57, 104 N. E. 350; *Heuer v. Rutkowski*, 18 Mo. 216; *Wells v. Smith*, 2 Edw. Ch. 78; *Duffy v. O'Donovan*, 46 N. Y. 223; *Blanchard v. Archer*, 93 N. Y. App. D. 459, 87 N. Y. S. 665; *Clarno v. Grayson*, 30 Oreg. 111, 46 Pac. 426; *In re Kutz's Est.*, 259 Pa. 548, 103 Atl. 293; *Spokane &c. R. Co. v. Balinger*, 50 Wash. 547, 97 Pac. 739. See also *Rude v. Levy*, 43 Col. 482, 96 Pac. 560, 24 L. R. A. (N. S.) 91, 127 Am. St. 123. Cf. *Horgan v. Russell*, 24 N. Dak. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150.

<sup>71</sup> *Emerson v. Fleming*, 246 Ill. 353, 92 N. E. 890.

<sup>72</sup> *Jenkins v. Harrison*, 66 Ala. 345; *Ashurst v. Peck*, 101 Ala. 499, 502, 14 So. 541 (cf. *Smith v. Sherman*, 174 Ala. 531); *Atkinson v. Hudson*, 44 Ark. 192; *Jones v. Petaluma*, 36 Cal.

230, 233; *Koyer v. Williams*, 150 Cal. 785, 788, 90 Pac. 135; *Fall v. Hazelrigg*, 45 Ind. 576, 579, 15 Am. Rep. 27; *Jordan v. Johnson*, 50 Ind. App. 273, 98 N. E. 143 (cf. *Sowle v. Holdridge*, 63 Ind. 213); *Winton v. Sherman*, Iowa, 295; *Nelson v. Wilson*, 75 Ia. 713, 38 N. W. 134; *Harris v. Greenleaf*, 117 Ky. 817, 79 S. W. 287; *Maughan v. Perry*, 35 Md. 352; *Snook v. Mundas*, 96 Md. 514, 517, 54 Atl. 77; *Irving Gregory*, 13 Gray, 215; *Cole v. Killam*, 187 Mass. 213, 72 N. E. 947; *Morrissey v. Hoyt*, 11 Mich. 9, 18; *Powell v. Dwyer*, 149 Mich. 141, 112 N. W. 499, 11 L. R. A. (N. S.) 978; *St. Paul Division of Temperance v. Brown*, 9 Minn. 13; *Stevenson v. Maxwell*, 2 N. Y. 40, 415; *Thomson v. Smith*, 63 N. Y. 30; *Schieck v. Donohue*, 92 N. Y. App. Div. 330, 334, 87 N. Y. S. 206, and cases cited; *Hawk v. Greensweig*, Pa. St. 295; *Chees's Appeal*, 4 Pa. 52, 45 Am. Dec. 668; *Brace v. Dobson*, 3 S. Dak. 110, 416, 52 N. W. 586, 589; *Seeley v. Howard*, 13 W. Va. 336. See also *Mason v. Atkins*, Ark. 491, 84 S. W. 630; *Brook v. Hildreth*, 13 Ohio St. 306, 310; *Brixen v. Jorgensen*, 33 Utah, 97, 92 Pac. 1004.

decree is made, the fact that a vendor was unable until suit brought to convey a good title does not conclusively establish that specific performance should be denied him.<sup>73</sup>

American decisions, however, adopt in equity the same standards at law, and require a tender preliminary to suit.<sup>74</sup> But in such jurisdictions less strictness would doubtless be required than might be appropriate in an action at law.<sup>75</sup>

### When concurrent conditions are implied.

Where concurrent conditions protect both parties, courts favor, so far as is not inconsistent with the expressed intention of the parties, to construe performances of mutual promises as concurrent conditions.<sup>76</sup> Therefore, not only, when no time is mentioned for either performance<sup>77</sup> but also, when each party promises to perform his side of a bilateral contract "on or before" a stated day, though the contract does not state that each shall perform on the same day, con-

*Under v. McGuin*, 261 Ill. 588, 104 S. E. 2d 588; *Maryland Construction Co. v. Cooper*, 90 Md. 529, 45 Atl. 197. See *infra*, § 879.

*Thompson v. Thompson*, 34 Ala. 633; *McClellan v. Thompson*, 41 Ala. 251; *Thompson v. Thompson*, 141 Ga. 31, 80 S. E. 2d 18; *Bearden v. Wood*, 1 A. K. 450; *Klyce v. Broyles*, 37 Miss. 450; *Deichmann v. Deichmann*, 49 N. J. 109. See also *Burkhalter v. Burkhalter*, 142 Ga. 344, 82 S. E. 1059; *Deters v. Deters*, 206 Ill. 159, 69 N. E. 7, 90 Am. St. Rep. 145; *Sowle v. Sowle*, 63 Ind. 213; *Tevis v. Tevis*, 159 Mo. 19, 167 S. W. 1003, 1917 A. 865; *Hall v. Whittier*, 153 N. E. 530; *Cummings v. Nielson*, 42 N. D. 57, 129 Pac. 619.

*Hines v. Roller*, 239 Fed. 486, 22 C. C. A. 364, it was said, from *Willard v. Tayloe*, 8 Pet. 57, 19 L. Ed. 501: "A party who forfeit his rights to the intervention of a court of equity to enforce the performance of a contract, reasonably and in good faith to comply, and continues ready

to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation.' *Tavener v. Barrett*, 21 W. Va. 656; *Vaught v. Cain*, 31 W. Va. 424, 7 S. E. 2d 9; *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195. The principle is clearly stated and illustrated by Judge Brannon in *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 2d 249, and by Vice Chancellor, later Justice, Pitney, in *Worch v. Woodruff*, 61 N. J. Eq. 78, 47 Atl. 725."

<sup>74</sup> *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Glenn v. Rossler*, 156 N. Y. 161, 50 N. E. 785; *Makepeace v. Dilltown Smokeless Coal Co.*, 179 N. Y. App. D. 60, 166 N. Y. S. 92. In *Dunn v. Oneida Community*, 177 Fed. 540, 546, the court said: "In the absence of anything to show a contrary intent on the part of the parties, a contract for the exchange of property must be performed on both sides concurrently." *Brennan v. Ford*, 46 Cal. 7; *Pead v. Trull*, 173 Mass. 450, 53 N. E. 901," and see *supra*, § 40.

<sup>77</sup> See *supra*, § 40, *infra*, § 955.

current conditions are implied, if the performances in the nature are capable of being performed concurrently.<sup>78</sup> This principle is modified in the exceptional cases where contemporaneous performances in a bilateral obligation were regarded by the parties as equivalent one to the other,<sup>79</sup> where, therefore, the principle of failure of consideration is inapplicable. The holder of a negotiable instrument may surrender the instrument contemporaneously with payment, but he can bring suit without presentment, that is, without offering to perform on his part by surrendering or even producing the instrument.<sup>81</sup> So a creditor holding collateral is though bound to surrender the collateral at the time when he receives payment of the debt, and though a refusal to surrender the collateral justifies a refusal to pay the debt, he may sue on the debt without first tendering the collateral, so the loss or destruction of a negotiable instrument does not preclude recovery, and loss or destruction of collateral would be no defence unless the creditor was in fault, and

<sup>78</sup> *Goodisson v. Nunn*, 4 T. R. 761; *Phillips v. Sturm*, 91 Conn. 331, 99 Atl. 689; *Stierle v. Rayner*, 92 Conn. 180, 102 Atl. 581.

<sup>79</sup> In *Roberts v. Brett*, 11 H. of L. Cas. 337, 351, each party covenanted to give a bond forthwith as security for his performance. Lord Westbury said: "It was also contended by the Appellant, that the covenants to give the bonds by the Appellant and Respondent respectively were mutual covenants dependent one on the other; and there was no default by the Appellant until that instant of time at which there was alike default by the Respondent, and that the Respondent being in like default, could not defend himself by pleading the default of the Appellant."

"But I fear that this is not the true meaning and effect of the contract. The engagements to give the bonds are not entered into in consideration one of the other; but the fulfilment of his own engagement by each of the parties is a necessary preliminary to his right

to recover on the agreement." See *Crompton v. McLaughlin Realty*, 51 Wash. 525, 529, 99 Pac. 588; L. R. A. (N. S.) 823, and *infra*, § 81.

<sup>80</sup> Uniform Neg. Inst. Law, Sec. 1166, *infra*, § 1166.

<sup>81</sup> Uniform Neg. Inst. Law, Sec. 1166, *infra*, § 1166; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474, 476.

<sup>82</sup> *Schlessinger v. Wise*, 106 N. Y. App. Div. 587, 94 N. Y. S. 718.

<sup>83</sup> *Lawton v. Newland*, 2 Stark. 161; *Scott v. Parker*, 1 Q. B. 809; *Son Valley Bank v. Hill*, 59 Calif. 107, 51 Wash. 525, 529, 99 Pac. 588; *Foster v. Purdy*, 5 Met. 442; *Do v. Wyckoff*, 49 N. J. L. 48, 7 Atl. 272, 82 N. Y. S. 573; *Security & Trust Co. v. Stewart*, 154 N. Y. App. D. 434, 437, 139 N. Y. S. 573; *Gordon v. Benguiat*, 95 N. Y. Misc. 159 N. Y. S. 1; *First Nat. Bank v. Gidden*, 175 N. Y. App. Cl. 563, 139 N. Y. S. 317; *Bank of Rutland v. Woodruff*, 34 Vt. 89. See also *W. v. Kohn*, 225 Fed. 718, 721, 140 C. 592.



event or in case of conversion only a defence *pro tanto*.<sup>84</sup> is because the creditor's claim does not have for its condition the performance of the act on his part which is contemporaneous with payment, but is based on the consideration of a prior loan or credit given by the creditor.<sup>85</sup> There are other prerequisites for the implication of concurrent conditions. If the contract expressly or by implication requires the performance on one side to be at a different place than the performance on the other side, there can obviously be no concurrent conditions. So, if by the terms of the contract the performances are to take place at different times there are no concurrent conditions originally, though such conditions may afterwards arise.<sup>86</sup> Therefore if either performance is incapable of performance at a single instant of time,<sup>87</sup> mutual promises cannot be concurrently conditional. But where the time for performance on one side is fixed and the contract does not state when performance on the other side is to take place, it will be inferred unless the nature of the contract or the surrounding circumstances make a contrary inference imperative that that performance was to be rendered at the same time, and concurrent conditions will be implied.<sup>88</sup>

*Woughborough v. McNevin*, 74 Cal. 50, 14 Pac. 369, 15 Pac. 773, 5 Mont. Rep. 435; *Harrell v. Citizens' Savings Co.*, 111 Ga. 848, 36 S. E. 131; *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Griswold v. Higonson*, 4 Hill, 522; *Cass v. Higgenbotham*, 100 N. Y. 248, 3 N. E. 189; *Smith v. Bamberger*, 10 Utah, 3, 36 P. 202, 205.

This case should be distinguished from the case where the creditor is an assignee of a debt and holds as security the title to the goods or a document representing them. Here the buyer is under no obligation to pay unless he gets title. The title was lost sight of in *First Nat. Bank v. Gidden*, 175 N. Y. App. D. 82 N. Y. S. 317. See 30 Harv. L. Rev. 514.

For the same reason where one who has contracted to sell an automobile has delivered it to the buyer for temporary

use as an inferior body, it was held not a condition of the buyer's right to sue for failure to deliver the agreed body that he should tender to the seller the inferior body. *Watkin v. Interborough Transfer Co.*, (N. Y. Supr. Ct.) 174 N. Y. S. 152.

<sup>84</sup> See *infra*, §§ 886, 887.

<sup>85</sup> Even where both parties agree to work simultaneously, it is impossible to make strict concurrent conditions. One cannot make a conditional tender of a week's work either at the beginning or at the end of the week.

<sup>86</sup> *Morton v. Lamb*, 7 T. R. 125; *Withers v. Reynolds*, 2 B. & Ad. 882; *Long v. Addix*, 184 Ala. 236, 63 So. 982; *Brennan v. Ford*, 46 Cal. 7, 16; *Baker v. McDonald*, 74 Neb. 595, 104 N. W. 923, 1 L. R. A. (N. S.) 474; *Rushton v. Campbell*, 94 Neb. 141, 142 N. W. 902; *Skillman Hardware Co. v. Davis*, 53 N. J. L. 144, 20 Atl. 1080; *Traver*

So if no time is fixed for the performance of either party the performances are concurrently conditional if their nature admits of concurrent performance.<sup>80</sup> The principle is applicable to the several parts of a divisible contract, so that unless otherwise provided, or the nature of the case makes it impossible, there will be concurrent conditions in each part. It has been held by the Supreme Court of the United States that where one performance was stated in the contract to be due "after" performance of the covenants on the other side that there were no concurrent conditions, but a condition precedent which must be performed, or an absolute and unconditional tender made, before a right of action would arise. Though this is in accordance with the literal meaning of the language of the contract, it may be questioned whether even here the court might not have implied concurrent conditions since the liability on one side would arise in an infinitesimal moment of time after the performance on the other side.

*v. Halsted*, 23 Wend. 66; *Dunham v. Pettee*, 8 N. Y. 508; *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080; *McCammon v. Kaiser*, 218 N. Y. 46, 112 N. E. 572; *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515, 52 Or. 337, 97 Pac. 546; *Pickett v. Cloud*, 1 Bail. 362; *Burlington Paper Stock Co. v. Diamond*, 88 Vt. 160, 92 Atl. 19. See also *Rawson v. Johnson*, 1 East, 203; Eng. Sales of Goods Act, Sec 28; Uniform Sales Act, Sec. 42.

<sup>80</sup> *Bloxam v. Sanders*, 4 B. & C. 941; *Lehman v. Warren*, 53 Ala. 535, 540; *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575; *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712; *Haskins v. Warren*, 115 Mass. 514, 533; *H. C. Miner Lithographing Co. v. Mittenthal Co.*, 119 N. Y. S. 1066; *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53.

<sup>81</sup> *Richardson Press v. Vandergrift*, 165 N. Y. App. Div. 180, 150 N. Y. S. 238.

<sup>82</sup> *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. Ed. 822, 14 Sup. Ct. 928. See also *Eastern Oregon*

*Land Co. v. Moody*, 198 Fed. 7, 1 C. C. A. 135.

<sup>83</sup> In *Beecher v. Conradt*, 13 N. 108, the plaintiff promised to make conveyance "upon the express condition that" the defendant "shall do well and faithfully perform the covenants" by him made. It was held that the performance by the plaintiff was due concurrently with the first performance of the defendant, and that the plaintiff could not insist upon full precedent performance by the defendant of all his covenants before the plaintiff himself became liable.

In *Michigan Home Colony Co. v. Tabor*, 141 Fed. 332, 72 C. C. A. 48, where a written contract for the sale of land recited the payment of a sum down by the purchaser and required him to pay the remainder of the purchase money on a specified date, and further provided that on such payment being made the vendor should "demand thereafter" cause to be executed to the purchaser "a good and sufficient deed in fee simple of the premises above described, free and

has been said that it is essential for the implication of current conditions that the exchange contemplated shall be between the parties to the contract, on the ground that simultaneous performance cannot in legal contemplation be made at an instant of time.<sup>93</sup> Such a rule, however, seems somewhat artificial. If the performances are to be rendered at the same place, there is no practical difficulty in simultaneous performance by A to B, and by B to C.<sup>94</sup> Nothing is more

of all legal liens and incumbrances," the covenants for payment of purchase money and for the conveyance of the deed conveying a good estate were held concurrently dependent, and the conditional tender of performance by the vendor in accordance with the contract was a condition precedent to the right to maintain an action to recover the purchase money from the purchaser.

*Henn v. Rossler*, 156 N. Y. 161, 100 N. E. 785, the court said: "The contention of the appellant is, that the provisions of the contract relating to the payment of that portion of the consideration constituted independent covenants which the plaintiffs were required to fully perform by the time the entire amount before he was entitled to a deed, and it was within a reasonable time after the payments were made that the plaintiffs were required to give him a deed of the property. As sustained that contention the plaintiff relies chiefly upon the language of the contract. It is to be observed that it, however, provides that after the payments mentioned are fully made, the plaintiffs shall execute and deliver a deed of the premises, and at the time deliver a tax and title deed, and that 'at the time' the plaintiffs should execute and deliver a deed to the defendants. The plaintiff claims that this language should be construed as not requiring delivery of the deed until a reasonable time after the payments were

made, and as sustaining that claim, he cites the cases of *Morris v. Sliter* (1 Denio, 59); *Meriden Britannia Co. v. Zingsen* (48 N. Y. 247); *Kirtz v. Peck* (113 N. Y. 222), and *Loud v. Pomona Land, etc., Co.* (153 U. S. 564). The language in the contract under consideration in *Morris v. Sliter*, was very similar to that contained in this agreement, and it was there held that the plaintiff was not required to convey at the time of receiving the last payment, but must do so within a reasonable time after it was made. That case has been several times cited in the authorities to which the appellant refers, and in those particular cases a similar doctrine has been held. These authorities seem to some extent, at least, to sustain the contention of the appellant. But, upon an examination of the cases, it will be observed that in each case the decision was based upon the ground that it was the intention of the parties that the payment should precede the giving of the deed. The intention of the parties when properly ascertained, must doubtless control in this case as in others involving the construction of written contracts. Moreover, in many of the subsequent cases a principle adverse to that contended for by the appellant has been applied."

<sup>93</sup> Langdell, Summary of Contracts, § 133, citing *Jones v. Barkley*, 2 Doug. 684, and *Northrup v. Northrup*, 6 Cow. 296.

<sup>94</sup> In *Burton v. Nacogdoches Lumber Co.* (Tex. Civ. App.), 161 S. W. 25,

common in transfers of real estate than simultaneous action not only by a buyer and seller, but by a mortgagee. Where no practical difficulty exists in giving parties the protection of concurrent conditions, the law should not create artificial trouble. Where in bilateral contracts the promise on one side is subject to an express condition that performance shall be made of a counter promise which itself is not in turn conditional, the performance of the two promises will, nevertheless, be concurrently conditional if the nature of the case permits it and the words of the express condition do not necessarily require that one performance shall precede rather than be concurrent with the counter-performance.<sup>95</sup>

**§ 836. Effect of the place of performance on concurrent conditions.**

The place where performance is due under the contract necessarily affects the duties and rights of the parties. The place of performance may be fixed by the express terms of the contract, or the law, in the absence of such express provision, may impose an obligation of performance in a particular place. If neither of these circumstances exist, a party seeking to put the other in default must seek out that party and make appropriate tender.<sup>96</sup> But where a place of performance is agreed upon expressly or by implication, performance or tender must take place there, and if either party is not there to receive performance at the proper time, he prevents performance. In such a case, therefore, a right of action is acquired by being ready and willing at the proper place if the other party is not present.<sup>97</sup> Thus in contracts for the

there were held to be concurrent conditions in a sale of personal property, though delivery was to be made not to the buyer but to a third person on the buyer's order.

<sup>95</sup> *Giles v. Giles*, 9 Q. B. 164; *Paynter v. James*, L. R. 2 C. P. 348; *Kane v. Hood*, 13 Pick. 281.

<sup>96</sup> See cases cited *supra*, § 832.

<sup>97</sup> *Sleeper v. Nicholson*, 201 Mass. 110, 112, 87 N. E. 473.

See also *Rhode Island Malleable*

*Iron Works v. O. K. Nut Lock Co.* (R. I. 1918), 103 Atl. 1036. It is not, however, incumbent on the holder of a negotiable instrument payable at a particular place, to present it at that place in order to acquire a right of action against the party primarily liable on the instrument. *Neg. Inst. Law*, Sec. 70, *infra* § 1116; *Gordon v. Benguiat*, 95 N. Y. Misc. 132, 159 N. Y. S. 1.

of personal property apart from any special agreement, the general rule is that the place of delivery is the seller's place of business if he has one, and, if not, his residence.<sup>98</sup> This rule is subject to the qualification that under a contract to sell specific goods which to the knowledge of the parties when the contract was made, were in some place other than the seller's place of business or residence, that other place is the place where delivery is due.<sup>99</sup>

Where a contract requires delivery at a town where the seller does business, delivery in the general receiving yards of that town with notice to the buyer, fulfils the seller's obligation.<sup>1</sup> Sometimes the nature of a contract is such that apart from any agreement to that effect it is requisite that performance shall be at a particular place.<sup>2</sup> Where the place

Uniform Sales Act, Sec. 43, *infra*, § 3, cited and applied in *Dordoni v. Jones*, 83 N. J. L. 355, 85 Atl. 353; *Walters v. Fahlberg Works*, 150 N. Y. 335, 90 N. Y. Misc. 590; *Schiff v. Winter Motor Car Co.*, 153 N. Y. S. 964. Such also is the rule of the common law. *Sousely v. Burns' Admr.*, 10 Bush, 87; *Bliss Co. v. United States Light Co.*, 149 N. Y. 300, 43 N. E. 101; *Halvordson v. Grossman* (N. Y. Sup. Ct.), 107 N. Y. S. 627. And the rule laid down by Pothier, *Contrat de Vente*, No. 52 (see also French Civil Code, Art. 1609), is the general rule in regard to delivery. The English Sale of Goods Act, in making the place of business or residence of the seller the place of delivery unless the goods are shown to be elsewhere, also agrees with the rule of the German Commercial Code, § 342.

Uniform Sales Act, § 43; *Hatch v. Lumber Co.*, 100 U. S. 124, 25 L. Ed. 554; *Land v. Wood*, 71 Ala. 145, 46 So. Rep. 305; *Phoenix Lock Works v. Wilmouth Hardware Co.*, 9 Houst. 232, 10 Atl. 79; *Baxley Tie Co. v. Simpson*, 1 App. 670, 57 S. E. 1090; *Wilmouth v. Patton*, 2 Bibb, 280; *Sousely v. Burns' Admr.*, 10 Bush, 87; *Smith*

*v. Gillett*, 50 Ill. 290; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Janney v. Sleeper*, 30 Minn. 473, 16 N. W. 365; *Dakota Stock Co. v. Price*, 22 Neb. 96, 34 N. W. 97; *Lobdell v. Hopkins*, 5 Cow. 516; *Rice v. Churchill*, 2 Denio, 145; *Gray v. Walton*, 107 N. Y. 254, 14 N. E. 191; *Lodwick Lumber Co. v. E. A. Butt Lumber Co.*, 35 Okl. 797, 131 Pac. 917; *Mann v. Flynn*, 62 Or. 465, 125 Pac. 274; *Nelson v. Imperial Trading Co.* (Wash.), 125 Pac. 777; *Hamilton v. Calhoun*, 2 Watts, 139; *Perlman v. Sartorius*, 162 Pa. St. 320, 29 Atl. 852, 42 Am. St. Rep. 834. See also *Moyle*, *Sale in the Civil Law*, 100.

<sup>1</sup> *Petroleum Products Co. v. Alton Tank Line*, 165 Ia. 398, 146 N. W. 52, citing *Choctaw R. Co. v. Colorado Fuel Co.*, 93 Fed. 742, 35 C. C. A. 568; *Missouri, etc., Coal Co. v. Pomeroy*, 80 Ill. App. 144; *Houdlette v. Dewey*, 200 Mass. 419, 86 N. E. 790.

<sup>2</sup> In *Shales v. Seignoret*, 1 Ld. Ray. 440, the contract in suit was for the sale of stock in the bank of England. The seller bringing suit averred that such stock was only transferable in the office of the bank in the presence of both parties, that he was present

of performance is fixed, but the contract does not exactly fix the time for performance, a party who seeks to put the other in default must give notice of his intention to tender at a certain time performance at the place fixed by law.<sup>3</sup> This necessarily follows from the principles governing notice as a condition implied in fact.<sup>4</sup>

### § 837. Concurrent conditions are not necessarily mutual.

Concurrent conditions may exist in unilateral contracts as well as in bilateral; that is, a promisor may be bound to perform only on condition of receiving simultaneous performance and may by the terms or offer be so bound on receiving a conditional offer of performance.<sup>5</sup> Conditions in unilateral contracts are necessarily classed as express conditions;<sup>6</sup> but a condition which is expressed often may be, so far as the language of the contract is concerned, either an ordinary condition precedent, or a concurrent condition. Thus if A covenants to sell Blackacre if B pays \$5,000 for it, so far as the words of the contract indicate, A might be entitled to demand the actual payment, or the unqualified and absolute tender of \$5,000, before he became liable to perform on his part. The words of the contract are equally satisfied, however, by construing A's liability as arising on a tender by B, conditioned on concurrent performance by A; and this construction will be given to such a contract. The obligations of the parties are not mutual, however, since B is under no obligation to buy the property. Even in bilateral contracts, it seems that the obligation of one party may be subject to a concurrent condition, while no such qualification exists to the obligation of the other party. This situation will arise where the contract has been substantially performed on one side before performance on the other side becomes due. The facts of an earl

at the time of performance to transfer the stock, but that the defendant failed to come. The plaintiff failed because it did not appear to the court that the bank stock might have not been transferred elsewhere. It seems clear, however, that if the facts were as stated in the declaration, the allega-

tions were those proper and necessary.

<sup>3</sup> See *infra*, § 894.

<sup>4</sup> *Ibid.*

<sup>5</sup> The earliest case of concurrent conditions was of this sort. *Turner v. Goodwin, Fortescue*, 145.

<sup>6</sup> See *supra*, § 812.

to suggest the problem. A contract was entered into by which the plaintiff agreed to sell a school with its good will, and to convey at a later day the school premises, and the defendant agreed to pay at such later day £120. The court held that the plaintiff could not recover payment without tender of the deed,<sup>7</sup> holding that part execution of the contract was only a circumstance from which the intention of the parties might be collected. This case is criticised by Professor Langdell,<sup>8</sup> because the "main subject of the transaction was the school and the house was only an incident." Assuming this to be true, it seems that the criticism is well founded. It would not follow, however, as Professor Langdell urges, that if the covenants were not mutually dependent they were mutually independent. For certainly the purchaser could not be permitted to recover on the promise to give him a conveyance unless he made tender of the price. The fact that the seller had largely performed before payment was made, would surely be no reason why the buyer should be allowed to recover the remaining performance without any performance on his own part. Substantial performance by the plaintiff may excuse him from performing the remainder of his obligation concurrently, but the plaintiff's performance cannot excuse the defendant from performing or making conditional tender of performance as a condition of the plaintiff's promise.

The same question is frequently involved in contracts for the sale of land, where the purchaser is given possession, and is required to make payments of the price in instalments, the vendor contracting to convey on payment of the last instalment. The vendor is here protected by an express condition, that the purchaser's promise is in terms unqualified. Because of the Serjeant Williams' rule based on *Pordage v. Cole*,<sup>9</sup> to the effect that where part of the price is payable at a time prior to the performance on the other side, the obligation to pay the price is absolute, a few decisions have held that the promise of the buyer to pay the price is absolute, and that in the last instalment may be recovered without tender of

*Glazebrook v. Woodrow*, 8 T. R.

<sup>8</sup> Summary of Contracts, § 136.

<sup>9</sup> 1 Williams' Saund. 319l.

the deed.<sup>10</sup> The great weight of authority, however, is to the contrary.<sup>11</sup>

It may be urged that the principle of equivalence which forms the basis of conditions implied in law is violated by such decisions since the last instalment of the price is not the equivalent in value of the conveyance. But the necessary equivalence is between the total performance on the one side and on the other. The fact that the seller gets a large part of the price before he gives any equivalent for it is no reason why he should get it all without making the agreed return.

### § 838. Failure to perform on the part of the plaintiff owing to excusable impossibility.

As the basis of the defendant's excuse where the plaintiff has failed to perform, or is obviously going to fail to perform, is based on failure of consideration, the reason why the plaintiff fails to perform is immaterial. Even though his failure is owing to excusable impossibility, the result is the same. The defendant has not got what he bargained for and need not perform.<sup>12</sup> Thus in a contract of employment, the illness of the employee for a material time excuses the employer from

<sup>10</sup> *Weaver v. Childress*, 3 Stew. (Ala.) 361; *Hays v. Hall*, 4 Port. 374, 387, 30 Am. Dec. 530; *White v. Beard*, 5 Port. 94, 100, 30 Am. Dec. 552; *Miller v. Wild Cat Road Co.*, 52 Ind. 51; *Clopton v. Bolton*, 23 Miss. 78; *McMath v. Johnson*, 41 Miss. 439; *Morris v. Sliter*, 1 Denio, 59; *Gale v. Best*, 20 Wis. 44; *Shenners v. Pritchard*, 104 Wis. 287, 80 N. W. 458. See also *Loud v. Pomona Land Co.*, 153 U. S. 564, 38 L. Ed. 822, 14 Sup. Ct. 928; *Gibson v. Newman*, 2 Miss. 341.

<sup>11</sup> *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Hill v. Grigsby*, 35 Cal. 656; *Sanford v. Cloud*, 17 Fla. 532; *Duncan v. Charles*, 5 Ill. 561; *Runkle v. Johnson*, 30 Ill. 328, 332, 83 Am. Dec. 191; *Headley v. Shaw*, 39 Ill. 354; *McCulloch v. Dawson*, 1 Ind. 413; *Summers v. Sleeth*, 45 Ind. 598; *Clark v. Continental Improvement*

*Co.*, 57 Ind. 135; *Berryhill v. Byington*, 10 Iowa, 223; *Courtright v. Deeds*, 3 Iowa, 503; *Zebley v. Sears*, 38 Iowa, 507; *Kane v. Hood*, 13 Pick. 28; *Wadlington v. Hill*, 18 Miss. 56; *Eckford v. Halbert*, 30 Miss. 27; *Robinson v. Harbour*, 42 Miss. 79; 97 Am. Dec. 501, 2 Am. Rep. 67; *Ackley v. Elwell*, 5 Halsted, 304; *Elbert v. Chew*, 2 Green (N. J. L.), 44; *Shinn v. Roberts*, 1 Spencer, 435, 4 Am. Dec. 636; *Johnson v. Wygant*, 1 Wend. 48; *Glenn v. Rossler*, 156 N. Y. 161, 50 N. E. 785; *Powell v. Dayton etc., R. Co.*, 14 Oreg. 22, 356, 12 Pac. 83, 665. See also *Giles v. Giles*, 9 Q. B. 164.

<sup>12</sup> This result would also be reached if the performance of the plaintiff regarded strictly as a condition, *infra* § 808.



ing out his agreement.<sup>13</sup> And where illness is so long continued that the employer would not be bound to continue the relation, the employee, it seems, may end it unless the employer elects to continue the contract and pay the agreed compensation without deduction.<sup>14</sup> So prevention by law of the employee's performance of the agreed services for a material though without his fault, justifies his discharge.<sup>15</sup> On the other hand, temporary illness of an employer which does not go to the root of the contract will not prevent him from enforcing it.<sup>16</sup> Impossibility of completing a construction contract substantially will not justify recovery on the con-

*aylor v. Caldwell*, 3 B. & S. 826; *Union Marine Ins. Co., L. R. P.* 125; *Poussard v. Spiers*, 1 D. 410; *Storey v. Fulham Steel*, 24 T. L. R. 89; *Greene v. Remy*, 7 Port. 133; *Remy v. Olds*, 34 Pac. 216, 21 L. R. A. 645; *Rayl*, 55 Ind. 551; *Camors*, 104 La. 349, 926, 81 Am. St. Rep. 128; *John-Walker*, 155 Mass. 253, 29 N. E. 406; *Newell*, 59 Minn. 335; *McGarrigle v. McCosker*, 184, 82 N. Y. S. 637, 71 N. E. 32; *Gaskill*, 32 Okla. 649, 38 L. R. A. (N. S.) 645; *Belden*, 27 Vt. 395; *Gilbert*, 21 Wis. 395; *Van Allen Co.*, 19 Ont. L. R. 158. See also *Ward*, 170 N. Y. S. 36. But *Mattson*, 15 Wash. 328, 341. In *Donlan v. Boston*, 223 N. E. 718, a school teacher died during the summer vacation. The teaching for the year had been completed, but the salary was payable according to the terms of the contract monthly during the year. It was held that the executor could not recover the payments falling due during the vacation "further payments conditional upon the continu-

ance of the contract, and not upon whether she was excused from the rendition of services during the succeeding month." The decision seems wrong. There was no express condition, qualifying the city's promise, and as the teacher had substantially fulfilled her contract, there was no failure of consideration. There can be no doubt that ten months' teaching was the essential if not the sole exchange for twelve monthly payments. The decision in effect allows the city to receive services without full payment for them. In maritime law a seaman may recover wages for the whole voyage, though incapacitated for a material part of it. *Chandler v. Grieves*, 2 H. Bl. 606n; *Walton v. Neptune*, 1 Pet. Adm. 152; *Ex parte Giddings*, 2 Gall. 56.

<sup>13</sup> See *infra*, § 1947.

<sup>14</sup> *Melville v. DeWolf*, 4 E. & B. 844; *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93. See further, *infra*, §§ 1957, 1958.

<sup>15</sup> *Cuckson v. Stones*, 1 E. & E. 248; *Bettini v. Gye*, 1 Q. B. D. 183; *Warren v. Whittingham*, 18 T. R. 508; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Gaynor v. Jonas*, 104 N. Y. App. D. 35, 93 N. Y. S. 287; *Spindel v. Cooper*, 46 N. Y. Misc. 569, 92 N. Y. S. 822. So under Scots law, *Bell's Principles*, § 179.

tract,<sup>17</sup> unless the chance of impossibility was foreseen and the risk of it expressly or impliedly assumed by the employer. Nor will the fact that a vessel is abandoned for good reason prevent the owner of the cargo from treating the contract of affreightment at an end.<sup>18</sup>

<sup>17</sup> *Littell v. Webster County*, 152 Iowa, 206, 131 N. W. 691, 694. "The action being on contract, and not for *quantum meruit*, plaintiffs, in order to recover, must show a substantial compliance with the terms thereof. They are bound by the terms of the agreement, and cannot escape because of impossibility to substantially comply with the provisions thereof. *Monaghan v. Vanatta*, 144 Iowa, 119, 122 N. W. 610; *Wernli v. Collins*, 87 Iowa, 548, 54 N. W. 365; *Hunt v. Tuttle*, 125 Iowa, 676, 101 N. W. 509; *Duncan v. Gray*, 108 Iowa, 599, 79 N. W. 362; *McCain v. City of Des Moines*, 128 Iowa, 331, 103 N. W. 979.

<sup>18</sup> *Soley v. Jones*, 208 Mass. 561, 95 N. E. 94, was an action for a balance alleged to be due under a contract in writing, whereby the plaintiff agreed to do for the defendant certain work on the Washington Street tunnel in Boston, which the defendant was engaged in constructing under a contract made by him with the city of Boston. The contract of the defendant with the city contained a clause giving transit commissioners the right to terminate it if the engineer should certify to them in writing that the contractor was not making such progress in the execution of the work as to indicate its completion within the required time. After part of the work under the plaintiff's contract had been done and paid for the defendant's contract with the city was terminated by the transit commissioners under that clause. The plaintiff's contract contained a provision that all the work should be done according to orders and directions and to the satisfaction of the transit com-

missioners or their authorized agents and the plaintiff at the time of making his contract with the defendant had a copy of the defendant's contract with the city and was familiar with its provisions, including that relating to the commissioners' right to terminate it. It was held that, the plaintiff and the defendant having made the contract with knowledge of the possibility of such a termination of the defendant's contract with the city, had occurred and having failed to provide for such a contingency reasonably to be anticipated, the defendant was bound by his absolute promise to pay the plaintiff the contract price for work stipulated for in his contract, so that the plaintiff was entitled to recover the unpaid balance of such contract price after deducting from it a reasonable cost of completing the work in accordance with the terms of his contract.

<sup>19</sup> *In H. Newsum & Co. Ltd., Bradley*, [1917] 2 K. B. 112, 115, the court said:

"A number of cases were cited to me, including *The Cito*, 7 P. D. 5, and *The Arno*, 72 L. T. 621. The law laid down in those cases is that abandonment of a vessel by its owner during a voyage, without any intention to retake possession, gives the owner of the cargo on board the right to treat the contract of affreightment as at an end. It may happen that after abandonment of a vessel its owner resumes possession before the cargo owner exercises his right to treat the contract as at an end, and the legal effect of such a resumption has never yet been decided. The point, however,

ilarly where a ship is to proceed under a charter party  
given port and load a cargo, if the ship is delayed even  
cepted perils, the ship owner, though excused from lia-  
cannot require the charterer to furnish a cargo.<sup>20</sup> So  
the charterer loads the vessel, and it is lost on the  
e, not only unpaid freight money cannot be recovered  
e owner,<sup>21</sup> but any part of it paid in advance by the  
rer may be recovered back.<sup>22</sup> So where a plaintiff has  
prevented by a supervening law from fulfilling his con-  
he is not entitled to performance from his co-contractor.<sup>23</sup>  
where the subject-matter of a promise has been destroyed  
transfer of risk the promisor cannot recover the con-  
tion promised by his co-contractor, and if he has received  
must restore it.<sup>24</sup> It should be observed, however, that  
ment or promise may be made, not in consideration of  
mance, but of a risk of performance assumed by the  
party. In such a case the fact that the party assum-  
e risk never becomes bound to perform gives no basis for  
fence of failure of consideration.<sup>25</sup> Whether a risk or

t arise in this case, for I find that, if the circumstances here show an abandonment of the vessel, the owners exercised their right to end to the contract before the charterers resumed their possession. The point for decision is whether there was an abandonment under the circumstances. In my view that is a question of fact. . . .

the present case the master abandoned the vessel under enemy violence, but I do not think that this is different from a captain and crew abandoning the vessel under the stress of the violence of the enemy, as was the case in *The Cilo*, 10 U.S. 5. 9."

*Johnson v. Union Marine Ins. Co.*,  
*Amwell, B., L.*, R. 10 C. P. 125,  
*Russard v. Spiers*, 1 Q. B. D. 410,  
*Blackburn, J.* See also *Storer v.*  
 3 M. & S. 308. The contrary  
 in *Huron Barge Co. v. Turney*,  
 972, cannot be supported.

<sup>21</sup> *Gibson v. Sturge*, 10 Exch. 622; *Dakin v. Oxley*, 15 C. B. (N. S.) 646; *British, etc., Ins. Co. v. Southern Pac. Co.*, 72 Fed. 285, 18 C. C. A. 561, 38 U. S. App. 243. But if the goods are accepted by the owner at an intermediate port of distress a *pro rata* recovery is allowed. *Dakin v. Oxley*, *supra*.

<sup>22</sup> *Pitman v. Hooper*, 3 Sumner, 50; *Reina v. Cross*, 6 Cal. 29; *Griggs v. Austin*, 3 Pick. 20, 22, 15 Am. Dec. 175; *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; *Phelps v. Williamson*, 5 Sandf. 578; and see *infra*, § 1101. The law of continental Europe seems the same as that of America. See *Watson v. Duykinck*, 3 Johns. 335.

<sup>22</sup> *American Mercantile Exch. v. Blunt*, 102 Me. 128, 66 Atl. 212, 10 E. R. A. (N. S.) 414. See also *Melville v. De Wolf*, 4 E. & B. 844.

<sup>24</sup> See *infra*, § 1946.

<sup>25</sup> See *infra*, § 888. In England, on authority, and upon original grounds

actual performance is bargained for is a question, of fact with the presumption in a doubtful case in favor of the latter construction.

**§ 839. Ignorance of the plaintiff's breach of contract when the defendant fails to perform.**

It is necessary for a plaintiff who seeks to excuse his own failure to perform a condition, to allege and prove that his failure was caused by the defendant.<sup>26</sup> Therefore, though facts exist which would justify the plaintiff in failing to perform the condition (though not making its performance impossible) his ignorance of them will be fatal to his case; since a fact of which he was ignorant cannot have caused his failure to comply with the condition. The situation of a defendant, however, is different. He should be excused from liability if the plaintiff has failed in a material particular to perform his contract although the defendant at the time when he refused to perform or to continue performance was ignorant of the plaintiff's prior breach of obligation. The defendant's excuse in such a case, as has been seen,<sup>27</sup> is in substance failure of consideration, and it makes no difference whether or not

not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. *De Silvale v. Kendall*, 4 M. & S. 37; *Allison v. Bristol Ins. Co.*, 1 App. Cas. 209, 226; *Byrne v. Schiller*, L. R. 6 Ex. 319. The result is now supported on the theory, which it seems is hardly tenable in fact, that the advance payment is not strictly freight, but is made in exchange for the chance of carriage. For the same reason it has been held in England that one who advanced money for the instruction of his son in a trade, cannot recover it back, if he who received it dies without giving the instruction. *Whincup v. Hughes*, L. R. 6 C. P. 78. In *Walker v. Clay*, 71 Ala. 799, a note payable in six months was given for a promise to defend a person accused of murder.

It was held no defence that the time had been postponed without the plaintiff's fault (and hence no service had been performed) and that the accused was insane and not likely to be tried. In *White v. Sailors*, 17 Ga. App. 587 S. E. 831, the defendant contracted to furnish "board, washing and seining" for a year in consideration of 250 pounds of cotton payable near the beginning of the term. Soon after making the payment the boarder died. His executor was denied recovery of any part of the value of the cotton. *Cf. Mendenhall v. Davis*, 52 Wash. 169, 100 Pac. 336, 21 L. R. (N. S.) 914, where it was held that payment has been made in advance for services and the services have not been completely rendered, a portion of the payment must be returned.

<sup>26</sup> See *supra*, §§ 677, 808.

<sup>27</sup> See *supra*, § 813.

discovered prior to the litigation that he was not receiving return for which he bargained in exchange for his own performance. Though one who has contracted to buy a horse to pay the price for him may be morally blameworthy if he repudiates his contract in ignorance of the prior death of the horse, the seller has suffered no legal injury because he could not have carried out the contract on his own part; and for the same reason whenever the performance promised to the defendant was not or would not be given as agreed, the defendant cannot be held liable on his promise, however innocent he may be of the plaintiff's default. This principle has its most frequent application in contracts of service. An employer who discharges an employee in ignorance of a sufficient cause for discharge, is not liable if, in fact, an adequate cause existed.<sup>28</sup>

The principle is equally applicable to other contracts, though the occasion for its application is not so common. Thus where recovery of property was demanded by the plaintiff who had bought it of the defendant, and the demand was refused, but only on a ground which justified the assertion of a lien, the

*Baillie v. Kell*, 4 Bing. N. C. 638; *Swadlow v. Barrow*, 5 Ex. 110; *Wicks v. Green*, 3 C. & K. 59; *Boston Sea Fishing Co. v. Ansell*, 39 D. 339; *Carpenter Steel Co. v. Cross*, 204 Fed. 537, 123 C. C. A. Ann. Cas. 1916 A. 1035; *Farmer v. Trust Co.*, 246 Fed. 671, 158 C. C. 27, L. R. A. 1918 C, 1027; *Troy Utilizer Co. v. Logan*, 90 Ala. 325, 146; *Loveman v. Brown*, 138 Ala. 35 So. 708; *Abendpost Co. v. Mel*, 67 Ill. App. 501; *Von Heyne v. Hopkins*, 89 Minn. 77, 93 N. W. 901, L. R. A. (N. S.) 524; *Odoneal v. Fry*, 70 Miss. 172, 12 So. 154; *W. v. Aylesworth*, 58 N. J. Eq. 349, 1 Atl. 178; *Green v. Edgar*, 21 Hun, *Arkush v. Hanan*, 60 Hun, 518, 1 Y. S. 219; *Hutchinson v. Wash-*, 80 N. Y. App. D. 367, 80 N. Y. 91; *Corgan v. George F. Lee Coal*, 218 Pa. 386, 389, 67 Atl. 655;

*Coates v. Allegheny Steel Co.*, 234 Pa. 199, 206, 83 Atl. 77; *Wyatt v. Brown*, (Tenn. Ct. App.), 42 S. W. 478; *Crescent &c. Iron Co. v. Eynon*, 95 Va. 151, 27 S. E. 935; *Loos v. Walter Brewing Co.*, 145 Wis. 1, 129 N. W. 645, 140 Am. St. R. 1052; *Thomas v. Beaver Dam Mfg. Co.*, 157 Wis. 427, 147 N. W. 364; *McIntyre v. Hockin*, 16 Ont. App. 498, 501; *Tozer v. Hutchison*, 1 Hanney (N. B.), 540. But see *Cussons v. Skinner*, 11 M. & W. 161; *Strauss v. Meertief*, 64 Ala. 299, 310, 38 Am. Rep. 8; *Whitmore v. Fourth Cong. Soc.*, 2 Gray, 306; *Sheahan v. Barry*, 27 Mich. 217; *Shaver v. Ingham*, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712; *Levy v. Jarrett* (Tex. Civ. App.), 198 S. W. 333. If the employer knew of the valid ground for discharge and nevertheless assigned an invalid one, the result is the same; see *supra*, § 744.

defendant having discovered afterwards that the plaintiff was insolvent at the time of his demand was allowed to set that up as justifying the retention of the goods.<sup>29</sup> So where goods were obtained by fraud, and the seller made an unsuccessful attempt to bring himself within the principles of stopping *in transitu*, a redelivery by the carrier to the seller was held because of the buyer's fraud, to impose no liability on the carrier, though the redelivery was before the discovery of the fraud.<sup>30</sup> So where the defendant had contracted to supply the plaintiffs with all the barrels which he should require for use during the current year, a refusal by the defendant to fill an order was held justified because the plaintiff had previously ordered barrels for use during the succeeding year, though the defendant was not aware of this fact when he refused to fill the order.<sup>31</sup> Conversely a justification for a refusal to carry out a contract cannot be found in the mistaken belief or opinion, however reasonable, of the existence of supposed facts which if true would have justified the refusal.<sup>32</sup> It should be observed, however, that under some circumstances the conduct of the defendant in assigning a reason for refusal to go on with the contract may, when relied upon by the other party, amount to a waiver of other defences. Whether this is true has been previously considered.<sup>33</sup>

#### § 840. Promises in separate contracts.

Not infrequently the terms of a single bargain are expressed in more than one instrument. If the two documents are neither of them specialties they constitute but a single contract—the two writings taken together being the integration of the agreement of the parties. Where, however, the promise on either side is a formal document, this seems impossible. A sealed instrument and an unsealed writing, not by reference

<sup>29</sup> *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113.

<sup>30</sup> *Clough v. London & North Western Ry. Co.*, L. R. 7 Exch. 26. Cp. *Wright's Case*, 7 Ch. App. 55.

<sup>31</sup> *Williams Cooperage Co. v. Scofield*, 115 Fed. 119, 53 C. C. A. 23. The court said: "The legal effect of an act

amounting to a breach of contract must be the same whether it is known or unknown to the opposite contracting party."

<sup>32</sup> *Jefferson v. Paskell*, [1916] 1 K. 57, *per* Phillimore, L. J.

<sup>33</sup> See *supra*, § 744.

into the sealed contract, cannot form together one contract. The impossibility of suing at common law on such a contract either in covenant or assumpsit is of itself enough to prove this, and the insistent requirement of the common law that a sealed instrument must contain within its own corners the whole obligation, establishes the same conclusion. Likewise a negotiable bill of exchange or promissory note, though requiring consideration to support it as between the original parties,<sup>34</sup> is a mercantile specialty, and therefore a distinct contract from a counter promise for which it is not a. Though an entirely separate contract, if made simultaneously with another, may be looked at like any of the surrounding circumstances<sup>35</sup> as an aid in determining the meaning of the other contract, its terms cannot be carried over as part of that other contract by any process of construction. Therefore, the doctrine which passes under the name of the sealed conditions were based solely on construction, the promise contained in a promissory note, in terms unconditional, cannot be treated as conditional upon performance of a promise given in a separate instrument in exchange for the note, and so the English court has held.<sup>36</sup> With these decisions Professor Langdell agreed.<sup>37</sup> The American law, however, is almost uniformly otherwise.<sup>38</sup> It seems clear that the

<sup>34</sup> See *supra*, § 108.

<sup>35</sup> See *supra*, § 628.

<sup>36</sup> *Wiggin v. Jones*, 14 East. 486; *Wiggin v. Westlake*, 2 B. & Adol. 155. Lord Gifford said in the latter case, "where, by one and the same instrument, a sum of money is agreed to be paid by one party, and a conveyance of real estate to be at the same time made by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover the money before he executes or offers to execute a conveyance; but here the vendee by a separate instrument agreed to pay part of the purchase-money on the 2d of January."

<sup>37</sup> Summary of Contracts, § 117.

<sup>38</sup> *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 433, 43 C. C. A. 270; *Gentry v. Rogers*, 40 Ala. 442; *Smith v. Henry*, 7 Ark. 207, 44 Am. Dec. 540; *Sorrells v. McHenry*, 38 Ark. 127, 134; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Rochester Distilling Co. v. Geloso*, 92 Conn. 43, 101 Atl. 500; *Tyler v. Young*, 3 Ill. 444, 35 Am. Dec. 116; *Duncan v. Charles*, 5 Ill. 561; *Headley v. Shaw*, 39 Ill. 354; *Thompson v. Shoemaker*, 68 Ill. 256, 259; *Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969; *Bowles v. Newby*, 2 Blackf. 364; *Cunningham v. Gwinn*, 4 Blackf. 341; *McCulloch v. Dawson*, 1 Ind. 413; *Hickman v. Rayl*, 55 Ind. 551; *Zebley v. Sears*, 36 Iowa, 507; *Little v. Thurston*, 58 Me. 86; *Smith v. Boston &*

American decisions reach the better result. Though the contract contained in a promissory note, and that contained a counter promise of the payee are separate contracts, the performances are, nevertheless, intended as equivalent exchanges for one another, and a failure to perform on one side should excuse performance on the other.<sup>30</sup> Though as matter of substance no recovery should be allowed on a note if default

Maine R., 6 Allen, 262; *Hunt v. Livermore*, 5 Pick. 395; *Fort Payne Coal & Iron Co. v. Webster*, 163 Mass. 134, 39 N. E. 786; *Siglin v. Frost*, 173 Mass. 284, 53 N. E. 820; *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146; *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79, 13 Am. St. Rep. 344; *Powell v. Newell*, 59 Minn. 406, 61 N. W. 335; *Peques v. Mosby*, 15 Miss. 340; *Divine v. Divine*, 58 Barb. 264; *Hoag v. Parr*, 13 Hun, 95; *Ewing v. Wightman*, 167 N. Y. 107, 60 N. E. 322; *Shelley v. Mikkelsen*, 5 N. Dak. 22, 63 N. W. 210; *Dahl v. Stakke*, 12 N. Dak. 325, 96 N. W. 353; *First Nat. Bank v. Spear*, 12 S. Dak. 108, 80 N. W. 166; *Chandler v. Marsh*, 3 Vt. 161; *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807.

In *Ewing v. Wightman*, 167 N. Y. 107, 111, 60 N. E. 322, the court said: "Some learned text writers have asserted the doctrine that promises contained in unilateral contracts cannot be dependent, though each is given in consideration of the other, and have criticised the cases in this country holding a contrary rule. Whatever may be the force of the arguments of those writers, or whatever the rule in England (*Spiller v. Westlake*, 2 Barn. & Ad. 155; *Moggridge v. Jones*, 14 East, 486), the general current of authority in this and other states is opposed to that doctrine." So in *Bryne v. Dorey*, 221 Mass. 399, 403, 109 N. E. 146: "The notes, mortgages and contract bear a common date on which they were simultaneously transferred, and having been given and received in con-

sideration for each other, they are to be construed as dependent promises, even if in form they are unilateral. See also *Duncan v. Clements*, 17 Ark. 279; *Fariah v. Jones*, 23 Ark. 32; *Falvey v. Woolner*, 71 N. Y. App. Div. 331. Contrary decisions are: *Hagman v. Sharkey*, 2 Miss. 277; *Gibbs v. Newman*, 2 Miss. 341; *Haslip v. Noland*, 14 Miss. 294; *Snyder v. Muldock*, 51 Mo. 175; *Lewis v. McMillen*, 41 Barb. 420. See also *Tronson v. Colby University*, 9 N. Dak. 559, 63 N. W. 474. These latter decisions are, however, mostly overruled.

<sup>30</sup> In *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235, 244, the court said: "In some respects the note is one thing and the executory contract upon which it was based another. As to right of action, pleading and evidence, each stands on its own footing, but in substance, in the settlement of the ultimate rights of the parties, both are to be considered together. The giving of the note did not take away any of the rights of either party respecting the executory contract of sale out of which it grew, on which it was based. If the purchaser had refused to deliver the goods that fact could have been proven constituting a total failure of consideration by way of full defence to the action on the note." Therefore even though judgment is obtained on the note, equity will enjoin the enforcement of the judgment if the promise which the note is given is afterwards broken. *Wray's Adm. v. Furniss*, 10 Ala. 471.



been made in performance of a promise given in exchange for the note, as matter of procedure the payee of the note establishes a *prima facie* case without alleging or proving that consideration of the note was a promise, and therefore without alleging or proving that performance of the promise had been made or tendered.<sup>40</sup> Consequently, in the case supposed, the burden should be on the defendant to allege and prove the plaintiff's failure to comply with his promise;<sup>41</sup> but it must be conceded the weight of authority is opposed to this view.<sup>42</sup> The rule contended for is not without analogy; where collateral security is deposited to secure payment of a note or bill, the debtor may demand the return of collateral as a condition of his payment of the debt, but it is unnecessary for the creditor to tender the return of the collateral before bringing an action on the debt.<sup>43</sup>

### 1. Part performance on one side.

Lord Mansfield decided soon after his recognition of the tendency of promises in bilateral contracts that where there had been part performance by the plaintiff and a breach of promise by him went only to part of the consideration and should be compensated in damages the plaintiff might recover in spite of such breach.<sup>44</sup> The principle thus established has been uniformly followed.<sup>45</sup>

The general rule permits the holder of a negotiable instrument to declare it without alleging or proving consideration. 2 Ames Cases on Bills of Exchange, 876; Uniform Neg. Inst. L., § 28; Brannan's Uniform Neg. Inst. L. (3d ed.) 95.

This has been so held in Maine. *Wright v. Brown*, 10 Me. 49; *Niles v. Binney*, 90 Me. 122, 37 Atl. 880; *Walker v. Clay*, 21 Ala. 797, 804. The court said: "If the payee of the note had failed or refused to perform the services stipulated, that would be a breach of consideration."

In many of the cases cited *supra*, n. 1, it is not clearly brought out whether the court intended to decide that the

plaintiff must show affirmatively as part of his case payment by him of his obligation, but this was decided in the following cases: *Newsome v. Williams*, 27 Ark. 632, 635; *Cunningham v. Gwinn*, 4 Blackf. 341; *Summers v. Sleeth*, 45 Ind. 598; *Hatfield v. Miller*, 123 Ind. 463, 466, 24 N. E. 330; *School District v. Rogers*, 8 Iowa, 316; *Ewing v. Wightman*, 167 N. Y. 107, 60 N. E. 322; *Withers v. Atkinson*, 1 Watts, 236, 246.

<sup>40</sup> See *supra*, § 835.

<sup>41</sup> *Boone v. Eyre*, 1 H. Bl. 273, n. See *supra*, § 818.

<sup>42</sup> Lord Blackburn expressed the principle in *Robinson v. Mollett*, L. R. 7 H. L. 802, 814, "where the plaintiff

It has been said, however,<sup>46</sup> that "There is a great difference in the authorities in the application of the doctrine of implied conditions precedent in a contract, especially where there has been part performance. This difference appears particularly upon the question as to the measure of performance by one party which is to be regarded as such substantial performance as will protect him from having his defaults considered as breaches of such a condition, and also upon the corresponding question as to the kind of default which so far goes to the essence of the consideration as to justify the other party in refusing to go on with the contract."

In the nature of the case precise boundaries are impossible. The question which must be decided is whether on the whole it is fairer to allow the plaintiff to recover, requiring the defendant to bring a cross action or counterclaim for such breach of contract as the plaintiff may have committed, or whether it is fairer to deny the plaintiff a right of recovery on account of his breach even at the expense of compelling him to forfeit any compensation for such part performance as he has rendered. The decision of this question must vary with the special circumstances of each case. Nevertheless some principles may be laid down. Where several promises are made by one party, a breach of one of them necessarily goes only to part of the consideration, but it may be a large part, or it may be a small part. A breach of a separate collateral promise of minor importance will not justify refusal by the other party to perform, if the main promise to him has been or is being sub-

has broken the contract in some particular, and the breach of contract on the plaintiff's side goes only to part of the consideration, and may be paid for in damages; it is a matter for a cross action or an allowance, and does not bar the plaintiff altogether." The same judge stated the doctrine more fully in *Mersey Steel and Iron Co. v. Naylor*, L. R. 9 A. C. 434, 443. "Where there is a contract in which there are two parties, each side having to do something (it is so laid down in the

notes to *Pordage v. Cole*, 1 Wm. Saund. 548 (ed. 1871), if you see that the failure to perform one part of the contract goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going to perform my part of it when the whole which is the root of the whole and the substantial consideration to my performance is defeated by your misconduct.'"

<sup>46</sup> *Eastern Forge Co. v. Corbin*, 101 Mass. 590, 592, 66 N. E. 419.

ally performed.<sup>47</sup> On the other hand, even though the breach occurs after part performance, if it is of such a material

*Kauffman v. Ræder*, 108 Fed. 100, 47 C. C. A. 278, Sanborn, J., 1901. The breach of a covenant of the whole—a dependent covenant, one which goes to the whole consideration of the contract—gives to the injured party the right to treat the entire contract as broken and to recover damages for the total breach. *Leopold v. Salkey*, 1312, 31 Am. Rep. 93; *Keck v. Railroad Co.*, 148 Pa. 645, 24 Atl. 170; *Russell*, 133 Mass. 74; *Railroad v. Van Deusen*, 29 Mich. 431; *and v. Railroad Co.*, 40 Iowa, 101. But a breach of a covenant of a second class, an independent covenant, a covenant which does not go to the whole consideration of the contract and is subordinate and ancillary to its main purpose, does not constitute a breach of the entire contract and does not authorize the injured party to rescind the agreement, but he is still bound to perform his part and his only remedy is a recovery of damages for the breach. *Union Trust Co. v. Travelers' Ins. Co.*, 83 Ill. 679, 28 C. C. A. 1, 4, 49 U. S. 52, 759; *Pordage v. Cole*, 123, 320, note; *Campbell v. Jones*, 10 R. 570, 573; *Surplice v. Farnsworth*, Man. & G. 576, 584; *Obermyer v. Burns*, 6 Bin. 159, 160, 164; *Burnes v. Lubbin*, 3 Kan. 221, 226, 87 Mo. 468; *Butler v. Manny*, 52 Ill. 506; *Turner v. Mellier*, 59 Ill. 536; *Pepper v. Haight*, 20 Ill. 29, 440; *Central Appalachian v. Buchanan*, 43 U. S. App. 265, 100 A. 33, 73 Fed. 1006." *Scar Barnett Foundry Co. v. Railroad*, 219 Fed. 450, 455, 135 C. C. A. 100. The court said, citing *Kauffman v. Ræder*, 108 Fed. 171, 47 C. C. A. 247; *Howe v. Howe & Ball Bearing Co.*, 154 Fed. 100, C. C. A. 536; *Neenan v. Otis*

*Elevator Co.*, 180 Fed. 997, 1,000: "While every breach of a contractual obligation confers a right of action upon the injured party, it is thus seen that every breach does not operate as a discharge. A breach which permits a rescission of the contract, discharging the other party, must be of an absolute part of the obligation—that is, a breach of that part of the obligation which goes to the whole consideration, and may be made, first, when the party renounces his liabilities under it; second, when by his own act he makes it impossible to perform; or, third, by failing fully to do what he promised. When this occurs, the party offended against may consider the contract rescinded and himself exonerated, or sue upon the contract for such damages as he has thereby sustained."

In *Fearon v. Aylesford*, L. R. 12 Q. B. D. 539, 548, there was a suit for an annuity under a separation deed by which the annuitant covenanted not to molest the defendant. The court said: "Thus we arrive at the main question in the case, viz., whether there being molestation it is a defence to the claim for arrears of the annuity. . . . The decisions in the cases of *Charlesworth v. Holt*, L. R. 9 Ex. 38, and *Grant v. Budd*, 30 L. T. (N. S.) 319, seem to me to point distinctly to the conclusion that, where there is a covenant such as this in a separation deed, for payment of an annuity during the life of the wife, it is an independent covenant unless made dependent by express words. There may be cases of acts absolutely inconsistent with, and amounting to an entire frustration of, the main object of the deed, viz., separation, which may perhaps admit of different considerations from those applicable

or essential character as to go to the root of the contract, the failure of the injured party to perform its further performance by the injured party is excused.<sup>48</sup>

to the present case, but so far as the question as to the construction of these covenants is concerned, I am of opinion that they are independent covenants."

In *Westerman v. Champion Fiber Co.*, 162 N. C. 294, 78 S. E. 221, the plaintiff contracted to cut and cord 50,000 cords of wood, and the defendant agreed to build the shacks for his hands. The defendant's failure to build the 8 or 10 ordinary shacks necessary to house plaintiff's hands was held not so material a breach as to justify plaintiff in refusing to perform.

In *Rioux v. Ryegate Brick Co.*, 72 Vt. 148, 47 Atl. 406, the court said: "That plaintiff did not comply with an implied provision in a brickmaking contract to buy all supplies of defendants is not a breach going to the essence of the contract, and hence will not defeat plaintiff's recovery for what he had done under the contract." See also *Tichnor v. Evans*, (Vt. 1918), 102 Atl. 1031.

In *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 529, 99 Pac. 586, 21 L. R. A. (N. S.) 823, the court held covenants in a contract for the sale of land relating to building restrictions and the making of street improvements by the grantors, independent of the covenants to convey and pay the purchase price, saying:

"The covenant to make improvements goes only to a part of the consideration, and the fact that the date for completing the improvements and the date of payment of one of the instalments of the purchase price fell on the same day was a mere coincidence."

In *Emigrant Co. v. County of Adams*, 100 U. S. 61, 25 L. Ed. 563, the Emigrant Company purchased certain lands from the county and

agreed, as a part of the consideration, to drain the lands and bring in settlers. In an action to rescind the contract for breach of this and other covenants the court said: "Here the contract was largely carried into execution soon after its inception. The engagements of the appellants to introduce settlers and the like were to be performed in the future; and their performance was not a condition, but, as before stated, rested in covenant. In case of breach, they would lay the foundation of an action, but nothing more." See also *Trimble v. Green*, 3 Dana, 355; *Big Run Coal Co. v. Employers' Liability Co.*, 163 Ky. 596, 174 S. W. 25; *Hunt v. Tibbetts*, 70 Mo. 222; *Cavanagh v. Tyson & Co.*, 227 Mass. 437, 116 N. E. 818; *Turner v. Mellie*, 59 Mo. 526; *Indian Mountain & Co. v. Asheville Ice & Co.*, 134 N. C. 574, 47 S. E. 116; *McCurry v. Purgeson*, 170 N. Car. 463, 87 S. E. 244, Ann. Cas. 1918 A. 907; *Coos Bay R. Co. v. Nosler*, 30 Oreg. 547, 48 Pac. 366; *Danville & Co. v. Pomroy*, 15 Pa. 159; *Collins-Plass Thayer Co. v. Hewlett* (S. Car.), 95 S. E. 510; *Cromwell v. Morris*, 34 Dom. L. R. 305.

"In *Clark v. West*, 137 N. Y. App. Div. 23, 122 N. Y. S. 380, action was brought on a contract by which the plaintiff agreed to write certain law books, and the defendant agreed to pay \$2 a page on delivery, and \$1 a page in addition as the income from the books might produce that amount. Owing to the defendant's breach of the contract in taking out the copyright in his name instead of in the name of the author, the plaintiff refused complete performance of the contract. He had, however, prepared and delivered one book and a portion of another. The court held him entitled to recover the additional \$4 a page

**Substantial performance.**

principle of part performance in dependent promises is expressed either by saying that a breach which is

the defendant's breach of contract prevented the earnings of the plaintiff from measuring the payment for the contract had provided, the sum was recoverable. The plaintiff (p. 29):

covenant by one party goes to the whole consideration of a promise to the other party its performance is a precedent to the right to the promise; but if it goes only in part of the consideration, the part of the other party may be enforced without performance of the whole, the other party being left with the right to recover damages for non-performance of the covenant. *Ham Foundry v. Hovey*, 21 N. H. 7, 439; *Boyle v. Guysinger*, 12 N. H. 300; *Coe v. Bradley*, 5 Fed. Cas. No. 2941; *Water Lot Co. v. Board*, 30 Ga. 560, 573; *Dey v. Dey*, 9 Wend. 129, 24 Am. Dec.

*New Jersey, etc., Trust Co. v. Board*, 85 N. J. Eq. 557, 96 Atl. 574, ante-nuptial agreement a promise by husband agreed to leave by his intended wife certain sum if she kept her promise to marry. They were married but several years later she left him and obtained a divorce on grounds not recognized in New York where the contract was made. Later the husband died and bequeathed the securities to another. The court held that the wife could not recover them under the ante-nuptial agreement. Even if it be granted that the husband's promise included an implied promise to continue a wife unless repudiated by a law like that of New York, substantial performance seems to have led to a different conclusion from that reached by the court. See the dissent in 29 Harv. L. Rev. 881. In

*Casavant v. Sherman*, 213 Mass. 23, 26, 27, 99 N. E. 475, the court said, speaking of a contract of employment: "The stipulations of the parties to the contract were mutual and dependent, and if, after it had been partially executed, the defendant by discharging the plaintiff made further performance impossible, he is liable in damages, unless the discharge could be justified on the ground of the plaintiff's defaults. *Hodgkins v. Moulton*, 100 Mass. 309; *Hapgood v. Shaw*, 105 Mass. 276; *Earnshaw v. Whittemore*, 194 Mass. 187, 192, 80 N. E. 520. It is settled that, while inadvertent or unimportant departures would not defeat the right of recovery, the plaintiff became bound to a substantial performance in furtherance of the objects intended to be accomplished. *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 592, 66 N. E. 419, *National Machine & Tool Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275, 63 N. E. 900. . . .

"The jury were to determine whether the various acts of omission had been proved, and, if proved, they were further to decide whether when viewed as a whole, even if any one of them might have been insufficient, the defects in performance reasonably warranted the inference that the plaintiff would not or could not properly exert himself in the promotion of the defendant's interests. *Chapman v. Coffin*, 14 Gray, 454; *Cabot v. Winsor*, 1 Allen, 546; *Cunningham v. Washburn*, 119 Mass. 224." See also *University Club v. Dakin*, 265 Ill. 257, 106 N. E. 790, L. R. A. 1915 C. 854; *Dudley v. Wye*, 230 Mass. 350, 119 N. E. 790; *Rosenthal Paper Co. v. National &c. Paper Co.*, 226 N. Y. 313, 123 N. E. 766.

material, or which goes to the root of the matter, or essence of the contract, is fatal to the plaintiff's case in spite of part performance; or it may be expressed by saying that the plaintiff, who has substantially performed, is entitled to recover, although he has failed in some particular to comply with his agreement. The latter mode of expression is especially common in building contracts and, as has been pointed out in a previous section,<sup>49</sup> even where the promise of the owner is qualified by an express condition which has not been complied with, the contractor is frequently allowed to recover. If his breach of contract is not very great and is not wilful. Such authorities show *a fortiori*, that a contractor may recover where there is no such expressed condition, and the owner's only defence is a comparatively slight breach of the builder's dependent promise.<sup>50</sup> The same principles which are applicable to building contracts must be applicable to other contracts where there is part performance of which the benefit enures to the defendant.<sup>51</sup> Though the wilfulness of the breach, if it exists, is an important element in the case

<sup>49</sup> § 805.

<sup>50</sup> In addition to the cases cited in § 805 see—*Morris v. Hokosona*, 26 Col. App. 251, 143 Pac. 826; *Pratt v. Dunlap*, 85 Conn. 180, 82 Atl. 195; *Fagerholm v. Nielson*, (Conn. 1919) 106 Atl. 333; *Littell v. Webster County*, 152 Iowa, 206, 131 N. W. 691; *Mitchell v. Spurrier Lumber Co.*, 31 Okl. 834, 124 Pac. 10; *Wiebener v. Peoples*, 44 Okl. 32, 142 Pac. 1036; *Edmunds v. Welling*, 57 Or. 103, 110 Pac. 533; *Gessler v. Graham*, 234 Pa. 586, 83 Atl. 429; *Pressey v. McCormack*, 235 Pa. 443, 84 Atl. 427; *Smith v. Cunningham Piano Co.*, 239 Pa. 496, 86 Atl. 1067. But see *contra Harris v. Westholme*, 12 D. L. R. (Canada) 640.

<sup>51</sup> *Leiston Gas Co. v. Leiston-Cum-Sizewell Council*, [1916] 1 K. B. 912; *La Follette v. La Follette Water &c. Co.*, 252 Fed. 762, 164 C. C. A. 602; *Turner v. Mellier*, 59 Mo. 526; *International Signal Co. v. Marconi Wireless Tel. Co.* (N. J. Eq.), 104 Atl. 378; *Cramp-*

*ton v. McLaughlin Realty Co.*, Wash. 525, 99 Pac. 586. In *Northwestern Theatrical Association v. Horgan*, 218 Fed. 359, 134 C. C. A. 1, the action was on an agreement by the defendant, a manager of theatres, to pay for the sole representation in certain cities of a theatrical attraction. Though the court held that on the facts of the case no recovery on the theory of substantial performance was possible it did not question the applicability of the doctrine if the facts warranted it. To the same effect *Gerber v. Kalmar*, 104 N. Y. M. 85, 171 N. Y. S. 92; *Bookhout v. Vuich*, 101 Wash. 511, 172 Pac. 7. See also *supra*, § 838, and § 49 *ad*

<sup>52</sup> In *Sipley v. Stickney*, 190 M. 43, 76 N. E. 226, 5 L. R. A. (N. 469, 112 Am. St. Rep. 309, the court apparently lay down the principle that any wilful breach, whether going to the essence or not is fatal to recovery on the contract; but in

which will not justify recovery on a contract by a plaintiff who has committed a material breach.<sup>53</sup>

### Benefit derived by the defendant from the plaintiff's part performance.

An important element in determining whether part performance rendered by the plaintiff makes it unfair to allow the defendant to refuse to go on with the contract, is the extent or lack of benefit derived by the defendant from the plaintiff's performance. It has been stated on high authority that the reason for the doctrine compelling the defendant to continue with the contract after part performance "besides the possibility of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not completed his whole, he should therefore be permitted to enjoy that without either payment or doing anything for it."<sup>54</sup>

As there was not only willful dishonesty—certainly a material breach. *Peterson v. Mayer*, 468, 45 N. W. 245, 13 L. R. A. 43, 115 N. E. 42. The Massachusetts court repeated the statement in *Stuart-Howland Co.*, 226, 43, 115 N. E. 42. It is a severe doctrine that any deviation from the contract for slight importance is fatal upon it, even though there is no loss condition. The question of some extent be one of degree. *Swain v. Seamen*, 9 Wall. 254, 272, 19 L. Ed. 554; *Beck v. Bridgman*, 40 Ark. 382,

born, J., said: "When a contract has been partially executed, and one of the parties has derived substantial benefits or has imposed upon the other material losses through the latter's partial performance of the agreement, then the first party cannot rescind the contract on account of the failure of the second party to complete his performance, but the agreement must stand, the first party must perform his part of it, and his only remedy for the failure of the second party to completely perform is compensation in damages for that breach. *German Sav. Inst. v. DeLa Vergne Refrigerating Mach. Co.*, 70 Fed. 146, 150, 17 C. C. A. 34, 38, 36 U. S. App. 184, 190; 1 Chit. Pl. (16th Am. Ed.) \*333; *Barbee v. Willard*, 4 McLean, 356, 359, Fed. Cas. No. 969; *Hunt v. Silk*, 5 East, 449; *Hammond v. Buckmaster*, 22 Vt. 375; *Brown v. Witter*, 10 Ohio, 143; *Dodsworth v. Iron Works*, 13 C. C. A. 552, 557, 66 Fed. 483; *Swain v. Seamen*, 9 Wall. 254, 272, 19 L. Ed. 554; *Beck v. Bridgman*, 40 Ark. 382,

however, the deficiency in quantity or quality is essential that the buyer would not get the substantial benefit of the bargain if specific performance were granted, the plaintiff was denied relief.<sup>62</sup> In England contracts for the sale of land infrequently provide that in case of any error or omission in the plans or descriptions the sale shall not be annulled and enforced with compensation. Even in such a case, however, if the error is material specific performance will not be decreed. And materiality of the error does not depend altogether on the difference in value between what is tendered and what was contracted for. "A vendor could not fulfil a contract to sell Whiteacre by conveying Blackacre, although he might prove to demonstration that the value of the latter was larger in excess of the value of the former."<sup>64</sup> It is not improbable

<sup>62</sup> *Hick v. Phillips*, Prec. Ch. 575; *Long v. Fletcher*, 2 Eq. Ab. 5 pl. 4; *Fordyce v. Ford*, 4 Bro. C. C. 494, 497; *Stewart v. Alliston*, 1 Mer. 26; *Collier v. Jenkins*, Younge, 295; *Leyland v. Illingworth*, 2 De G. F. & J. 248; *Drewe v. Corp*, 9 Ves. 368; *Stapylton v. Scott*, 13 Ves. 425; *Knatchbull v. Grueber*, 1 Madd. 153, 3 Mer. 124; *Roffey v. Shallcross*, 4 Madd. 227; *Dalby v. Pullen*, 3 Sim. 29; *Casamajor v. Strode*, 2 M. & K. 706, 726; *Peers v. Lambert*, 7 Beav. 546; *Perkins v. Ede*, 16 Beav. 193; *Hughes v. Jones*, 3 De G. F. & J. 307; *Arnold v. Arnold*, 14 Ch. D. 270; *Hepburn v. Auld*, 5 Cranch, 262, 3 L. Ed. 96; *Beck v. Bridgman*, 40 Ark. 382; *Lombard v. Chicago Congregation*, 64 Ill. 477; *O'Kane v. Kiser*, 25 Ind. 168; *McKean v. Reed*, Litt. S. C. 395, 12 Am. Dec. 318; *Winne v. Reynolds*, 6 Paige, 407; *Hinckley v. Smith*, 51 N. Y. 21; *Bird v. Bradburn*, 127 N. C. 411, 37 S. E. 456; *Buchanan v. Alwell*, 8 Humph. 516; *Spinner v. Walsh*, 11 Ir. Eq. R. 597.

<sup>63</sup> *Arnold v. Arnold*, 14 Ch. D. 270. Cf. *Fawcett v. Holmes*, 42 Ch. D. 150.

<sup>64</sup> *Lee v. Rayson*, [1917] 1 Ch. 613 618, the court added: "Value, no doubt, is an element to be taken into

account in determining whether an error in description is substantial or material, but it is certainly not the only element, nor, in my opinion, the dominant one. A statement of Eldon's, quoted by Buckley, J., in a case to which I have already referred—*Jacobs v. Revell*, [1900] 858, 863, indicates, in my opinion, a pertinent inquiry which has not been answered. It is in *Knatchbull v. Grueber*, [1817] 3 Mer. 124, 146, Lord Eldon says: 'This Court is from time to time approaching nearer to the doctrine that a purchaser shall take that which he contracted for, or may be compelled to take that which he did not mean to have.' I take this to mean that what the Court has to do in such a case as I have here to decide is to decide whether the purchaser is getting substantially that which he bargained for, or whether the vendor is seeking to put him off with something which he never bargained for, and arriving at a conclusion on this question the Court is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser



the rule at law may become somewhat ameliorated and though one who still can make accurate performance will not be allowed to recover without tender of such performance, one who has already committed a breach *in limine* making performance impossible, but who can and does tender performance varying but slightly from his agreement will be allowed to enforce the agreement at law, the defendant's right of recoupment or counterclaim being regarded as equivalent to the compensation which equity requires.

#### **. Distinction between breach as to the time of performance and as to character of performance.**

When a promisor binds himself to do a particular act at a particular time, or within a particular period, his promise may be conceivably be regarded either as indivisible or composed of two severable parts. On the first supposition, whether the promisor failed to do what he agreed or failed to do it at the time when he agreed, the consequences would be the same. It is, however, desirable to distinguish between a breach of promise to do a thing and a breach of promise as to the time when it shall be done, and courts of equity in England and America have treated stipulations as to time as subsidiary to the performance of the thing, of comparatively little importance, unless either the intention of the parties or the nature of the case imperatively required that the date of performance was vital. In courts of common law, however, and especially in mercantile contracts, it is held that time is of the essence of the contract,<sup>65</sup> and

to make the contract; if, on the other hand, the subject-matter remains unaffected, or so little affected as to be substantially that which was agreed to, then the purchaser must be taken to have accepted of this contract."

*Partup v. Macdonald*, 2 Man. & G. 5 (seller contracted to deliver goods before a certain day. The court was held justified in refusing to grant specific performance after that day); *Gath v. Lees*, 11 Q. B. 558 (seller contracting to deliver cotton "at seller's option in October or September," and having

given notice that he elected to deliver in August, must deliver in that month, and the buyer need not accept a later delivery). *Coddington v. Paleologo*, L. R. 2 Ex. 193 (a contract which called for delivery to begin on April 17, justifies the buyer in repudiating the agreement if delivery is not begun on that day); *Reuter v. Sala*, 4 C. P. Div. 239, 249 (goods shipped in December under contract for goods of November shipment need not be accepted); *Bowes v. Shand*, 2 A. C. 455 (shipment chiefly in February will not satisfy a

it is important to determine the meaning and the limits of the doctrine.

contract for March shipment); *Norington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366 (shipment of 400 tons in the first month and 885 tons in the second, justifies buyer in refusing to proceed under a contract for 5,000 tons to be shipped at the rate of about 1,000 tons a month); *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 S. Ct. 882, 30 L. Ed. 920 (shipment during two months after opening of navigation justifies buyer in refusing goods under contract construed to require shipment at opening); *Camden Iron-Works v. Fox*, 34 Fed. 200 (contract to buy pipe, "the entire delivery to be completed within nine weeks." Only a small part was delivered within that time, and on the day when the nine weeks expired the buyer notified the seller that no more would be accepted. Held he was justified); *Oshinsky v. Lorraine Mfg. Co.*, 187 Fed. 120, 109 C. C. A. 38 (the plaintiff contracted to sell goods, some at certain specified dates and the balance Nov. 15th. Some goods were delivered and accepted prior to Nov. 15th, and the balance was tendered on Nov. 16. Held the refusal was justified); *Connell Bros. Co. v. Diederichsen*, 213 Fed. 737, 130 C. C. A. 251 (contract for shipment during February. Shipment March 8th gives the buyer a right to rescind); *Deming Co. v. Bryan*, 2 Ala. App. 317, 56 So. 754 (contract did not specify time, but as goods were needed to protect crops then growing as seller knew, it was held that the buyer need not accept goods unless shipped within a reasonable time); *Bearden Mercantile Co. v. Madison Oil Co.*, 127 Ga. 695, 58 S. E. 200 (contract to deliver goods as requested "between now and January 1st." Buyer lost his right to demand delivery after January 1st); *Augusta*

*Factory v. Mente*, 132 Ga. 503 S. E. 553 (instalment contract weekly deliveries. The seller did deliver on time and after fixing a reasonable time within which a must perform, the buyer not receive performance bought other goods sued for damages. Recovery was allowed); *Cromwell v. Wilkinson*, Ind. 365 (goods "to be delivered between the 1st and 10th days of December." The court said, p. 371, "at time is of the essence of a contract performance is required at the day"); *Bamberger Bros. v. Burrows*, 145 Ind. 528, 124 N. W. 333, 337 ("if the seller fail to make delivery on the date fixed, the buyer may rescind or recover damages for the seller's breach of contract"); *White-Branch-McConnell v. Shelton Co. v. Carson*, 25 Ky. L. 1230, 77 S. W. 366 (goods were ordered to be shipped from 10th to 15th. They were shipped later and rejected. Buyer held justified); *New Bedford Copper Co. v. Southard*, 95 Me. 49 Atl. 1062 (goods to be delivered one of two specified months, cannot be demanded after the close of the month so named); *Salmon v. Boykin*, 66 Atl. 541, 7 Atl. 701 ("shipment . . . later than November" imposed condition precedent to the buyer's obligation); *Crane v. Wilson*, 105 Mo. 554, 63 N. W. 506 (seller of logs agreed to "run said logs down to the buyer just as early as possible in the spring of 1891." The buyer was held not bound to accept delivery of logs in 1891); *Denton v. McInnis*, 85 Mo. App. (a week's delay in shipping goods beyond the time fixed by the contract was held to justify the buyer's refusal); *Frost-Trigg Lumber Co. v. Forrester*, 124 Mo. App. 304, 101 S. W. 164 (contract to deliver goods within five days. The goods were not delivered

**Meaning of time being of the essence.**

When it is said that time is of the essence, the proper meaning of the phrase is that the performance by one party at the time specified in the contract or within the period specified in the contract is essential in order to enable him to require performance of the other party.<sup>66</sup> It does not mean that delay will not give rise to a right of action against him. A breach of any kind in a contract, whether of vital importance or not, is a breach; nor does the phrase mean merely that time is a material matter, but that it is so material that exact compliance with the terms of the contract in this respect is essential to the right to require counter performance. Even where time is not of the essence, it is generally true that an unreasonable delay of time may be fatal. Thus time is almost always of varying degrees material but not so often an essential part of the contract. It is obvious that in any contract one party may make his promise expressly conditional on the exact perform-

... weeks, and the buyer was held in refusing them); *McIntyre v. McGraham*, 86 Neb. 383, 125 N. W. 1098 (contract agreed to take a quantity "within twelve months from ..."). Held that the seller need not perform within an order given a week after the date of the contract (period); *Higgins v. Delaware, D. C.*, 60 N. Y. 553 (breach of contract to take away in October by the defendant, held to be a refusal to deliver it the following January); *Blossom v. Shotter*, 59 N. Y. 486, 13 N. Y. S. 523, 100 N. Y. 679, 145 (vessel to arrive within ...). After the time expired, the contract was absolved from obligation); *Empire Dairy Salt Co.*, 50 N. Y. 114, 63 N. Y. S. 565 (contract for salt "to be taken within 60 or 90 days." The shipper was justified in refusing to deliver the salt within the time specified); *Sunshine Cloak & Suit Co.*, 30 N. Dak. 134, 152 N. Dak. 159 (contract calling for shipment within 15th. Goods shipped in

September held properly rejected); *Sun Publishing Co. v. Minnesota Type Foundry Co.*, 22 Or. 49, 29 Pac. 6; *Fountain City Drill Co. v. Lindquist*, 22 S. Dak. 7, 114 N. W. 1098 (contract provided for shipment on or about February 1st. A delay for forty days after that date justified the buyer in refusing to accept); *Goff v. Pacific Coast S. S. Co.*, 9 Wash. 386, 37 Pac. 418. (In view of special circumstances, failure to pay freight on the morning after the contract was made, held a condition precedent to the obligation to charter a steamer.) See also *General Electric Co. v. Chattanooga &c. Corp.*, 241 Fed. 38, 154 C. C. A. 38; *cf. Woolfe v. Horne*, 2 Q. B. D. 355; *Kauffman v. Ræder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Montgomery v. Thomson*, 152 Cal. 319, 92 Pac. 866; *Re Canadian Niagara Power Co.*, 30 Ont. 185.

<sup>66</sup> See comment on the frequent loose use of the phrase in *Helgar Corp. v. Warner's Features*, 222 N. Y. 449, 119 N. E. 113, 114.

ance of any agreed condition, and therefore performance at a specified day or hour, or before a specified day may be required by such a condition. So that the first point to be determined in an inquiry whether time is of the essence in a particular case, is whether the parties have in terms made it so. It is only when this question has been decided in the negative that any rule of law other than one of construction is called into play. But often the defendant has not made his promise to perform expressly conditional on the plaintiff's performance at a fixed day; he has contented himself with exacting from the plaintiff a promise of performance at that day, and the inquiry is whether a breach by the plaintiff of his promise to perform excuses the defendant from liability. The justice of such an excuse depends chiefly on two considerations:

1. Is the delay in performance of the plaintiff's promise after part performance, or did he fail to perform at the agreed day at a time when the contract was still wholly executory and
2. Is the nature of the contract such as to make time of the vital importance?

**§ 847. A breach in limine as to time is fatal in contract for sale.**

In executory contracts to buy and sell time is of the essence in an action at law. This principle has been strictly applied at least until recent times, not only in regard to personal property, but in regard to real estate. "If A contracts to deliver a horse to B on Monday next, for which B agrees to pay \$100, A can not recover by an offer to deliver on Tuesday." <sup>67</sup>

The same principle was applied in contracts to sell real estate. Though the rule in equity was different, at law nei-

<sup>67</sup> Phillips, etc., *Construction Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341. To the same effect see—*Coddington v. Paleologo*, L. R. 2 Exch. 193; *Jones v. United States*, 96 U. S. 24, 24 L. Ed. 644; *Oshinsky v. Lorraine Mfg. Co.*, 187 Fed. 120, 109 C. C. A. 38; *Cromwell v. Wilkinson*, 18 Ind.

365; *Osgood v. Boston*, 165 Mass. 285, 43 N. E. 108; *Clark v. Wright*, Phila. 439. *Cf. Montgomery v. Tison*, 152 Cal. 319, 92 Pac. 866; *More & Ohio R. Co. v. Carter*, Md. 551, 105 Atl. 760; *Paton v. Paton*, 35 Scot. L. Rep. 112 (H. L.).

endor<sup>66</sup> nor vendee<sup>67</sup> could recover without tender on the day named in the contract. That the absorption of equitable principles by the law may have modified the force of this rule even without the aid of statute, is pos-

sible. In executed sales of personal property the principle of part performance precludes either party from treating time as of the essence; therefore neither the seller's failure to tender on the day, nor the buyer's failure to pay on the day, permits the other party instantaneously to rescind the contract.<sup>71</sup> In instalment contracts, certainly, exact per-

formance is required. In *Bank of Columbia v. Hagner*, 14 L. Ed. 465 (7 L. Ed. 219), the court held that the time fixed for the performance of the contract was, according to law, as it stood before the Judicature Act, 1873, of the essence of the contract, so that non-payment on that day, provided it was not caused by the default of the vendor, authorized the vendor at law to treat the contract as rescinded. The cases of *Wilde v. Fort*, 4 Taunt. 334; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Noble v. Edwardes*, 5 Ch. D. 378, and the opinion of Lord St. Leonards on Vendor and Purchaser (13th Ed.), chap. vi, § 1, are some amongst many authorities to which I might refer in support of these propositions." *Hill v. Fisher*, 34 Me. 143.

This was so laid down by Lord St. Leonards, and has never been departed from in practice. The contrary would lead to endless difficulties, in every case, it must be referred to the court to consider, whether the act was done within a reasonable time; in the case of a precise contract of the parties, the contract is avoided, in order to introduce an uncertain rule, which would lead to endless litigation. But equity, from its peculiar jurisdiction, is not bound to examine into the cause of delay in completing a purchase, and to consider how far the day named was material by the parties, will, in cases, carry the agreement into effect, although the time appointed has elapsed." See also *Noble v. Edwardes*, 5 Ch. D. 378; *Janulewycz v. Janulewycz*, 88 Conn. 60, 89 Atl. 897; *Woolfe v. Hopkins*, 157 N. C. 470, 133, 135.

*Woolfe v. Smith*, 27 Ch. D. 89, 133, 135, L. J., said: "In my opin-

ion the time fixed by a contract for the payment of the balance of the purchase-money, and the completion of the contract was, according to law, as it stood before the Judicature Act, 1873, of the essence of the contract, so that non-payment on that day, provided it was not caused by the default of the vendor, authorized the vendor at law to treat the contract as rescinded. The cases of *Wilde v. Fort*, 4 Taunt. 334; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Noble v. Edwardes*, 5 Ch. D. 378, and the opinion of Lord St. Leonards on Vendor and Purchaser (13th Ed.), chap. vi, § 1, are some amongst many authorities to which I might refer in support of these propositions." *Hill v. Fisher*, 34 Me. 143.

<sup>70</sup> In *Strother v. Miller* (Ky.), 124 S. W. 358, the contract was for the sale of a half interest in a horse, the possession and care of which was to be at times for one party and at times for the other. A tender by the buyer within a reasonable time after the date specified in the contract was held sufficient.

<sup>71</sup> See *Martindale v. Smith*, 1 Q. B. 389; *Mirabita v. Imperial Ottoman Bank*, 3 Exch. Div. 164; *Williston on Sales*, § 550. In *Woolfe v. Horne*, 2 Q. B. D. 355, an auction catalogue contained amongst others, the following condition: "The lots to be cleared away

formance of every instalment on the day has not generally been thought a condition precedent to liability of the other party.<sup>72</sup>

within three days after the sale at the purchaser's expense," &c.

The plaintiff attended the sale, received a catalogue, bought one of the lots, and paid a deposit. He did not fetch the goods away on Saturday (the last of the three days for clearing), but went for them on the Monday following, when he was told by one of the defendants that the lot had been delivered to another person. He was allowed to recover. Field, J., said: "It was argued that punctuality in clearing the goods was a condition precedent to the right to claim delivery. But to make these stipulations conditions precedent, it is necessary that they should go to the whole root of the consideration. I do not think that they go so far. If the goods were to have been cleared before 12 o'clock on Saturday, it never could be supposed that the plaintiff would lose his right to them by coming half an hour too late. No doubt there is an implied agreement, for the breach of which the purchaser is liable, but it is not a condition precedent." *Cf. Higgins v. Delaware, etc., R.*, 60 N. Y. 553, 556. There, in dealing with a contract by which it was provided that certain coal bought at auction by the plaintiff should be taken away in October, the court said: "A failure of the buyer to take away all the coal bought, within the time specified, gave the defendants the right and power to refuse further delivery, and to forfeit the earnest money paid by the buyer, or to resell the coal on the buyer's account,

and at his risk of loss. And we readily perceive that it is essentially the successful prosecution of the business of the defendants, that should not be compelled, by the toriness of their vendees, to furnish upon their docks at Elizabethport, Hoboken, space for the keeping, succeeding months, of the coal by them deliverable in a given month. Hence their stipulation in the terms of the sale appears, from a fair consideration of the language of it, and the other parts of those terms and the circumstances, to be of the essence of the contract, to have been intended by the parties, and to have formed a condition precedent, to be observed and kept by the plaintiff, if he wished to be able to retain the contract and to have it enforced against the defendants."

So in *Sun Publishing Co. v. Minnesota Type Foundry Co.*, 22 Or. 60, 22 Pac. 6, the court said: "The principle is that if time appear, as a fair consideration of the language of the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent." In *Phillips, etc., Const. v. Seymour*, 91 U. S. 646, 650 (2 Ed. 341) the court said: "When a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniable that the general rule that the covenants are mutual, and are dependent on each other, they are to be performed at the same time; and if, by the terms or nature

<sup>72</sup> See *supra*, §§ 865-869. Even where as in *Norrington v. Wright*, 115 U. S. 188, 29 L. Ed. 366, 6 Sup. Ct. 12; and *Augusta Factory v. Mente*, 132 Ga. 503, 64 S. E. 553, the court

says time is of the essence of such contracts, it is evident that what is material is that the element of time is material, not that a day's delay will be fatal.

**Whether the time for the payment of money is of the essence.**

is sometimes said that the time for the payment of money is as essential as the time for other performance.<sup>73</sup> The distinction, however, may easily be overemphasized. There is no reason to suppose that in a contract to buy and sell which is wholly executory on both sides, the buyer's tender of the money at the agreed day is not as essential to the right of recovery as the seller's tender of the goods at the agreed day is essential in the converse case. The decisions upon which it is supposed to support the distinction are cases where there has been part performance by the seller and a debt had already arisen. It is doubtless true then that payment of the money on the precise day when it is due is not of the essence.<sup>74</sup> Such a situation is comparable to one where title to goods has been passed, though delivery has not yet been made, and in such a case as has been seen in the preceding section non-

performance of a contract, one is first to be performed as the condition of the obligation of the other, that which is first performed must be done, or the other, before that party can sustain an action against the other. There is no doubt that in this case of contracts, where the time is fixed for performance, the duty of the party whose duty it is to perform or whose duty it is to perform or performance first must do it on the day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party.

But, both at common law and in equity, there are exceptions to this rule. Growing out of the nature of the contract to be done and the conduct of the parties. The familiar case of part performance, possession, etc., in which the time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads, or other large and expensive undertakings, in which the means of performance and the labor become com-

bined and affixed to the soil, or mixed with materials and money of the owner, often afford examples at law.

"If A contract to deliver a horse to B on Monday next, for which B agrees to pay \$100, A cannot recover by an offer to deliver on Tuesday; but if A agree to deliver a horse, buggy and harness on Monday, and B accepts delivery of the horse and buggy, can he refuse to pay anything, though he accepts delivery of the harness on Tuesday? This is absurd. He waives, by this acceptance, the point of time as to the harness, at least so far as A's right to recover the agreed sum is concerned. If B have suffered any damage by the delay, he can recover it by an action on A's covenant to deliver on Monday; or, if he wait to be sued, he may recoup by setting it up in that action as a cross-demand growing out of the same contract."

<sup>73</sup> It is so provided in Sec. 10 of the English Sale of Goods Act.

<sup>74</sup> *National Machine Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275, 63 N. E. 900, see *infra*, § 884.

delivery of the goods at the day is not necessarily fatal. It is of doubtful utility to attempt to make a more specific rule where there has been part performance than to say that in every case unless the parties have made an express provision on the subject the court must consider the materiality of the delay in view of the nature of the contract, and the surrounding circumstances, and then determine whether justice will be achieved by depriving the party in delay of all remedy under the contract, or of allowing him to recover subject to a cross claim because of his delay. If the matter is looked at in this light any difference in regard to the payment of money and the performance of a non-pecuniary obligation will be at most one of degree.

Frequently building construction contracts require payments to be made as the work progresses. Such contracts are not divisible, for the several payments are made in exchange for the work done up to the time of each payment (though generally the amount is so calculated as not to exceed the value of the work done) but are payments on account of a total sum which is the price of the whole work. Non-payment of an instalment of the price justifies the contractor in refusing to continue the work. Doubtless a day's delay in the payment of an instalment will not justify permanent cessation of work, but it se-

<sup>74</sup> Phillips, etc., *Construction Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *P. J. Carlin Const. Co. v. Guerini Stone Co.*, 241 Fed. 545, 154 C. C. A. 321, s. c. *sub nom.* *Guerini Stone Co. v. P. J. Carlin Const. Co.*, 248 U. S. 334, 344, 39 S. Ct. 102, 63 L. Ed. (1919); *Cox v. McLaughlin*, 54 Cal. 605; *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, 158 Cal. 264, 110 Pac. 951; *San Francisco Bridge Co. v. Dumbarton Land Co.*, 119 Cal. 272, 51 Pac. 335; *Woodruff Co. v. Exchange Realty Co.*, 21 Cal. App. 607, 132 Pac. 598; *Dobbins v. Higgins*, 78 Ill. 440; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Geary v. Bangs*, 37 Ill. App. 301; *Shulte v. Hennessy*, 40 Iowa, 352; *Finnigan v. Worden-Allen*

*Co.*, 201 Mich. 445, 167 N. W. 577; *Nelson v. San Antonio Tract Co.*, 107 Tex. 180, 175 S. W. 778; *Bennett v. Shaughnessy*, 6 Utah, 273, 22 Pac. 156; *Prebster v. Bottom*, 27 Vt. 249; *Rioux v. Gate Brick Co.*, 72 Vt. 148, 47 N. S. 66. But see *Campbell v. McLeod*, 406 N. S. 66.





"If the builder has done a large and valuable part of work, but yet has failed to complete the whole or any special part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make good or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, &c., we need not inquire here; but if the other party says to him, 'I prefer you should finish your work,' or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed." This puts the matter wholly on the basis of waiver, but the doctrine of part performance is not wholly based on waiver, but is in part at least on the inequity of excusing altogether the defendant from performing his promise (not in terms expressly conditional on exact performance by the plaintiff) because of any slight default whatever by the plaintiff in his duty. In building contracts the forfeiture of the builder's work which would result if the rule were otherwise, furnishes a good illustration of the propriety of the rule.

#### § 850. Time is not of the essence in contracts of service.

In contracts of service time is not essential in the sense that any deviation by an employee from the agreed times for service is fatal. This is obviously true after part performance since otherwise a contract of service could be abrogated by absence or tardiness for a single day.<sup>80</sup> Even though a breach is *in limine*, the question of materiality in the particular case must be considered, unless the employer's obligation is in terms made conditional on strict performance

mour, 91 U. S. 646, 651, 23 L. Ed. 341.

<sup>80</sup> In *Fillieul v. Armstrong*, 7 A. & E. 557, unexcused absence of a teacher

for two days longer than an allowed vacation was held not to justify discharge.

the employee.<sup>81</sup> The kind of service to be performed, however, is an important element to consider in arriving at conclusion. If the service relates to a commercial adventure, it may be very important. In a charter party, for instance, the time agreed for loading or sailing is vital.<sup>82</sup>

#### 51. When time is essential in performing collateral stipulations.

Sometimes by the terms of a contract some performance other than the main performance of the contract is to be made on a fixed day or within a fixed period. If this provision is made by the express terms of the contract, a condition stated to be of the essence, the materiality of the provision in view of the nature of the case and the surrounding circumstances may be the guide for the court.<sup>83</sup> Thus where a contract for the sale of wool provided that the names of the vessels in which the wool was shipped should be declared as soon as the wool was shipped, the court said of this stipulation that "looking at the nature of the contract, and the great importance of it to the object with which the contract was entered into with the knowledge of both parties, we think it was a condition pre-

In *Bettini v. Gye*, 1 Q. B. D. 183, the contract the plaintiff agreed to be in London without fail at least ten days before the commencement of the engagement for the purpose of rehearsals." Breach of this agreement was held not to justify the plaintiff's dismissal. In *Lewis v. West*, 121 W. Va. 1063, 1064, the court said: "The time within which an act to be done is not always essential, when the time specified for performance of a contract is relatively unimportant, it is not of the essence of the contract, unless made so in express terms, or it appears to be a condition rather than a covenant. *Adams v. Lacy*, 64 W. Va. 181, 61 S. E. 2d 1063. No terms used by the parties imported intent to make the time of performance essential. Though the plaintiff

promised to arrive on Thursday, and the defendant expressed satisfaction with that date, neither used any word signifying intent to make the contract depend upon that fact for its binding force or validity. On the contrary, the defendant's conduct indicated allowance of reasonable latitude as to time. It first said, Come at once, and then allowed a day or two for preparation."

<sup>82</sup> In *Barker v. Borzone*, 48 Md. 474, the owner of a ship agreed that lay-days for loading should begin "not later than 31st January." A tender of the ship a single day too late was held to justify refusal of the charterer to load.

<sup>83</sup> *Meier Dental Mfg. Co. v. Smith*, 237 Fed. 563, 150 C. C. A. 445; *Jennings v. Bowman*, 106 S. Car. 455, 91 S. E. 731.

cedent.”<sup>84</sup> On the other hand, if moderate delay in performing a subsidiary stipulation seems of slight importance such delay will not excuse the other party.<sup>85</sup>

### § 852. In equity time is not generally of the essence.

In contracts for the sale of land equity has established the rule that unless expressly made so by the terms of the contract or by special circumstances, time is not essential. Accordingly the vendor may enforce the contract against the purchaser although he was not ready himself to perform at the agreed time,<sup>86</sup> and similarly the purchaser, though not ready at the law day, may have relief against the vendor on making tender subsequently.<sup>87</sup> The delay, however, may be

<sup>84</sup> *Graves v. Legg*, 9 Exch. 709.

<sup>85</sup> *Ady v. Jenkins*, 133 Md. 36, 104 Atl. 178.

<sup>86</sup> *Langford v. Pitt*, 2 P. Wms. 629; *Hertford v. Boore*, 5 Ves. 719; *Seton v. Slade*, 7 Ves. 264; *Radcliffe v. Warrington*, 12 Ves. 326; *Taylor v. Brown*, 2 Beav. 180; *Shepherd v. Walker*, 20 Eq. 659; *Hepburn v. Dunlop*, 1 Wheat. 179, 196, 4 L. Ed. 65; *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 437; *Guntton v. Carroll*, 101 U. S. 426, 25 L. Ed. 985; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct. 258; *Raymond v. San Gabriel Co.*, 53 Fed. 883, 10 U. S. App. 601, 4 C. C. A. 89; *Bennie v. Becker-Franz Co.*, 14 Ariz. 580, 134 Pac. 280; *Brumfield v. Palmer*, 7 Blackf. 227; *Burkhalter v. Roach*, 142 Ga. 344, 82 S. E. 1059; *Monarch Portland Cement Co. v. Washburn*, 89 Kan. 874, 133 Pac. 156; *Knipe v. Troika*, 92 Kan. 549, 141 Pac. 557; *Henderson v. Perkins*, 94 Ky. 207, 21 S. W. 1035; *Scarlett v. Stein*, 40 Md. 512; *Maryland Const. Co. v. Kuper*, 90 Md. 529, 45 Atl. 197; *Hammer v. Westphal*, 120 Md. 15, 87 Atl. 488; *Dresel v. Jordan*, 104 Mass. 407; *Mansfield v. Wiles*, 221 Mass. 75, 108 N. E. 901; *King v. Connors*, 222 Mass. 261, 110 N. E. 289; *Seaver v. Hall*, 50 Neb. 878, 70 N. W. 373; *Sharp v.*

*Trimmer*, 24 N. J. Eq. 422; *Seymour v. DeLancey*, 3 Cow. 445, reversing *S. C. Hopk. Ch.* 436, 14 Am. Dec. 55; *Pierce v. Nichols*, 1 Paige, 244; *Hun Bourdon*, 57 N. Y. App. Div. 351, 6 N. Y. S. 112; *Baumeister v. Demut*, 84 N. Y. App. Div. 394, 82 N. Y. S. 831, affd. 178 N. Y. 630, 71 N. E. 1128; *Arnett v. Smith*, 11 N. Dak. 588 N. W. 1037; *Wilson v. Tappan*, Oh. 172; *Townsend v. Lewis*, 35 P. 125; *Miller v. Cramer*, 48 S. C. 282, 2 S. E. 657; *Chadwell v. Winston*, Tenn. Ch. 110; *Mullens v. Big Creek Co. (Tenn. Ch.)*, 35 S. W. 439; *Dani v. Leitch*, 13 Gratt. 195; *Katz v. Hatl away*, 66 Wash. 355, 119 Pac. 804.

<sup>87</sup> *Reynolds v. Nelson*, 6 Madd. 1; *Taylor v. Longworth*, 14 Pet. 172, 1 L. Ed. 405; *Ahl v. Johnson*, 20 How. 511, 15 L. Ed. 1005; *Brown v. Guarantee Co.*, 128 U. S. 403, 32 L. Ed. 469, 9 Sup. Ct. 127; *McCabe v. Matthew*, 155 U. S. 550, 39 L. Ed. 256, 15 Sup. Ct. 190; *Mason v. Wallace*, 3 Mc. 148; *Dewey v. Whitney*, 93 Fed. 53, 547, 35 C. C. A. 414, affirming 85 Fed. 315; *Love v. Butler*, 129 Ala. 531, 3 So. 735, 737; *Vance v. Newman*, 7 Ark. 359, 80 S. W. 574, 105 Am. S. Rep. 42; *Butler v. Colson*, 99 Ark. 34, 138 S. W. 467; *Barsolou v. Newton*, 6 Cal. 223; *Byers v. Denver Circle I*

great or its circumstances so inexcusable as to preclude relief.<sup>88</sup> The amount of delay which a court of equity will

13 Colo. 552, 22 Pac. 951; Pritchard v. Todd, 38 Conn. 413; Clower v. Odwin, 140 Ga. 128, 78 S. E. 714; Khalter v. Roach, 142 Ga. 344, 82 S. E. 1059; Hanna v. Ratekin, 43 Ill. 1059; Linton v. Potts, 5 Blackf. 396; Nett v. Welch, 25 Ind. 140, 87 Am. Dec. 354; Brown v. Ward, 110 Iowa, 81 N. W. 247; Tyler v. Onsts, 93 Ill. 331, 20 S. W. 256; Watson v. El, 139 La. 375, 71 So. 585; Linscott v. Buck, 33 Me. 530; Diamond v. Ver, 114 Md. 643, 80 Atl. 217; Verse v. Blumrich, 14 Mich. 109, 31 Am. Dec. 230; Munro v. Edwards, 14 Mich. 91, 48 N. W. 689; Libby v. Ay, 98 Minn. 366, 108 N. W. 299; s v. Loggins, 37 Miss. 546; Langan v. hummel, 24 Neb. 265, 38 N. W. 100; Pennock v. Ela, 41 N. H. 189, 191; an v. McCulloch, 46 N. J. Eq. 11, 10 Atl. 822; Leaird v. Smith, 44 N. Y. 100; Day v. Hunt, 112 N. Y. 191, 19 S. E. 414; Scarlett v. Hunter, 3 Jones, 84; Brock v. Hidy, 13 Oh. St. 306; Light-Blodgett Co. v. Astoria Co., 45 Pac. 224, 77 Pac. 599; Sylvester v. a, 132 Pa. 467, 19 Atl. 337; White v. Atterson, 139 Pa. 429, 21 Atl. 360; Case Threshing Mach. Co. v. sworth, 28 S. Dak. 432, 134 N. W. 100; Craig v. Leiper, 2 Yerg. 193, 24 Dec. 479; Farris v. Bennett, 26 S. E. 568; Smith's Ex'x v. Profit's Ex'rs, 82 Va. 832, 1 S. E. 67; Durand v. ege, 11 Wis. 151.

This was so held where the seller sought enforcement of the contract in *Ed v. Collett*, 4 Bro. C. C. 469; *Wrighton v. Wheeler*, 4 Ves. 686; *St v. Homfray*, 5 Ves. 818; *Macdonald v. Weekes*, 22 Beav. 533; *Bank v. Columbia v. Hagner*, 1 Pet. 455, 7 S. E. 219; *McKay v. Carrington*, 1 S. E. 50; *Harding v. Olson*, 177 Ill. 100; *52 N. E. 482*; *Johnson v. Burdett*, 7 Kan. App. 134, 53 Pac. 87;

*Smith v. Cansler*, 83 Ky. 367; *Richmond v. Gray*, 3 Allen, 25; *Williams v. Hart*, 116 Mass. 513; *Strater v. Flynn* (N. J. Eq.), 91 Atl. 591; *Begen v. Pettus*, 144 N. Y. App. D. 476, 129 N. Y. S. 218; *Blackwell v. Ryan*, 21 S. C. 112; *Christian v. Cabell*, 22 Gratt. 82; *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, and where the buyer was plaintiff. *Spurrier v. Hancock*, 4 Ves. 667; *Carter v. Dean of Ely*, 7 Sim. 211; *Walker v. Jeffreys*, 1 Hare, 341; *Levy v. Stogdon*, [1899] 1 Ch. 5; *Wallace v. Hesslein*, 29 Can. s. c. 171; *Brashier v. Gratz*, 6 Wheat. 528, 5 L. Ed. 322; *Stewart v. Allen*, 47 Fed. 399; *Gentry v. Rogers*, 40 Ala. 442; *Henderson v. Hicks*, 58 Cal. 364; *Knox v. Spratt*, 23 Fla. 64, 6 So. 924; *Hawkins v. Studdard*, 136 Ga. 727, 71 S. E. 1112; *Hoyt v. Tuxbury*, 70 Ill. 331; *Wolfe v. Bradberry*, 140 Ill. 578, 30 N. E. 665; *Hatch v. Kizer*, 140 Ill. 583, 30 N. E. 605; *Morse v. Seibold*, 147 Ill. 318, 35 N. E. 369; *Brown v. Ward*, 110 Iowa, 123, 81 N. W. 247; *Williams v. Starke*, 2 B. Mon. 196; *Logan v. Bull*, 78 Ky. 607; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Ely v. McKay*, 12 Allen, 323; *Cook v. Stafford*, 86 Mich. 163, 48 N. W. 785; *Northrup v. Stevens*, 39 Minn. 105, 38 N. W. 810; *Holingren v. Piete*, 50 Minn. 27, 52 N. W. 286; *Wolf v. Great Falls Water, etc., Co.*, 15 Mont. 49, 38 Pac. 115; *Eastman v. Plumer*, 46 N. H. 464; *Johnson v. Somerville*, 33 N. J. Eq. 152; *Finch v. Parker*, 49 N. Y. 1; *Delevan v. Duncan*, 49 N. Y. 485; *Huntington v. Titus*, 50 N. Y. App. Div. 468, 64 N. Y. S. 58; *Love v. Welch*, 97 N. C. 200, 2 S. E. 242; *Holden v. Purefoy*, 108 N. C. 163, 12 S. E. 848; *Kirby v. Harrison*, 2 Oh. St. 326, 59 Am. Dec. 677; *Campbell v. Hicks*, 19 Oh. St. 433; *DuBois v. Baum*, 46 Pa.

permit and still enforce the contract at suit of the party in fault will vary according to the equities of the particular case, both extrinsic to the contract, and involved in the contract itself. Thus where a contract by its terms made time of the essence against one party, the other party will not be allowed the benefit of long delay in performance of his obligations.<sup>89</sup> There is no doubt, moreover, that if possession has not been given to the purchaser, the parties may by their agreement make time essential. This may be done in express terms, or as a necessary construction of the conditions of the contract. If an executory contract to buy and sell real estate created, as is sometimes said, a relation like that of mortgagor and mortgagee, such provisions would have as little effect as provisions for the strict enforcement of a mortgage according to its literal language, and such was Lord Thurlow's opinion.<sup>90</sup> But the law is generally settled to the contrary, and if time is made essential by the agreement, neither the vendor,<sup>91</sup> nor the purchaser<sup>92</sup> can enforce the contract specifically after

537; *Miller v. Henlan*, 51 Pa. 265; *Smith's Heirs v. Christmas*, 7 Yerg. 565; *Eppinger v. McGreal*, 31 Tex. 147; *Anthony v. Leftwich's Representatives*, 3 Rand. 238; *Williams v. Williams*, 50 Wis. 311, 6 N. W. 814.

<sup>89</sup> *Harding v. Olson*, 177 Ill. 298, 52 N. E. 482; *Thomas v. Seaman*, 275 Ill. 267, 114 N. E. 40.

<sup>90</sup> *Williams v. Thompson*, *Newlands Contracts* (Phila. ed.), 238; *Gregson v. Riddle*, *id.* 239.

<sup>91</sup> *Seyton v. Slade*, 7 Ves. 264, 269; *Levy v. Lindo*, 3 Mer. 81, 84; *Boehm v. Wood*, 1 J. & W. 419; *Withy v. Cottle*, T. & R. 78; *Hipwell v. Knight*, 1 Y. & C. Ex. 401; *Roberts v. Berry*, 3 De G. M. & G. 284 (affirming s. c. 16 Beav. 31); *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280; *Woodruff v. Semi-Tropic Co.*, 87 Cal. 275, 25 Pac. 354; *Westerman v. Means*, 12 Pa. 97; *Rugg v. Midland Realty Co.*, 261 Pa. 453, 104 Atl. 685.

<sup>92</sup> *Hearne v. Tenant*, 13 Ves. 287; *Honeyman v. Marryat*, 21 Beav. 14;

*Barclay v. Messenger*, 43 L. J. Ch. 449; *Kentucky Distilleries, etc., Co. v. Warwick Co.*, 109 Fed. 280, 48 C. C. A. 363; *Grey v. Tubbs*, 43 Cal. 359; *Bennett v. Hyde*, 92 Cal. 131, 28 Pac. 104; *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 123 Pac. 363; *Smith v. Post*, 167 Cal. 69, 138 Pac. 705; *Coyle v. Kierski* (Del. Ch.), 89 Atl. 598; *Watkins v. Hendricks*, 137 Ga. 330, 73 S. E. 581; *Shortall v. Mitchell*, 57 Ill. 161; *Turn Verein Eiche v. Kionka*, 255 Ill. 392, 99 N. E. 684, 43 L. R. A. (N. S.) 44; *Carter v. Walters*, 91 Ia. 727, 59 N. W. 201; *Auxier v. Taylor*, 102 Ia. 673, 72 N. W. 291; *Missouri River, Fort Scott, etc., R. Co. v. Brickley*, 21 Kan. 275; *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405, 71 N. E. 793; *Smith & Rice Co. v. Canady*, 213 Mass. 122, 99 N. E. 968; *Hollmann v. Conlon*, 143 Mo. 369, 45 S. W. 275; *Glass v. Rowe*, 103 Mo. 513, 15 S. W. 334; *Bradley v. Union Pac. R. Co.*, 76 Neb. 172, 107 N. W. 238; *Collins v. Delaney Co.*, 71 N. J. Eq. 320, 64

the agreed day if it is then still wholly executory on both sides; and even though the contract makes no such provision, one party may by serving notice on the other requiring him to perform within a stated reasonable time, make such performance a condition of his own further liability.<sup>93</sup> The effect

Atl. 107; *Wells v. Smith*, 7 Paige, 22, 31 Am. Dec. 274; *Brewer v. State of Connecticut*, 9 Oh. 189; *Reed v. Breeden*, 61 Pa. 460; *Axford v. Thomas*, 160 Pa. 8, 28 Atl. 443; *Williams v. McManus*, 90 S. C. 490, 78 S. E. 1038; *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884. The fact that the contract expressly states that time is of the essence is not conclusive. Other provisions of the contract may be so inconsistent with this as to lead to the conclusion that time is not essential. *Phillis v. Gross*, 32 S. Dak. 438, 143 N. W. 373.

<sup>93</sup> The purchaser's right to do this was recognized in *Taylor v. Brown*, 2 Beav. 180, 183; *King v. Wilson*, 6 Beav. 124 (one week too short); *Benson v. Lamb*, 9 Beav. 502 (10 days); *Southcombe v. Bishop*, 6 Hare, 213 (2 months); *Nokes v. Kilmorey*, 1 De G. & Sm. 444 (6 months); *Macbryde v. Weekes*, 22 Beav. 533 (1 month); *Nott v. Ricard*, 22 Beav. 307; *Wells v. Maxwell*, 32 Beav. 408, affirmed 33 L. J. Ch. 44 (1 month too short); *Lee v. Soames*, 36 W. R. 884, 885 (1 week); *McMurray v. Spicer*, 5 Eq. 527 (1 week too short); *Harding v. Olson*, 177 Ill. 298, 52 N. E. 482; *Mansfield v. Wiles*, 221 Mass. 75, 83; *Schmidt v. Reid*, 132 N. Y. 108, 30 N. E. 373 (3 days); *Darrow v. Cornell*, 30 N. Y. App. D. 115; *Clarno v. Grayson*, 30 Or. 111, 121, 46 Pac. 426. The vendor's similar right was recognized in *Pegg v. Wisden*, 16 Beav. 239 (6 weeks too short); *Crawford v. Toogood*, 13 Ch. D. 153 (35 days too short); *Green v. Sevin*, 13 Ch. D. 589 (3 weeks too short); *Howe v. Smith*, 27 Ch. D. 89; *Henderson v. Hicks*, 58 Cal.

364; *Asia v. Hiser*, 38 Fla. 71, 80, 20 So. 796; *Chabot v. Winter Park Co.*, 34 Fla. 258, 15 So. 756 (40 days); *Burkhalter v. Roach*, 142 Ga. 344, 82 S. E. 1059; *Lang v. Hedenburg*, 277 Ill. 368, 115 N. E. 566 (three weeks sufficient, but time was of the essence); *Presser v. Hildenbrand*, 23 Iowa, 483; *Fuller v. Hovey*, 2 All. 324, 79 Am. Dec. 782; *Thaxter v. Sprague*, 159 Mass. 397, 398, 34 N. E. 541; *Myers v. DeMier*, 52 N. Y. 647; *Campbell v. Hicks*, 19 Oh. St. 433; *Knott v. Stephens*, 5 Ore. 235, 241.

In *Augusta Factory v. Mente & Co.*, 132 Ga. 503, 64 S. E. 553, 557, the court said: "If time was not of the essence originally, still the vendor did not have the right indefinitely to postpone compliance, and when the vendees, after a considerable delay, fixed a definite time in advance within which delivery would have to be made, and notified the vendor of that fact, if the time set was reasonable, it was incumbent on the vendor to meet such reasonable demand; and, if it failed to do so, the vendees were authorized to treat such failure as a breach of the contract. In *Parkin v. Thorold*, 16 Beav. 59, Sir John Romilly, Master of the Rolls, said (on page 71): 'It is, I consider, the undoubted law of this court, that although time was not originally an essential part of the contract, still that either party may, by a proper notice, bind the other party to complete within a reasonable time to be specified in such notice; and if the party receiving such notice do not complete within the time so specified, equity will not enforce a specific performance of the contract, but leave the

of possession and part performance by the purchaser of a contract for the sale of real estate, where time is made of the essence, has been considered in another connection with reference to the seller's right to withhold the land and for partial payments of the price.<sup>94</sup>

### § 853. Time is of the essence in equity in a contract of option

In a contract of option the party giving the option protects himself only by a condition. There is no obligation on the other side to perform. The question here, therefore, is one of condition implied in law but of an express condition which must be strictly performed in order to hold the promisee liable. Accordingly the party entitled to the option must offer performance in accordance with its terms within the time fixed in order to obtain a right to equitable relief.<sup>95</sup>

parties to their remedies and their liabilities at law.' See also, *Ellis v. Bryant*, 120 Ga. 890, 894, 48 S. E. 352, and authorities cited in note to *Johnson v. Evans*, 8 Gill, 155, 50 Am. Dec. 669, 678, 679, and in note to *Jones v. Robbins*, 50 Am. Dec. 600."

<sup>94</sup> See *supra*, § 791.

<sup>95</sup> *Joy v. Birch*, 4 Cl. & F. 57, 89; *Brooke v. Garrod*, 2 De G. & J. 62; *Weston v. Collins*, 34 L. J. Ch. 353; *Austin v. Tawney*, 2 Ch. App. 143; *Nicholson v. Smith*, 22 Ch. D. 640; *Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479, 12 Sup. Ct. 646; *Kelsey v. Crowther*, 162 U. S. 404, 40 L. Ed. 1017, 16 Sup. Ct. 808; *Martin v. Morgan*, 87 Cal. 203, 25 Pac. 350, 22 Am. St. Rep. 240; *Byers v. Denver Circle R. Co.*, 13 Colo. 552, 557, 22 Pac. 951; *Roberts v. Norton*, 66 Conn. 1, 33 Atl. 532; *Durant v. Comegys*, 3 Idaho, 204, 28 Pac. 425, 35 Am. St. Rep. 267 (see also *Virginia Min. Co. v. Hæder*, (Idaho, 1919), 181 Pac. 140); *Longfellow v. Moore*, 102 Ill. 289; *Crandall v. Willig*, 166 Ill. 233, 44 N. E. 755; *Dikeman v. Sunday Creek Coal Co.*, 184 Ill. 546, 56 N. E. 864; *Jones v. Noble*, 3 Bush, 694; *Stembridge v.*

*Stembridge's Adm'r* 87 Ky. 9; *S. W.* 611; *Smith v. Howard*, 32 L. Rep. 211, 105 S. W. 411; *Cole v. Applegarth*, 68 Md. 21, 11 Atl. Carter v. Phillips, 144 Mass. 100 N. E. 500; *Steele v. Bond*, 32 Minn. 18 N. W. 830; *Glass v. Rowe*, 103 513, 15 S. W. 334; *Hollmann v. C* lon, 143 Mo. 369, 45 S. W. 275; *P v. Whitehead*, 20 N. J. Eq. 55; *Ke Purdy*, 51 N. Y. 629; *Willis v. For* Busbee Eq. 256; *Longworth v. I* chell, 26 Oh. St. 334; *Mitchel* Probst (Okl.), 152 Pac. 597; *Clarr* Grayson, 30 Oreg. 111, 124, 46 426; *Patchin v. Lamborn*, 31 Pa. Barnes v. Rea, 219 Pa. 279, 285 Atl. 836; *Barnes v. Rea*, 219 Pa. sub nom. *Barnes v. Hustead*, 68 839; *Killough v. Lee*, 2 Tex. Civ. 260, 21 S. W. 970; *Sowles v. Hall* Vt. 247, 20 Atl. 810; *Olsen v. North* S. S. Co., 70 Wash. 493, 127 Pac. cf. *Davis v. Godart*, 131 Minn. 154 N. W. 1091, where a purchaser given a right "to relinquish the land the end of one year" and to rec back the price. The vendee gave notice that he desired to exercise privilege twelve days after the l



#### 54. Time is of the essence even in equity if the property is of speculative or fluctuating value.

Time may become of the essence of a contract in equity only by the express terms of the parties but from the very nature of the property. Mineral property requires the parties interested in it to be vigilant and active in asserting their rights.<sup>96</sup>

Whether property of fluctuating value is subject to the same rule.<sup>97</sup> So the general character of a contract may indicate

the year. A majority of the court held that the vendee had no right to rescind until the end of the year and was not entitled to a reasonable time therefor, and that twelve days' delay was unreasonable. See comment on the decision in 14 Mich. L. Rev. 420.

*Huxham v. Llewellyn*, 28 L. T. 577; *Waterman v. Banks*, 144 N. D. 394, 36 L. Ed. 479, 12 S. C. Rep. 236; *Olympia Min. &c. Co. v. Kerns*, 135 Pac. 255, aff'd 236 U. S. 211, 35 Sup. Ct. 415, 59 L. Ed. 539; *Skookum Oil Co. v. Thomas*, 162 Pac. 363.

*Lewis v. Lechmere*, 10 Mod. 503 (sea stock); *Seaton v. Mapp*, 111 L. R. 556 (public house as a going concern); *Nokes v. Kilmorey*, 1 De G. & J. 444 (land desired for immediate building); *Day v. Luhke*, 5 Eq. 336 (public house); *Claydon v. Green*, 3 C. P. 511 (public house); *Les v. Gale*, 7 Ch. 12 (public house); *Doloret v. Rothschild*, 1 S. & W. 90 (government stock); *Coslake v. Hill*, 1 Russ. 376 (public house); *Re Banner*, 15 L. J. Ch. 227 (rent—payment required to protect *Glasbrook v. Richardson*, 23 W. R. 342 (trade property); *Patrick v. Milne*, 2 C. P. D. 342, 348 (reversionary interest in stock); *Weston v. Savage*, 1 Ch. D. 736, 741 (public house); *Re League*, 62 Fed. R. 654, 2 C. C. A. 571 (lands fluctuating in value); *Kentucky Distilleries, etc., Co. v. Warwick Co.*, 109 Fed.

280, 48 C. C. A. 363 (property fluctuating in value); *Telegraphphone Corp. v. Canadian Telegraphphone Co.*, 103 Me. 444, 69 Atl. 767 (patent); *Goldsmith v. Guild*, 10 Allen, 239 (land in war time, when gold fluctuated greatly); *Hawley v. Jelly*, 25 Mich. 94 (property likely to advance greatly because of expected public improvement); *King v. Ruckman*, 20 N. J. Eq. 316 (fluctuating property); *Howell's Estate*, 224 Pa. 415, 420, 73 Atl. 445 (bonds of fluctuating value). In *Kentucky Distilleries, etc., Co. v. Warwick Co.*, 109 Fed. 280, 48 C. C. A. 363, there was in suit a contract for the sale of distillery property and a large quantity of whiskey, the latter constituting two-thirds in value of the entire property sold. The contract provided that a conveyance of the realty should be placed in the hands of a trust company, to be delivered to the purchaser on payment "of the consideration herein set forth for properties to be delivered, provided the said consideration is paid to said trust company on or before March 10, 1899." It was held, that in view of the nature of the greater part of the property, which was a marketable commodity, and at the time fluctuating in value, such provision must be construed as making time of the essence of the contract, and the seller could not be compelled to perform specifically where the purchase money was not paid to the trust company until April

### § 857. Hour of performance.

The early rule of the common law in regard to the hour of performance was thus stated by Baron Parke:<sup>10</sup> "A party who is by contract to pay money, or to do another thing *transitory, i. e.,*—anywhere—on a certain day, or on one of several days, has the whole of that day, or of all of the days respectively, for performance. He must find the other party at his peril,<sup>11</sup> and within the time limited, if the other be within the four seas,<sup>12</sup> and must do all that without the concurrence of the other he can do, and at a convenient time, having regard to the nature of the act, *before midnight*. 'Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. . . . But where the thing to be done is to be performed *at a certain place* on or before a certain day to another party to a contract, there the tender must be to the other party *at that place*;' and as the attendance of that party at that place is necessary to complete the act, the law fixes a particular part of the day for his presence, and 'it is enough if he be at the place at such a convenient time *before sunset* on the last day as that the act may be completed by daylight.' But this being a rule made only for the convenience of both parties, 'if it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, the tender is good.'" <sup>13</sup> These rules though still sometimes quoted <sup>14</sup> must be accepted with

waived and the time for performance will be deemed to have been extended for a reasonable time. *King v. Radeke*, 175 Ill. 72, 51 N. E. 698; *Moline Malleable Iron Co. v. McDonald*, 38 Ill. App. 589." See also *infra*, § 868.

<sup>10</sup> *Startup v. Macdonald*, 6 M. & G. 593.

<sup>11</sup> Citing *Kidwelly v. Brand*, [1551] Plowden, 69, 71.

<sup>12</sup> Citing *Shep. Touch.* 136.

<sup>13</sup> Citing 7 Bac. Abr. 529; "Tender,"

D.; Co. Litt. 202a, 211; 5 Co. Litt. 114; Cro. Eliz. 14.

<sup>14</sup> In *Hall v. Whittier*, 10 R. I. 534. The court said: "Where a contract is to be performed on a certain day and at a certain place, the time of performance is the last convenient hour of the day for transacting the business; usually, that is, say, such convenient time before sunset as that the act may be completed by daylight. This rule is established for the convenience of both parties."

some qualification. One who is subject to a unilateral obligation maturing on a certain day may undoubtedly discharge that obligation at any reasonable hour of the day. What is a reasonable hour of the day is a question of fact largely dependent upon business custom; but generally where all that is required of the other party is to receive a payment or performance which can readily be accepted, it seems probable that any hour when the debtor could find the creditor would be reasonable for that purpose. In case of goods which were bulky or needed special care, an hour might be unreasonable, however, which would not be so for an ordinary payment of small sum of money.<sup>15</sup> Where the question is not merely one of tender but also of demand, reasonableness will depend on the justifiable expectation that the hour is reasonable for giving as well as receiving. By the custom of merchants in the case of negotiable paper it is the obligation of the party primarily liable to pay on presentment at any reasonable hour on the day of maturity. By this custom, therefore, if a note presented to the maker at 9 o'clock in the morning and payment is not then made, it is dishonored. This custom is so well recognized by the law that after such a presentment notice of dishonor may be given immediately to parties secondarily liable.<sup>16</sup> For the purpose of bringing suit, however, the custom

at neither may be compelled, unnecessarily, to attend during the whole day. Earlier in the day, therefore, either party can discharge himself in the absence of the other by being present and ready to perform; though, if both parties are earlier present, a tender and refusal then will be as effectual as at a later hour. *Wade's Case*, 5 Co. 114; *Lancashire v. Killingworth*, 12 Mod. 530; s. c. 1 Ld. Raym. 66; *Hammond v. Ouden*, 12 Mod. 11; *Rutland v. Hodgson*, 2 Str. 777; *Snickler v. Prentice*, 4 Taunt. 549; *Boe v. Paul*, 3 C. & P. 613; *Acocks v. Phillips*, 5 H. & N. 183, and note; *Evary v. Goe*, 3 Wash. (C. C.) 140; *Wernan v. Napier*, 5 Yerg. 410; *Alrich v. Albee*, 1 Greenl. 120, 10 Am. Dec. 45. A tender, however, which

is made after sunset, will be sufficient if the party to receive is present, but after sunset, the absence of either party is not a default. *Startup v. Macdonald*, 6 M. & G. 593; *Sweet v. Harding*, 19 Vt. 587."

<sup>15</sup> *Croninger v. Crocker*, 62 N. Y. 151. The American Uniform Sales Act, Sec. 43 (4) (see *infra*, § 956) provides that demand or tender may be treated as ineffectual unless made at a reasonable hour, and that what is a reasonable hour is a question of fact.

<sup>16</sup> *Ex parte Moline*, 19 Ves. 216; *Clowes v. Chaldecott*, 7 L. J. K. B. 147; *Bussard v. Levering*, 6 Wheat. 102, 5 L. Ed. 215; *Lindenberger v. Beall*, 6 Wheat. 104, 5 L. Ed. 216; *Curry v. Bank of Mobile*, 8 Port. 360; *McFarland v. Pico*, 8 Cal. 626; *Farmers' Bank*

of merchants is not uniformly followed. In some States it is true that it is held a suit may properly be brought against the maker or acceptor after demand made at any reasonable hour on the day of the maturity and refusal of payment. A contrary view, however, has been accepted in England and several States.<sup>18</sup> Though this rule seems opposed to the custom of merchants in regard to negotiable paper, it undoubtedly expresses the rule of the common law as to conditional obligations. Consequently, where a demand is to be made under such an obligation by a creditor upon a debtor, a refusal in case of concurrent conditions where a conditional tender is made, a refusal to perform at the beginning of the day does not necessarily involve a breach of duty, or serve as an excuse for a further conditional tender later in the day. It is held that a total refusal ever to perform or to perform at any hour of that day would excuse a further tender, but so would such a statement if made on a previous day; and in either case unless the refusal had been acted on, it might be withdrawn at any time prior to the last convenient hour of the day of maturity.<sup>19</sup> Until then there is no default. What is a reasonable hour and what is the last reasonable hour of the day are questions of fact,<sup>20</sup> and doubtless vary according to the nature of the business.<sup>21</sup>

*v. Duvall*, 7 Gill & J. 78; *Widgery v. Munroe*, 6 Mass. 449; *Shed v. Brett*, 1 Pick. 401, 11 Am. Dec. 209; *Gilbert v. Dennis*, 3 Met. 495, 38 Am. Dec. 329; *Smith v. Little*, 10 N. H. 526; *Manchester Bank v. Fellows*, 28 N. H. 302; *Corp v. M'Comb*, 1 Johns. Cas. 328; *Etheridge v. Ladd*, 44 Barb. 69; *Lawson v. Farmers' Bank*, 1 Oh. St. 206; *Coleman v. Carpenter*, 9 Barr, 178, 49 Am. Dec. 552; *Haslett v. Ehrick*, 1 N. & McC. 116; *Garland v. West*, 9 Baxter, 315; *Thorpe v. Peck*, 28 Vt. 127.

<sup>17</sup> *Holland v. Clark*, 32 Ark. 697; *Heise v. Bumpass*, 40 Ark. 545; *Veazie Bank v. Winn*, 40 Me. 62; *Church v. Clark*, 21 Pick. 310; *Staples v. Franklin Bank*, 1 Mete. 43, 35 Am. Dec. 345; *Fletcher v. Thompson*, 55 N. H. 308;

*McKensie v. Durant*, 9 Rich. 61; *Man v. Ewing*, 4 Humph. 241. also *infra*, § 1173.

<sup>18</sup> *Kennedy v. Thomas*, [1890] Q. B. 759; *McFarland v. Pico*, 8 Cal. 626; *Davis v. Eppinger*, 18 Cal. 79 Am. Dec. 184; *Smith v. Aylesworth*, 40 Barb. 104; *Osborn v. Monckton*, Wend. 170; *Coleman v. Carpenter*, Barr, 178, 49 Am. Dec. 552.

<sup>19</sup> See extract from *Hall v. Whitcomb*, 10 R. I. 530, 534, quoted *supra*.

<sup>20</sup> This is so provided in the Uniform Sales Act, Sec. 43 (4). Taken from Sec. 29 (4) of the English Sale of Goods Act.

<sup>21</sup> *Lancashire v. Killingworth*, Mod. 530; s. c. 1 Ld. Raym. 686; *land v. Hodgson*, 2 Str. 777; *Whittier*, 10 R. I. 530, 534.

### 8. Partly bilateral contracts.

contract which consists of a promise on one side which given in consideration both of a promise and of some performance on the other side, may be called a partly bilateral contract. It is in effect like a wholly bilateral contract which has been partly performed on one side. It has been urged that in a partly bilateral contract the performance of the promise on one side and on the other are obviously not an equivalent exchange for one another, and that therefore the contract fails for implying conditions.<sup>22</sup> It is of course true that the performance of the promises cannot be regarded as equivalent to one another, but the performance of one promise is really clearly the equivalent of the performance of the other promise plus the performance rendered when the contract was entered into. There can be no difference in principle between a case where part of the exchange of equivalents contemplated by the parties is made at the inception of the contract, and the case where similar performance is made wholly after its inception. In both cases a party to a proposed exchange of equivalents has received something—much or little—and has given nothing. It is as true in cases of partly bilateral contracts as in the case of wholly bilateral contracts, that the parties contemplate an exchange of equivalents, and though part performance on one side is given as consideration at the outset. Therefore, there would be the same value of consideration if either party were allowed to obtain the performance due him while failing to give the performance due the other side. It cannot be doubted that American courts at least would hold an essential breach by the plaintiff fatal to his cause of action.<sup>23</sup> As in the case of a wholly bilateral contract partly performed, what amounts to an essential breach inevitably becomes a question of degree.

### 9. Mutual debts do not cancel one another.

In the Civil Law the smaller of two mutual debts extin-

Langdell, *Summ. Cont.*, §§ 109-110. Contracts were held dependent in *Allen v. Sanders*, 7 B. Mon. 593; *Jones v. Marsh*, 22 Vt. 144.

guishes *pro tanto* the larger without judicial action.<sup>24</sup> is not true in the Common Law.<sup>25</sup>

That cross debts do not cancel one another is shown in instance, by the fact that where there are cross debts the lapse of time may bar recovery of one and leave the other still enforceable; and if one of the claims thus becomes barred it cannot be asserted as a set-off in an action on the unbarred claim;<sup>26</sup> though a claim thus barred is recognized by the law as still an existing, if unenforceable right.<sup>27</sup> In order that a claim shall cancel a cross-claim *pro tanto*, it must not only be pleaded by way of set-off or counterclaim or recoupment, but judgment must be rendered for the difference between the two claims. From this it follows not only that a failure of a party to pay one debt or to perform one contract does not give the injured party no right to the injured party to refuse to pay another debt or to perform a separate contract, and that, therefore, in instance a conditional sale or mortgage is broken by non-payment though the creditor owes the debtor on another

<sup>24</sup> It was an axiom in the later Roman law that set-off took place *ipso jure*. The meaning of this was disputed; one school maintaining that without any act of the parties the set-off took place at the instant of the co-existence of the two debts; the other school contending such cancellation took place only when asserted by one of the parties. Dernburg, *Compensation* (2d ed.), 283. The former view finds expression in the French Civil Code, Art. 1290. Even under the latter view, the assertion of a party, not a decree of court, is all that is necessary for cancellation. See Swiss Code of Obligations, Arts. 122-124. Under the German Civ. Code it is necessary that the claims shall have arisen out of the same legal relation. Bürg. Gesetzbuch, § 273.

<sup>25</sup> In *Searles v. Sadgrave*, 5 El. & Bl. 639, to an action for money had and received, the defendant pleaded a tender of a certain sum, and the defendant made replication that a larger entire sum was due from the defend-

ant. To this the defendant replied that the plaintiff was indebted to the defendant in a sum equal to the sum of the larger sum except the sum which had been tendered. (Overruling the rejoinder was held.) See also *Phillpotts v. Clifton*, 10 Q. B. 135; *L'Hommedieu v. The H. I. Co.*, 38 Fed. 926; *Cotton v. Scott*, Ala. 447, 12 So. 65; *Faylor v. Faylor*, 7 Ind. App. 551, 34 N. E. 833; *v. Harris*, 83 N. C. 496; *Persing v. Feinberg*, 203 Pa. 144, 52 A. 2d 11; *Greenhill v. Hunton* (Tex. Civ. App.), 69 S. W. 440. But see *Smith v. Smith*, 38 Mich. 393.

<sup>26</sup> *Harwell v. Steele*, 17 Ala. 17; *McFaddin v. Bice*, 58 Colo. 17; *Pac.* 244; *Gilchrist v. Williams*, 10 A. K. Marsh. 235; *Nolin v. Blair*, 31 N. J. L. 170; *Hinkley v. Watts*, 8 Watts, 260; *Taylor v. Gould*, Pa. 152; *Verrier v. Guillou*, 97 N. H. 210; *Turnbull v. Strohecker*, 4 M. 210; *Trimyer v. Pollard*, 5 N. H. 460.

<sup>27</sup> See *infra*, § 2002.

count a greater amount than that due him,<sup>28</sup> but also that here under a contract an absolute debt has arisen, failure to perform an independent promise even in the same contract affords no excuse for non-payment of the debt.

A business man doubtless assumes that when he has a claim against one who also has a claim against him, that he need pay only the difference between the amounts of the two obligations. As a practical matter he would generally be foolish to pay in full the debt which he owes and to trust to his ability to collect later his own claim; for all that can happen to him is that he may be sued, and if sued for the full amount of his debt he can set up his cross claim by set-off or counterclaim or recoupment, at any rate if the claims are liquidated or arise out of the same transaction. Where, however, the existence of some right is dependent on the payment of a debt, such a course as that suggested is dangerous. As the debts do not cancel one another, even *pro tanto*, the full obligation must be satisfied in order to perform the condition which the existence of the right in question depends. Thus it seems that where rent is due under a lease, the tenant must pay the rent even though he has been obliged to spend money on repairs which the landlord had covenanted to make. It is true that if sued for the rent he would in most jurisdictions now be allowed to recoup or counterclaim the damages due from the landlord, but the landlord may not merely sue for the rent. If the lease or a statute, as is usually the case, allows the landlord to eject a tenant for the non-payment of his rent the landlord may pursue this remedy, and it cannot be said that the tenant has paid or tendered the rent due, if he has deducted even a valid cross claim.<sup>28a</sup> So in a divisible contract, a debt has arisen for one instalment furnished to the buyer,

<sup>28</sup> *Doody v. Pierce*, 9 Allen, 141; *Benjamin v. Columbia Canal Co.*, 74 Wash. D. So a tender of his own overdue paper to a creditor is not equivalent to a tender of cash. *Hughes v. Dana*, 87 Mich. 190, 49 N. W. 542.  
<sup>28a</sup> See *Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560; 77 Pac. 4; *Hunter v. Porter*, 10 Ida. 4; *Faylor v. Brice*, 7 Ind. App.

551, 34 N. E. 833; *D'Armond v. Pullen*, 13 La. Ann. 137; *McGloy v. Ryan*, 27 Mich. 110; *Johnson v. Hoffman*, 53 Mo. 504; *Phillips v. Port-Townsend Lodge*, 8 Wash. 529, 36 Pac. 476; *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808. But see *Hexter v. Knox*, 63 N. Y. 561; 567; *New York Elev. R. Co. v. Manhattan R. Co.*, 63 How. Pa. 14.

he may not refuse to pay this because of a later default by the seller. If he does so, his failure to pay may operate as an excuse to the seller for refusing to continue performance. A contrary conception undoubtedly is popular and though it cannot be justified in view of the settled principle of Common Law, finds some slight support in decisions.<sup>30</sup>

In a number of cases against beneficiary associations it has appeared that by charter or custom, the society is entitled to apply in satisfaction of premiums due from the insured, a debt due to him and where this is the case it has generally been held that the society, having the power to pay itself, cannot elect not to do it, and declare the insurance forfeited for breach of a condition requiring payment of dues or assessments.<sup>31</sup> There is no conflict in such decisions with

<sup>30</sup> In *Rodgers v. Wise*, 106 Ark. 310, 153 S. W. 253, 254, the court stated with approval the earlier decision of *Harris Lumber Co. v. Wheeler Lumber Co.*, 88 Ark. 491, 496, 115 S. W. 168, 171, saying that there, "it was decided that where H contracted to sell to W 11 cars of lumber, and to ship same as fast as lumber accumulated upon vendor's yard, and that each car should be billed separately, and the purchase price for the lumber contained therein should be due 60 days after delivery, but W retained \$100, which was past due, to force H to ship the remainder, if 'H had not performed his contract in shipping the lumber as promptly as the contract required, and refused to ship any more lumber under it, W could have abandoned same and sued for damages for the breach; but W could not stand on the contract and insist on further shipments of lumber, where he was in default in making payments that were past due under it, at least without tendering those payments.'" See also *Freeth v. Burr*, L. R. 9 C. P. 208; *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84, 96, 37 N. E. 676, 679; *Chicago Washed Coal Co. v. Whitsett*, 278 Ill. 623, 116

N. E. 115 (cp. *Bradley v. King*, Ill. 339; *Hess v. Dawson*, 149 Ill. 138, 36 N. E. 557); *National Contracting Co. v. Vulcanite etc., Co.*, 192 Mo. 247, 255, 78 N. E. 414; *J. K. Arnold Co. v. Gray's Harbor Comm. Co.*, Oreg. 173, 123 Pac. 32, 36.

<sup>31</sup> This was so ruled in *Robertson v. Davenport*, 27 Ala. 574. In *Spencer etc., Co. v. O'Neill-Adams Co.*, Fed. 231, 107 C. C. A. 337, plaintiff was held not to have waived its right to sue for breach of a transportation contract by withholding security for damages a monthly instalment due the defendant thereunder, after it became manifest the defendant had broken the contract and intended to continue to do so. No authority is cited to support this conclusion. In *Burgie v. Hill*, 203 Fed. 340, 347, Ray, J., ruled that a buyer under an installment contract had a right to retain a payment due for an instalment already delivered because of failure to make another delivery. See also *Central Lumber Co. v. Arkansas Valley Lumber Co.*, 86 Kans. 131, 119 Pac. 1; *Hjorth v. Albert Lea Mach. Co.* (Minn. 1919), 172 N. W. 488.

<sup>32</sup> The cases are collected in



principle stated in this section. Unless, however, the party has the right by contract or custom to make the liquidation there seems no ground for excusing forfeiture. No more genuine exception exists in the law of bankruptcy. It seems to be true in England<sup>32</sup> and may be true in the United States that where one of two mutual debtors becomes bankrupt an actual cancellation *pro tanto* is effected by the bankruptcy and would take place though one or both of the debts were not matured, if they were provable claims. A banker, by virtue of his lien may without the aid of a court set off against his customer's deposit account, matured debts due from him.<sup>33</sup>

#### 10. General dependency and particular dependency.

A bilateral contract may consist of a promise on each side for one thing, or it may consist of several promises on either side on both sides. Whether a transaction is a single contract or several contracts depends not on the number of promises or the number of things promised, but on whether there has been a single expression of mutual assent to all the promises in one unit or whether the parties expressed their assent separately to the various promises. It may be assumed that if the promises, though more than one on each side, constitute but a single contract, there is a general dependency between all the promises on one side and all the promises on the other. That is, the performance of all the promises on one side must be regarded as the agreed equivalent for all the performances on the other side. Consequently a failure as to a material promise on one side will excuse continued performance on the other. Besides such general dependency there may be what may be called a particular dependency between separate performances on one side and on the other. That is, the performance of a promise on one side may by the terms of the agreement be set off as an equivalent to a corresponding performance on the other side, though these performances may

A. 605, note. See also Johnson v. Delity, etc., Co., 184 Mich. 406, 191 N. W. 593, L. R. A. 1916, A.

<sup>32</sup> *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434, 438.

<sup>33</sup> See Morse on Banks and Banking, § 324.

not be all the performances which the contract requires. There will be then a particular dependency between these promises of partial performance. A contract under which the whole performance is divided into two sets of partial performances, each part of each set being equivalent to a corresponding part of the set of performances to be rendered by the other promisor, is called a divisible contract. It is possible for a contract to be divisible as to one or more pairs of partial performances and yet be indivisible as to the rest.

### § 861. Divisible contracts—meaning of the term.

Some confusion has arisen from the inexact use of the terms "divisible contract" and "severable contract" on the one hand, and "entire contract" on the other. In an ordinary contract for the purchase and sale of goods, the buyer is bound to receive delivery of the goods in instalments. He is entitled to delivery of all the goods at the same time, and it may be added, is bound to receive delivery of all at the same time.<sup>34</sup> and the same principle is applicable to other promises which are capable of instantaneous performance. Similarly, a buyer has no right to pay the price in instalments. By agreement, however, either goods or other performances may be deliverable in instalments or the price payable in instalments, and this agreement need not be in express words.

<sup>34</sup> *Reuter v. Sala*, 4 C. P. D. 239. This rule is a necessary consequence of the fact that the buyer cannot be compelled to accept a smaller quantity than the contract specifies, for a buyer who accepts an instalment can never have any certainty that he will get the remainder of the goods. So the English Sale of Goods Act, Sec. 31, and the American Uniform Sales Act, Sec. 45.

<sup>35</sup> *Brandt v. Lawrence*, 1 Q. B. D. 344. The plaintiff had agreed to sell the defendant 9,000 quarters of oats by two contracts each for 4,500 quarters. The contracts contained the words "shipment by steamer, or steamers, during February." The

plaintiff shipped 4,511 quarters to answer his first contract and 1,139 quarters on the same steamer to answer in part his second contract and subsequently shipped enough oats to fulfill his obligations. The defendant refused to accept any of the oats on account of delay in shipment. The jury found that the first shipment was seasonable, but the second one too late. The court found the defendant liable, not only for failure to accept the 4,511 quarters in satisfaction of the first contract but also for his refusal of the 1,139 quarters in part satisfaction of his second contract. Although the defendant afterwards had made default

promise for continuing services or work necessarily must thus performed. But this does not create a divisible or severable contract.<sup>36</sup> The essential feature of such a contract is that a portion of the price is by the terms of the agreement set off against a portion of the performance and made payable for that portion, so that when part of the performance has been rendered a debt for that part immediately arises.<sup>37</sup> Where by the terms of a contract the performance is to be paid for at a certain rate so that the contract price for a portion of the performance can readily be calculated, it is still true that in the absence of an agreement to that effect, no part of the price is payable until the whole performance has been received.<sup>38</sup> It is essential not only that the price for a part can be calculated, but that expressly or impliedly there shall

be a second contract, at the time when the first contract was made. In *1,139 quarters* were tendered, there is no evidence that the buyer would completely perform the contract, and the terms of the contract were such that the buyer was bound to accept performance in instalments. See *Producers' Coke Co. v. Hillman*, 313, 90 Atl. 144, 145. *Bullard v. Eames*, 219 Mass. 49, 191 N. E. 584; *Waite v. Stanley*, 88 N. E. 407, 92 Atl. 633. In *Berlin Machine Works v. Miller*, 59 Wash. 572, 190 Pac. 422, the court achieved the remarkable result of holding a contract for two machines divisible though the price was a lump sum for the two. The court might perhaps have allowed recovery, as it did, for one of the machines, on the theory of a quasi-contractual obligation to pay for a benefit received, but it is obvious that where there is no promise to pay for a partial performance, divisibility is out of the question.

"The distinguishing mark of a divisible contract is that it admits of apportionment of the consideration on either side so as to correspond to an unascertained consideration on the other side. Where such a purpose appears in the contract, or is clearly

deducible therefrom, it is allowed great significance in ascertaining the intention of the parties. It is a mistake, however, to suppose that in every case it is conclusive in itself. It is determining only when there are no opposing signs or marks. Where these latter are present it becomes a question of preponderance." *Producers' Coke Co. v. Hillman*, 243 Pa. 313, 90 Atl. 144, 145. See also *Button v. Thompson*, L. R. 4 C. P. 330; *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 115 N. E. 42, 2 A. L. R. 678; *McGrath v. Cannon*, 55 Minn. 457, 57 N. W. 150; *Willis v. Jarrett Const. Co.*, 152 N. C. 100, 67 S. E. 265, and *infra*, § 1028.

<sup>36</sup> *Waddington v. Oliver*, 2 B. & P. N. R. 61; *Walt v. Gaba*, 160 Cal. 324, 116 Pac. 963; *Central Georgia Brick Co. v. Carolina Portland Cement Co.*, 136 Ga. 693, 71 S. E. 1048; *Laclede Construction Co. v. Tudor Iron Works*, 169 Mo. 137, 69 S. W. 384; *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 103 Atl. 417, 2 A. L. R. 685; *Seibert v. Dunn*, 216 N. Y. 237, 110 N. E. 447; *Shinn v. Bodine*, 60 Pa. 182, 100 Am. Dec. 560; *Keningsberger v. Wingate*, 31 Tex. 42, 98 Am. Dec. 512.

be a promise to pay for a part. Frequently a contract not state the intention of the parties in this respect, usage may be of importance in giving the contract a proper construction. Moreover, the right to require full performance before payment may be waived.<sup>39</sup> If the contract is divisible it must not be supposed for that reason that there is more than one contract. "Provisions as to shipping in different months and as to paying for each shipment upon its delivery do not split up the contract into as many contracts as there shall be shipments or deliveries of so many quantities." Similarly a contract for a year's service is not split up into twelve contracts by a provision that the employee is entitled to his pay in monthly instalments. The use of the words "entire" and "indivisible" and "divisible" has, however, not infrequently been confusing, for sometimes the words entire or indivisible are used as meaning that there is one contract as distinguished from several contracts, and at other times the words are used as meaning more than this, namely that there is a contract which is not divisible.<sup>41</sup> A divisible

<sup>39</sup> *J. K. Armsby Co. v. Gray's Harbor Commercial Co.*, 62 Or. 173, 123 Pac. 32, 36.

"Plaintiff further contends that it is not in default in payment for shipments, insisting that payments were not due until the whole amount of the particular shipping order was filled. If plaintiff intended to require the receipt of each shipping order in full before paying for any part of it, it should have refused to receive a partial shipment; but it accepted and used the shipments as received, without reference to the shipping order, and therefore was under obligations to pay for such as were so received. See *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84, 89, 37 N. E. 676."

<sup>40</sup> *Mersey Steel Co. v. Naylor*, 9 A. C. 434, 439; *Norrington v. Wright*, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A.

402; *Fullam v. Wright & Colton*, 196 Mass. 474, 82 N. E. 711; *Dence Coal Co. v. Cox*, 19 R. I. 582, 35 Atl. 210. The contrary expressed in *Hersog v. Purdy*, Cal. 99, 51 Pac. 27, holding that a separate price for different amounts made independent bargains and each is unsound. See also *W. v. Badger Motor Car Co.*, 99 Neb. 155 N. W. 891.

<sup>41</sup> An illustration of this error is the case of *Longfellow v. Huffman*, Or. 481, 104 Pac. 961. A buyer in default for failure to purchase the first instalment of a contract was nevertheless, entitled to recover on the seller's refusal to deliver the second instalment. The court accepted that there is excellent authority in support of its conclusion, but says the law in Oregon is settled otherwise. In support of the supposed difference the Oregon cases are cited to show that such a contract had been held "divisible."

tract, using that term properly, is always one contract and not several contracts. It differs in one respect only from other contracts—namely, that on performance on one side of each of its successive divisions, the other party becomes indebted for the agreed price of the division.<sup>42</sup>

### 32. When a contract will be construed as divisible.

In case of a contract naturally and accurately severable (such as a contract for the sale of a bill of goods at certain prices for each article), courts incline to hold the contract severable, and to grant a recovery for that portion of the goods actually delivered, less damages for the non-delivery of any portion not delivered. Under all ordinary circumstances this course will result in exact justice. The vendor will receive

"but in these cases the plaintiff is suing for the price of a divisible performance which the defendant had received. The term "divisible contract" seems to have been regarded by the court in the later case as necessarily implying several contracts. Perhaps a contract to serve for a year at a month, the court might not have thought that the fact that the servant could sue for the price of a month's service which had been rendered in spite of default in the remainder of the contract, proved that if the servant failed to perform services for the first month or for seven months, he could sue the employer for failure to accept his services for the remaining months. This suppositious case is, however, identical in principle with the case which the court had before it. Numerous decisions opposed to the position in the present case are collected *infra*, § 867. A contract is called "divisible" in *Wilcox v. Badger Motor Co.*, 99 N. W. 189, 155 N. W. 891, though the decision requires the conclusion that there were two separate contracts. Conversely in *Garon v. Credit Foncier Canadien*, 37 R. I. 273, 92 Atl. the court speaks of a transaction

as an "indivisible" contract when it means that there was but a single contract. In this case the terminology induced no error, but in fact though there was but a single contract, it was divisible. The terminology is the same in *Dunn v. T. J. Cannon Co.*, 51 Okla. 382, 151 Pac. 1167; *Jameson v. Board of Education*, 78 W. Va. 612, 89 S. E. 255, L. R. A. 1916 F. 926; *Edilson v. Joyce*, [1917] N. Zealand L. R. 648. Still another meaning is given to "entire" in *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516. Where a contractor undertakes the completion of a whole undertaking as building a house or a canal, as in *Boyle v. Agawam Canal Co.*, 22 Pick. 381, 33 Am. Dec. 749, and therefore becomes responsible for the whole work, there is a "contract of entirety." Where, however, as in the West Virginia case the contractor merely undertakes certain performances specified in the contract, if he does those things, he is not responsible for their failure to achieve the engineering result desired.

<sup>42</sup> See *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126, and *infra*, § 871.

pay for his goods which the vendee has retained, and the vendee will receive compensation for any damage which he has actually suffered." <sup>43</sup> "If, however, it appears by express or by necessary implication from the terms of a contract that the intention of the parties was to make payment of the consideration depend upon delivery of all the articles, the contract will be held entire, though the consideration may be measured in units and be actually severable." <sup>44</sup> A contract may be divisible if separate payment was by the contract to be made for several things, even though they were used together as parts of a completed whole. <sup>45</sup> The dif-

<sup>43</sup> *National Knitting Co. v. Bouton & Germain Co.*, 141 Wis. 63, 64, 123 N. W. 624. To the same effect see *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55; *Spring v. Slayden-Kirksey Woolen Mills*, 106 Ill. App. 579; *Aultman & Taylor Co. v. Lawson*, 100 Ia. 569, 69 N. W. 865; *Longfellow v. Huffman*, 55 Or. 481, 104 Pac. 961; *Gill v. Johnstown Lumber Co.*, 151 Pa. 534, 25 Atl. 120; *McLaughlin v. Hess*, 164 Pa. 570, 30 Atl. 491; *Brown v. Exeter Mach. Works*, 60 Pa. Super. 365, and cases cited.

<sup>44</sup> *National Knitting Co. v. Bouton & Germain Co.*, 141 Wis. 63, 64, 123 N. W. 624, citing *Goodwin v. Merrill*, 13 Wis. 658; *Shinn v. Bodine*, 60 Pa. St. 182, 100 Am. Dec. 560. The court added:—"Thus, when a contract required the delivery of 2,000 yards of crushed stone for the purpose of building a bridge, it was held to be entire, notwithstanding the payment was to be at a certain rate per yard. *Prautsch v. Rasmussen*, 133 Wis. 181, 113 N. W. 416. So contracts to tow a given quantity of logs at so much per thousand feet, and to carry 5,000 barrels of salt at so much per barrel, have been held entire, upon the idea that the terms of the contract, in the light of the surrounding facts, showed that the parties evidently intended to contract for one entire job,

and only used the unit of measurement of the consideration for convenience and not as indicating a contemplation of severability. *v. Lindsley*, 84 Wis. 644, 54 1017; *Warehouse & B. S. Co. v. 96 Wis. 523, 71 N. W. 804, 65 Rep. 57. See also Widman v. 104 Wis. 277, 80 N. W. 450. These cases may be added: *First Bank v. Perris Irrigation Dis. Cal. 55, 40 Pac. 45; Johnson v. feldt*, 106 Minn. 202, 118 N. W. 20 L. R. A. (N. S.) 1069; *Hayes v. Mayers*, 26 N. J. L. 284; *Kelly Co. v. Hackensack Brick Co.*, 9 L. 585, 103 Atl. 417, 2 A. L. J. 101; *Baker v. Higgins*, 21 N. Y. 397; *Tobias*, 26 N. Y. 217, 84 Am. D. 101; *Nightingale v. Eiseman*, 121 N. Y. 288, 24 N. E. 475; *Hochberg v. Contracting Co. v. F. & P. Auto Co. (N. Y. Misc.)*, 158 N. Y. 101; *Witherow v. Witherow*, 16 Oh. 101; *Easton v. Jones*, 193 Pa. 147, 101; *Producers Coal Co. v. 243 Pa. 313, 90 Atl. 144.**

<sup>45</sup> In *Reeves & Co. v. Block*, 60 Dak. 60, 139 N. W. 780, a contract for the sale of a threshing outfit, consisting of a separator, etc., was divisible, where the parties intended that each separate article was specified. The court said:

"The contract was divisible and the price at which each separate

determining whether a contract is divisible or not arises only when the contract specifies a rate of payment as so much a pound or a foot or a month, but does not in terms specify whether any payment shall be made before full performance has been rendered. The governing principle is the manifested intention of the parties in view of the nature of the contract and the usages of business<sup>46</sup>—that is, their intention to the performance of the contract in parts and have the performance of a part on one side the price or exchange of a corresponding part on the other. If payment of a lump sum is to be made for several articles, the contract is necessarily divisible.<sup>47</sup>

Contracts of service for a specified term are held severable when the wages or salary can be construed as payable at specified shorter periods, and generally the mere fact that a contract for the shorter period is stated seems enough to warrant such a construction.<sup>48</sup> There can be little doubt that such is

where it was sold was specified. *North v. Thresher Co. v. Mehlhoff*, 23 Cal. 476, 122 N. W. 428, 35 Cyc. 101; *Nichols & Shepherd Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 101 N. W. 41; *Westbrook v. Reeves*, 101 Iowa, 655, 111 N. W. 11." *Los Angeles Gas & Elec. Co. v. Gramated Oil Co.*, 156 Cal. 776, 101 Pac. 55; *Bamberger v. Burrows*, 101 Iowa, 441, 124 N. W. 333; *Crawford v. Surety Inv. Co.*, 91 Kans. 748, 101 Pac. 481; *Gilmore v. Samuels*, 101 Ky. 706, 123 S. W. 271, 21 Ann. 101; *Barlow Mfg. Co. v. Stone*, 101 Mass. 158, 86 N. E. 306; *Mullins v. Dieudonne*, 103 Minn. 352, 115 N. W. 636; *Clark v. West*, 137 N. Y. 23, 28, 122 N. Y. S. 380, and 101 N. Y. S. 380; *Elliott Supply Co. v. Stone*, 135 N. Dak. 641, 160 N. W. 1002; *Waters' Coal Co. v. Hillman*, 243 Ill. 3, 90 Atl. 144.

*Holman v. Updike*, 208 Mass. 466, 101 E. 689; *Petersburg Fire Brick Co. v. American Clay M. Co.*, 101 Mo. 365, 106 N. E. 33. In *Bullard v. Jones*, 219 Mass. 49, 106 N. E.

584, 586. The court said: "The provision for the manufacture of 1,000 sets for \$2,500 was an entire contract. Although the devices were to be delivered at the rate of 100 sets a week, with a provision for an advance payment of \$300 by the defendants to the plaintiff at the time of the execution of the contract, and certain weekly payments were thereafter to be made, yet these provisions do not in any way change the nature of the contract or tend to show that it is separable, as where different and distinct articles are sold for different prices. *Barlow Mfg. Co. v. Stone*, 200 Mass. 158, 86 N. E. 306; *Fullam v. Wright, etc., Co.*, 196 Mass. 474, 82 N. E. 711; *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407."

<sup>48</sup> *Taylor v. Laird*, 1 H. & N. 266; *Button v. Thompson*, L. R. 4 C. P. 330; *Davis v. Preston*, 6 Ala. 83; *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200; *Jones v. Dunton*, 7 Ill. App. 580; *White v. Atkins*, 8 Cush. 367; *Chamblee v. Baker*, 95 N. C. 98; *Markham v. Markham*, 110 N. C. 356, 14 S. E.

generally the intention of the parties; and an increasing tendency is observable in this direction; but not a few decisions assume that in the absence of more indication than is furnished by the statement of a rate for the shorter period there is necessarily an indivisible contract for the full period. This seems wrong, but no doubt the nature of the services (as if they are of slight or much diminished value if the performance of a task contracted for is not completed) or business uses may properly lead in particular cases to a holding that such a contract is indivisible.<sup>49</sup> Where the employee under a contract is to render distinct services but the compensation is not stated, the contract is entire entitling the employee to payment only on completion of all the services.<sup>50</sup>

### § 863. When transactions constitute several contracts.

The essential test to determine whether a number of promises constitute one contract or more than one is simple. It must be nothing else than the answer to an inquiry whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise

963; *Matthews v. Jenkins*, 80 Va. 463; *La Coursier v. Russell*, 82 Wis. 265, 52 N. W. 176.

\* See *Boston, etc., Ice Co. v. Ansell*, 39 Ch. D. 339; *Norris v. Moore*, 3 Ala. 676; *Turner v. Baker*, 30 Ark. 186; *Hofstetter v. Gash*, 104 Ill. App. 455; *DeCamp v. Stevens*, 4 Blackf. 24; *Davis v. Maxwell*, 12 Met. 286; *Beach v. Mullin*, 34 N. J. L. 343; *Lantry v. Parks*, 8 Cow. 63; *Monell v. Burns*, 4 Denio, 121; *Tipton v. Feitner*, 20 N. Y. 423; *Larkin v. Buck*, 11 Oh. St. 561; *Young v. Watson* (Tex. Civ. App.), 140 S. W. 840; *Brown v. Kimball*, 12 Vt. 617; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719. In *Martin v. Massie*, 127 Ala. 504, 29 So. 31, it was held that where a party entered into a contract with the commission appointed to codify the laws of the State, by which he agreed to perform such parts of the work as

might be assigned to him by the commissioner, "and to do all in his power to make the work of the Code complete in every particular," and stipulated that his compensation was to be \$75 per month, but should not exceed \$1,000, however long it might be necessary for him to continue his services, the contract was held an entire, having no specified time to run, and of the completion of the codification of the laws; and where before the completion of the Code, the employee declined to perform the work assigned to him by the commissioner, his refusal constituted an abandonment of the contract, which prevented the recovery of the value of the services which had already been performed by him and accepted by the commissioner.

<sup>49</sup> *Shafer v. Pratt*, 79 N. Y. A. 447, 80 N. Y. S. 109; *cf. Baugh v. Mathias*, 19 Oreg. 482, 24 Pac.



set of promises were struck out. What makes the test sometimes difficult of application is the possibility that though the set of promises originally constituted a contract by itself, it was adopted as part of another agreement made perhaps a few minutes later, perhaps a week later, when a new set of promises was added.<sup>51</sup> As has been seen,<sup>52</sup> in cases involving the Statute of Frauds, courts have gone to a considerable length in holding bargains for different articles a single sale. The question essentially is one of fact: Did the parties give a single assent to the whole transaction or did they assent separately to several things? It is sometimes suggested,<sup>53</sup> that the test is whether the nature of the subject-matter of the several things to be performed is such that part performance will be of diminished value unless the rest of the performance is furnished. An inquiry of this sort is an aid in a doubtful case in determining whether several things were contracted for in one bargain, or whether several bargains

<sup>51</sup> As in *Franklyn v. Lamond*, 4 C. B. 677. See on the question of one contract, or several: *Spring v. Slayden-Warkey Woolen Mills*, 106 Ill. App. 9; *Mulcahy v. Dieudonne*, 103 Minn. 2, 115 N. W. 636; *Mailhot v. Turner*, 7 Mich. 167, 121 N. W. 804, 133 Am. 333; *Mattison v. Connerly*, 46 Mont. 103, 126 Pac. 851; *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127; *De Graff v. Sawyer*, 119 N. Y. S. 657, 65 N. Y. 185. In *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 94 N. E. 803, a written agreement was held one contract though the parties expressly stipulated that each instalment was a separate contract. As there was obviously a single assent to the whole writing, the decision is sound. The opinion of the parties as to how many contracts they have made, or whether they have made any at all, is immaterial. Their purpose doubtless was to permit recovery of the price for the instalment, and this result could be reached by holding the contract one and indivisible. In *Jordan v. Patterson*,

67 Conn. 473, 35 Atl. 521, the plaintiff sent defendant fourteen separate orders for goods, each specifying fully the amount and kind of goods ordered and the terms of payment. The defendant on receipt of the last order sent a letter saying: "We are in receipt of the following contracts," describing the several contracts. This letter was held to be an acceptance of all the orders, creating a single contract. Compare *Peoria Mfg. Co. v. Bain Mfg. Co.*, 76 Mo. App. 76. Here an order was given for twine, and on the same day another order for rope. Acceptance of both orders was made in one letter. This was held not to create such a connection between the two orders that a countermand of the order for the twine released the seller from liability to furnish rope.

<sup>52</sup> *Supra*, § 524.

<sup>53</sup> See *Norris v. Harris*, 15 Cal. 226; *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55, 57; *Wooten v. Walters*, 110 N. C. 251, 256, 14 S. E. 734, 736.

were made, but no more than this can be said. It is certainly possible for parties to make a single contract for several things which have no relation to each other, and the value of each is not increased by being associated together or diminished by separation. It is equally possible to make several contracts for goods which have little use unless associated together.

#### § 864. Conditions implied in divisible contracts.

If it be granted that upon a true construction a contract is divisible, there is a dependency between the obligations of the buyer and seller in regard to each instalment. Thus, if no time is fixed showing an intention inconsistent with the current performance, the seller will not be bound to deliver the instalment until the buyer pays the price, and, conversely, the buyer will not be bound to pay the price unless the seller delivers the goods. If by the terms of the contract, delivery of an instalment is to precede payment for it, or if, as will rarely happen, payment for an instalment is to precede delivery, the performance of the prior act is a condition precedent to any obligation to perform the subsequent act. Furthermore, the same conditions as to quantity and quality exist as are applicable in contracts and sales generally. Accordingly, the buyer need not receive a smaller or a larger instalment than he bargained for; nor need he receive goods of a different kind, or of defective quality.<sup>54</sup> If a tender defective in quantity or quantity is made, the right to correct the defect and to substitute a proper tender depends on principles hereafter stated, as do the rights of a buyer who has received earlier instalments.

<sup>53a</sup> It should be observed that a misrepresentation may vitiate more than one contract. In *Holliday v. Lockwood* (1917), 2 Ch. 47, the court referred to such a case: "Where a purchaser separately acquires two lots of property at an auction, in reliance on an innocent misrepresentation of the vendor as to the second lot, entitling the purchaser to rescission as to that lot, he cannot also rescind the contract for the first lot, unless from the circumstances known and understood by both parties at the time of the sale

the Court can infer that the transactions were to the knowledge both interdependent. If, however, the court is satisfied that, apart from the misrepresentation, the particular purchaser would not have bought the first lot, it will refuse the vendor's performance as to the first lot."

<sup>54</sup> So held in *Jackson v. Rotax I. Co.*, [1910] 2 K. B. 937 (C. A.), though a prior instalment of proper quality had been previously offered and accepted.

<sup>55</sup> See *infra*, § 1295.

in the expectation that the later ones will be delivered  
 need, and who is disappointed in that expectation.<sup>56</sup>  
 rly in a divisible contract of employment, performance  
 h division of the service will be impliedly a condition  
 ent to the recovery of a corresponding portion of the

se principles though not all of them undisputed, have  
 chiefly engaged attention. The question that has been  
 ively litigated is, how far does defective performance  
 or more instalments justify the injured party in refusing  
 continue the contract as to further instalments. If the  
 te instalments of the contract were properly to be con-  
 d as so many separate contracts, the answer would be  
 for a breach of one contract does not permit the party  
 ved to refuse to perform another.<sup>57</sup> But as has already  
 een, there is but one contract in the case under considera-

Accordingly, the general rule governing bilateral con-  
 must be applied. (If either buyer or seller, therefore,  
 mitted a material breach of contract, or has by repudia-  
 manifested an intention to commit such a breach, the  
 party should be excused from the obligation to perform  
 r. If, however, the injured party knowingly accepts  
 ve performance of the contract, or accepts further  
 nance after he is aware that a breach of contract has  
 committed, such conduct will operate as an election to  
 with the contract <sup>58</sup> though it will not necessarily destroy

*infra*, § 1388.  
 uthnot v. Streckeisen, 35 L. J.  
 (S.) 305; Stephenson v. Cady,  
 ss. 6; Hanson v. Wittenberg,  
 ss. 319, 91 N. E. 383; Frohlich  
 ependent Glass Co., 144 Mich.  
 7 N. W. 889; Hutchens v.  
 and, 22 Nev. 363, 40 Pac. 409;  
 Building Supply Co. v. Vul-  
 Portland Cement Co., 203  
 33, 96 N. E. 370, 36 L. R. A.  
 322; Wilfand v. Zwerner (N. Y.  
 168 N. Y. S. 564; Bowers  
 Co. v. Farrell, 66 Vt. 314, 29  
 ; Linger v. Wilson, 73 W. Va.  
 S. E. 1108, 1109. It should be

observed, however, that together with  
 other facts, breach of one contract may  
 afford some evidence either of intent  
 to repudiate another or of prospective  
 inability to perform another. See  
 Beatty v. Guggenheim Exploration Co.,  
 225 N. Y. 380, 122 N. E. 378.

<sup>58</sup> Such a statement, therefore, as  
 that in 25 Halsbury's Laws of England,  
 p. 216, "For the purpose of delivery  
 and acceptance each instalment is  
 deemed to be the subject of a separate  
 contract" must be regarded as a mis-  
 chievous error.

<sup>59</sup> See *supra*, § 687.

his right to recover damages for the breach committed by the other party.<sup>60</sup>

### § 865. English test of intent to repudiate.

These principles are reasonably well settled in regard to contracts generally, and should furnish a sufficient guide in regard to instalment contracts; but, unfortunately, the English courts, though at first seeming to accept these views,<sup>61</sup> in later decisions seem to deny the injured party the right to refuse to continue performance irrespective of the materiality of the breach, unless the breach or some acts or conduct of the vendor doer "amount to an intimation of an intention to abandon the contract, and altogether to refuse performance of the contract."<sup>62</sup>

<sup>60</sup> See *supra*, §§ 700 *et seq.*

<sup>61</sup> *Hoare v. Rennie*, 5 H. & N. 19. The contract was to sell about 667 tons of iron to be shipped in June, July, August, and September, in about equal portions. 21 tons only were shipped in June, but when tendered were refused because June had then elapsed and no further shipments had been made during the month. The sellers brought action but the defendants' plea setting up that the plaintiffs were never willing or ready to deliver a June shipment according to the contract was sustained. As time is of the essence of mercantile contracts the decision seems sound. The difference between 21 tons and about 167 tons to which the buyer was entitled as a June shipment was material even though it be assumed that the seller would within the four months have delivered the correct total number of tons; and if it be supposed that the seller would only have shipped about 167 tons during each of the remaining three months the materiality of the breach is still more apparent.

<sup>62</sup> *Freeth v. Burr*, L. R. 9 C. P. 208. In *Simpson v. Crippin*, L. R. 8 Q. B. 14, the buyer had contracted to take from six to eight thousand tons of coal in his wagons from the seller's

colliery in equal monthly quantities for twelve months. During the first month the buyer sent wagons for 150 tons. This was held not to amount to the seller to refuse to deliver any more coal. The court discredited the decision in *Rennie*, 5 H. & N. 19, and *Blair v. J.*, who delivered the longest time. It said: "I prefer to follow *Portage v. Cole*" [1 Wms. Saund. 319] on the view of the fact that *Portage v. Cole* regarded as the leading authority on the medieval doctrine that time is of the essence in bilateral contracts and is independent unless the parties have expressly stated a condition (a condition which was overthrown by Lord Kenyon in *Field*, and of which Lord Kenyon's decision in *Goodisson v. Nunn*, 4 T. R. 70, it outraged common sense, and which is now generally regarded as indefensible), this statement is extraordinary. In *Freeth v. Burr*, L. R. 9 C. P. 208, there was a contract to deliver 250 tons of iron to be delivered in two months, the remainder in four months. Payment was to be made fourteen days after delivery of each lot. The buyer, under a mistaken claim of a set off loss for delay in delivery of the first instalment refused to pay for it as agreed, and was sued

s to have been adopted by the most recent English decisions as a general rule in bilateral contracts,<sup>63</sup> though such is inconsistent with earlier English decisions in which materiality of the breach was made the vital point. Both authority and on principle, the later decisions are open to criticism. They do not represent the law of the United States.<sup>64</sup>

and only then paid it. The because of the buyer's delay in paying for the first instalment refused to deliver the second, but was liable for this failure to deliver because of the non-payment by the buyer of "evidence of an intention no longer bound by the contract." In *Hoare v. Muller*, 7 Q. B. D. 92, *Hoare v. Rennie* was approved and other distinguished on the ground that in *Hoare v. Rennie* and in the present case no performance at all had taken place. In *Mersey Steel Co. v. Naylor*, 9 A. C. 434, the contract was for the delivery of 5,000 tons of steel in monthly instalments of 1,000 tons, payment to be within three months after receipt. The seller delivered part of the steel, but before payment became due a petition was presented to wind up the company. The erroneous legal advice of the seller's refusal to pay for the instalment, unless the sanction of the court was first obtained. The buyer was held that such refusal would be treated as a breach of contract releasing the seller from further obligation. An action was brought for the value of the steel delivered and the seller counterclaimed for damages caused by the seller's refusal to deliver the remainder of the steel. A House of Lords held the seller justified in its refusal—Lords Macmillan and Bramwell on the principle stated in *Freeth v. Burr*, *supra*, where there was no renunciation or abandonment by the buyer to perform

the contract; Lord Blackburn, because the breach did not appear to him to go to the root of the contract. See also *Millar's Karri & Co. v. Weddell*, 100 L. T. 128; *Berk v. Day*, 13 T. L. R. 475; *Paysu v. Saunders*, [1919] 2 K. B. 581; *cf. Morris v. Baron*, [1918] A. C. 1.

<sup>63</sup> See in addition to the cases cited in the previous note, *Cornwall v. Henson*, [1900] L. R. 2 Ch. 298; *Newsum v. Bradley*, [1918] 2 K. B. 271; *Rubel Bronze & Co. v. Vos*, [1918], 1 K. B. 315, 323; *Rhymney Ry. Co. v. Brecon, etc., Ry. Co.*, 83 L. T. 111; *In re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108; *Bloomer v. Bernstein*, L. R. 9 C. P. 588. There are strong expressions to the same effect in Colonial decisions. In *Bradley v. Bertoumieux*, 17 Vict. L. R. 144, 147, it is said: "A contract broken is not a contract rescinded, and unless one of the parties to the contract clearly intimates his intention not to perform his contract, or his inability to perform it, the other party is not at liberty to rescind the contract." See to similar effect, *Prendergast v. Lee*, 6 Vict. L. R. (Law) 411; *Hacker v. Australian, etc., Co.*, 17 Vict. L. R. 376; *Oaten v. Stanley*, 19 Vict. L. R. 553, 555; *Moroney v. Roughan*, 29 Vict. L. R. 541; *Edilson v. Joyce*, [1917] N. Zealand L. R. 648; *Midland Ry. Co. v. Ontario Rolling Mills*, 10 Ont. App. 677; *Cromwell v. Morris*, 34 Dom. L. R. 305. See, however, *Muston v. Blake*, 11 S. C. New South Wales, 92.

<sup>64</sup> See *infra*, § 867.

### § 866. Materiality of the breach is the true test.

If a party to an instalment contract fails in an important particular to keep his promise as to one instalment, what does it matter whether he plans to fulfill the remaining instalments or not? He has already committed a material breach. Why should the innocent party be compelled to go on with the bargain merely because the performance is divided into instalments when he could not be compelled to put up with a deficient performance if the contract had been performed at one time? Accordingly the correct rule upon principle is that stated in the Uniform Sales Act.

"(1) Unless otherwise agreed, the buyer of goods is bound to accept delivery thereof by instalments.

"(2) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken." <sup>65</sup> This rule makes the obligation of the innocent

<sup>65</sup> Sec. 45. This section is based on section 31 of the English Sale of Goods Act, but in subsection (2) a slight change has been made. Instead of the words in the American act, "It depends," etc., the English act reads, "It is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated." The reasons for changing the English provision will appear in the criticisms made, *supra*, § 865, of

the English law. Decisions on this section are *Roach v. Lane*, Mass. 598, 116 N. E. 470; *Corey Minch*, 82 N. J. L. 223, 82 Atl. E. 1. *Dupont de Nemours & Co. v. United Zinc & Co.*, 85 N. J. L. 89, 89 Atl. 992; *Helgar Corp. v. Warner Features*, 222 N. Y. 449, 119 N. E. 2d 980; *Hadfield v. Colter*, 103 N. Y. Misc. 170, 170 N. Y. S. 643; *Alden Coal Co. v. C. L. Amos Coal Co.*, 171 N. Y. S. 980; *De Vivo v. Gallerani*, 174 N. Y. S. 13; *Ambler v. Sinaiko* (Wis., 1919), 170 N. W. 270.

In *Helgar Corp. v. Warner's Features*, *supra*, the court said:

"We have departed from the

erty depend upon the materiality of the breach committed by the wrongdoer. Whether a given breach is material or essential, or not, is a question of fact;<sup>66</sup> but the question in a particular case may be so clear that a decision can properly

be based upon the English statute (St. 56 and 57 Vict. c. 71, § 31, subd. 2), which keeps the contract alive unless the breach is so material as to be equivalent to repudiation. Note the provisions of the Commissioners on Uniform Laws, American Uniform Commercial Acts, § 336; Williston on Sales, pp. 809, 810; Halsbury, Laws of England, p. 220. The courts have established a new test which weighs the effect of the default, and adjusts the rigor of the remedy to the gravity of the wrong. 'It depends in each case on the terms of the contract and the circumstances of the case' whether the breach is 'so material' as to affect the contract as a whole. 'The answer to that question must vary with the facts (Williston on Sales, p. 810). Default in respect of one instalment, though falling short of repudiation, may under some conditions, be so material that there would be an end to the obligation to keep the contract alive. Under other conditions, the default may be nothing more than a technical omission to observe the letter of a promise. Williston on Sales, p. 823; National Machine Co. v. Standard Co., 181 Mass. 275, 279, 18 N. E. 900; Wharton & Co. v. Winch, 100 N. Y. 287, 35 N. E. 589. General statements abound that, at law, time is always of the essence. Williston, Sales, p. 823; Norrington v. Wright, 115 N. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Booth v. S. D. Rolling Mills Co., 60 N. Y. 487; Schmidt v. Reed, 132 N. Y. 303, 30 N. E. 373. For some purposes time is still true. The vendor who fails to receive payment of an instalment on the very day that it is due may sue at once for the price. But it does not follow that he may be equally precipitate in his election to declare the con-

tract at an end. Williston, p. 823; Beatty v. Howe Lumber Co., 77 Minn. 272, 79 N. W. 1013, and cases there cited; Graves v. White, 87 N. Y. 463, 466. That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties. Whatever the rule may once have been, this is the test that is now prescribed by statute. The failure to make punctual payment may be material or trivial according to the circumstances. We must know the cause of the default, the length of the delay, the needs of the vendor, and the expectations of the vendee. If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is willful, if there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent so that continued performance is imperiled, in these and in other circumstances, there may be another conclusion. Sometimes the conclusion will follow from all the circumstances as an inference of law to be drawn by the judge; sometimes, as an inference of fact to be drawn by the jury." A similar test was applied as matter of common law in Collins-Plass-Thayer Co. v. Hewlett (S. Car., 1918), 95 S. E. 510.

<sup>66</sup> *Corey Co. v. Minch*, 82 N. J. L. 223, 82 Atl. 304, and see cases in the following section.

be given only one way, and in such a case the court may properly decide the matter as if it were a question of law. The view here expressed is in general that of the American cases. These may be classified according to the nature of the breach committed. A breach of one instalment of an instalment contract which causes a refusal to go on with subsequent instalments may be of several sorts: (1) The seller may have failed to deliver the quantity of goods he was bound to deliver as an instalment. (2) The buyer may have refused to take or accept delivery of the quantity of goods he was bound to take as an instalment. (3) The buyer may have failed to pay an instalment of the price. (4) Part or all of the goods delivered by the seller may have been defective in quality. These breaches may have happened in regard to one instalment or in regard to more than one. Under any of these circumstances the innocent party should be allowed to refuse further performance if the breach is material.

#### § 867. American decisions.

The American cases clearly support the doctrine of the preceding section at least as to the first three of the classes of cases just referred to. Failure to deliver one instalment is generally held to excuse the buyer from taking the rest.<sup>67</sup>

<sup>67</sup> *Norrington v. Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 L. Ed. 366. In this case the plaintiff agreed to sell and the defendants to buy 5,000 tons of rails, shipment to be at the rate of about 1,000 tons per month. Price to be paid on presentation of the bills. The plaintiff shipped 400 tons towards the end of the first month, 885 tons in the second month, 1,571 tons in the third, 850 tons in the fourth, 1,000 tons in the fifth, and 300 tons in the sixth. The defendants received and paid for the first month's shipment, but then learning the amounts of the later shipments, notified the plaintiff that they should decline to accept them. The trial court instructed the jury that on these facts the defendants had a right to rescind the contract. This

instruction was sustained. In *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 S. Ct. 882, 30 L. Ed. 920, the contract involved was for all the pig iron made from 1,400 tons of ore, to be shipped in instalments. About seven-eighths was seasonably shipped, the remaining one-eighth was delayed two months. The buyer was held justified in refusing to take any iron after it appeared that the seller could not deliver all of it in substantially the time agreed upon. To similar effect are *California & Co. Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671, 674; *Bollman v. Burt*, 61 Md. 415; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304; *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 88 N. E. 24, 21 L. R. A. 864; *King Phillip Mills v.*



cases, however, hold the contrary in the absence of an action on the part of the seller to repudiate or abandon the contract altogether.<sup>68</sup> In accordance with the prevailing opinion view, also, default in accepting one instalment is no excuse the seller from delivering the remainder.<sup>69</sup>

12 R. I. 82, 34 Am. Rep. 603. Case last cited the court disapproved of *Simpson v. Crippen*, L. R. 14, and [at page 86], sharply disapproved *Pordage v. Cole*, 1 Wms. 319 [7]. See also *Hamilton v. ...* 7 Neb. 210. There the defendant agreed to rent to the plaintiff, hotel for a year for \$6,000 in twelve payments. By the same contract was agreed that certain perishables were to be bought by the buyer to pay for them on a monthly basis. Rent was paid for eleven months and then the tenant refused to pay for the twelfth month, and the plaintiff brought an action on the ground that the defendant had not cost as much as it had agreed that it had. The court held that the covenant to purchase the perishable goods by the defendant could not be enforced without the payment of the furniture and, *vice versa*, the enforcement of one stipulation depended on a compliance with the

*Norris v. Harris*, 15 Cal. 226. Contract made at the same time for different articles at different prices was an entire contract unless the performance of the whole was essential from the character of the property, or was required by the agreement of the parties, and a failure to obtain part of the articles, unless such failure materially effect the object of the contract and thus influence the value of such a failure been anticipated, did not justify a refusal to perform the rest); *Herzog v. Purdy*, 119 Cal. 51 Pac. 27 (the contract was for the sale of certain salt hides, skins, and tallow of animals previously

slaughtered and thereafter during the current month to be slaughtered; to be delivered on or about the 1st of the following month. It was held that a refusal to take the salt hides did not justify a refusal to deliver the other articles, as a separate price was fixed by the contract for each). These cases should be regarded as perhaps improperly holding the contracts before the court several separate contracts than as laying down an erroneous proposition as to divisible contracts. Cf. *California &c. Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671, 674.

<sup>68</sup> In *Cresswell Co. v. Martindale*, 63 Fed. 84, 11 C. C. A. 33, the contract was for the sale of about 5,000 steers, each to weigh over 900 pounds, to be delivered in instalments. After nearly half the cattle had been delivered, the seller offered an instalment of 980 steers. Of these the buyers refused to accept or pay for 282 on the ground that they did not weigh 900 pounds. Before the time for another delivery arrived, the seller notified the buyers that since they had violated the contract by rejecting the 282 head, that no more cattle would be delivered. The buyers sued for damages for the failure of the seller to deliver the remainder. The jury found that the rejected cattle fulfilled the requirements of the contract. The court said: "The right of a party to a continuing contract to refuse to make subsequent performance on his part, after the other contracting party had refused, upon full notice and demand, to perform a substantial part of the contract on his part, is not dependent on the good faith of the latter, nor on his

So failure to pay for one instalment by the buyer excuses the seller from delivering the rest; and this is generally so held without regard to the reason for the buyer's failure.<sup>70</sup> A

belief that he is not violating the contract." In *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402, the plaintiff agreed to buy from the defendant the plaintiff's consumption of phosphate rock for five years, and the defendant agreed to sell the same. After about seven months' performance the buyer for nearly a year and a half wrongfully failed to order any phosphate rock. Upon receiving an order after that time the seller refused to fill it or deliver any more rock, and was held not liable for so refusing. In *Smith v. Keith Coal Co.*, 36 Mo. App. 567, under a contract for the sale of 120 tons of hay to be delivered before May 1st, fifty-two tons were delivered and the defendant then rejected several loads of merchantable hay. The court held that on notice of the rejection of merchantable hay the seller was justified in refusing further to perform and disapproved the case of *Simpson v. Crippen*, L. R. 8 Q. B. 14. In *Providence Coal Co. v. Cox*, 19 R. I. 380, 35 Atl. 210, under a contract to sell 10,000 tons of coal, "cash thirty days." "Barge loaded immediately, balance in equal monthly proportions before February 1, 1893," the buyer failed to take shipment for July and four following months. This was held to warrant the seller in rescinding the contract. See also *Alpena Cement Co. v. Backus*, 156 Fed. 944, 84 C. C. A. 444; *Alwart Bros. Coal Co. v. Royal Colliery Co.*, 234 Fed. 20, 148 C. C. A. 36; *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55; *California &c. Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671; *Robson v. Hale*, 139 Ga. 753, 78 S. E. 177; *Koch v. Wimbrow*, 111 Md. 21, 73

Atl. 896. But see *Worthington v. Gwin*, 119 Ala. 44, 24 So. 379, 43 L. R. A. 382. The plaintiff in this case agreed to mine all the ore within a given territory, the defendant paying monthly a specified sum for each ton delivered. The plaintiff mined several thousand tons and a small part of this was mined and delivered in a way not authorized by the contract. This was held not to give the defendant a right to forbid the plaintiff to continue mining. The court cites with approval the doctrine of the English and New Jersey cases.

<sup>70</sup> *Youghiogeny & O. Coal Co. v. Verstine*, 176 Fed. 972; *Savannah River Sales Co. v. McFarland*, 242 Fed. 587; *Ackerman v. Santa Rosa-Vallejo Tanning Co.*, 257 Fed. 369, (C. C. A. 1919); *Farmers', etc., Trading Co. v. Ward*, 170 Ala. 491, 54 So. 513; *Stokes v. Baars*, 18 Fla. 656; *Branch v. Palmer*, 65 Ga. 210; *Savannah Ice Co. v. American Refrigerator Co.*, 110 Ga. 142, 35 S. E. 280; *Armuchee Pants Mfg. Co. v. Juilliard*, 14 Ga. App. 141, 80 S. E. 525; *Chicago Washed Coal Co. v. Whitsett*, 278 Ill. 623, 116 N. E. 115; *Patten v. Iroquois Furnace Co.*, 124 Ill. App. 1; *Ohio Valley Buggy Co. v. Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 574; *Cullen-Friestedt Co. v. Turley*, 50 Ind. App. 468, 97 N. E. 946; *Capper v. Manufacturers' Paper Co.*, 86 Kans. 355, 121 Pac. 519; *Central Lumber Co. v. Arkansas, etc., Lumber Co.*, 86 Kan. 131, 119 Pac. 321; *Godchaux v. Chicago Lumber, etc., Co.*, 131 La. 112, 50 So. 33; *Curtis v. Gibney*, 59 Md. 131; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; *Baltimore v. Schaub*, 96 Md. 534, 54 Atl. 106; *Sullivan v. Boswell*, 122 Md. 539, 89 Atl. 940; *Eastern Forge Co. v. Corbin*,

new decisions in this matter also adopt the English test, whether there was an intent to repudiate, denying the seller the right otherwise to refuse to continue performance.<sup>71</sup> Under any view a refusal to pay unless some condition is performed which the buyer is not justified in imposing will excuse the seller from his obligation to deliver.<sup>72</sup> Nor it seems does the fact that the buyer's refusal to pay for an instalment is due to the assertion of a right to set off a well-founded claim for damages because of a breach of duty by the seller prevent the non-payment from operating in favor of the seller as at least a dilatory defence.<sup>73</sup>

### 868. Defect in quality of an instalment.

Where the seller sends one or more instalments of goods inferior in quality to what the contract calls for, there seems

2 Mass. 590, 66 N. E. 419; Robson v. Bohn, 27 Minn. 333, 7 N. W. 357; Palmer v. Breen, 34 Minn. 39, 24 N. W. 12; Berthold v. St. Louis Construction Co., 165 Mo. 280, 65 S. W. 784; Gardner v. Clark, 21 N. Y. 399; Tokomo Co. v. Inman, 134 N. Y. 92, 1 N. E. 248; American Broom Co. v. Addickes, 19 N. Y. Misc. 36, 42 N. Y. 871; Edward Thompson Co. v. Nacheron, 125 N. Y. S. 939, 69 N. Y. Misc. 83; Reybold v. Voorhees, 9 Pa. St. 116; Rugg v. Moore, 110 Pa. St. 236, 1 Atl. 320; Easton v. Jones, 193 Pa. St. 147, 44 Atl. 264; Alpha Portland Cement Co. v. Oliver, 25 Tenn. 135, 140 S. W. 595, 38 R. A. (N. S.) 416.

<sup>71</sup> Monarch Cycle Co. v. Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 23; Johnson Forge Co. v. Leonard, 3 Kennew. 342, 51 Atl. 305, 57 L. R. A. 25, 94 Am. St. Rep. 86; Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692; Tuttle-Chapman Coal Co. v. Coaldale Fuel Co., 136 Ia. 382, 113 N. W. 827; Barton v. American Law Book Co., 123 Ia. 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1; Collins v. Swan-Day Lumber Co., 158 Ky. 231, 164 S. W.

813; Winchester v. Newton, 2 Allen, 492 (cf. Eastern Forge Co. v. Corbin, 182 Mass. 590, 66 N. E. 419); West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791; Beatty v. Howe Lumber Co., 77 Minn. 272, 79 N. W. 1013; Blackburn v. Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159; Otis v. Adams, 56 N. J. L. 38, 27 Atl. 1092; Empire Rubber Mfg. Co. v. Morris, 77 N. J. L. 498, 72 Atl. 1009; Trotter v. Heckscher, 40 N. J. Eq. 612, 4 Atl. 83. (The passage of the Uniform Sales Act has now changed the New Jersey law. Materiality of the breach is now the test. E. I. Dupont de Nemours Powder Co. v. United Zinc & Co., 85 N. J. L. 416, 89 Atl. 992.) Tucker v. Billing, 3 Utah, 82, 5 Pac. 554; Campbell & Cameron Co. v. Weisse, 121 Wis. 491, 99 N. W. 340.

<sup>72</sup> Withers v. Reynolds, 2 B. & Ad. 43; Munroe v. Trenton, etc., Co., 206 Fed. 456, 124 C. C. A. 362; Sturdevant v. Mittelstaedt, 166 N. Y. App. Div. 943, 151 N. Y. S. 298. But see Hjorth v. Albert Lea Mach. Co., (Minn. 1919) 172 N. W. 488.

<sup>73</sup> See *supra*, § 859.

no reason to distinguish the case from the kinds of breach of contract already considered. Even if the seller does not manifest an intent to persist in sending inferior goods, if he has already sent a great quantity of inferior goods, the inevitable consequence is that he will not substantially perform the contract even though all the remaining instalments are what the contract calls for. The buyer should therefore, be allowed to refuse to go on with the contract unless he has manifested an election to do so by knowingly and voluntarily accepting inferior goods,<sup>74</sup> or otherwise. The decisions perhaps show less readiness to allow a refusal to go on with the contract on account of a defect in quality than because of the other breaches of contract referred to above. Many cases certainly seem to regard it as no defence to the buyer that a considerable quantity of inferior goods has been furnished.<sup>75</sup> But the view here advocated is sup-

<sup>74</sup> As in *Acme Brewing Co. v. Wm. Rahr Sons Co.*, 10 Ga. App. 564, 73 S. E. 955; *Barnette Sawmill Co. v. Fort Harrison Lumber Co.*, 126 La. 75, 52 So. 222.

<sup>75</sup> As by asking that the remaining goods be kept for him. *Dolby v. Laramore*, 121 Md. 618, 89 Atl. 442.

<sup>76</sup> *Jonassohn v. Young*, 4 B. & S. 296; *Wayne's Coal Co. v. Morewood*, 46 L. J. Q. B. (N. S.) 746; *Guernsey v. West Coast Lumber Co.*, 87 Cal. 249, 25 Pac. 414; *Vallens v. Tillman*, 103 Cal. 187, 37 Pac. 213; *Habicht v. Gallagher*, 172 Mich. 328, 137 N. W. 685; *Blackburn v. Reilly*, 47 N. J. L. 290, 1 Atl. 27, 54 Amer. Rep. 159; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231, 33 Am. Rep. 753; *Reeves v. Block*, 31 S. Dak. 60, 139 N. W. 780; *Ellison v. Flat Top Grocery Co.*, 69 W. Va. 380, 71 S. E. 391, 38 L. R. A. (N. S.) 539. In *Blackburn v. Reilly*, 45 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159, the plaintiff agreed to sell fifty-two carloads of bark to be delivered one carload a week until the whole should have been delivered. Five

carloads were delivered and paid for. It was not used for some time after delivery and the buyer then claimed it was unfit for the purpose for which it had been bought notified the seller not to send any more. The seller brought action, but the parties settled their differences by a further agreement for the delivery of the remainder of the bark weekly, shipments to begin on April 1st or within ten days. The bark was delivered within the time stipulated, and on April 21st the buyer gave notice that he would not receive any bark under the contract. On action by the seller for damages the court held that the plaintiff could not recover because the circumstances were not such as to warrant an inference that the plaintiff purposed to abandon the contract. *Cahen v. Platt*, 69 N. 348, 25 Am. Rep. 203, and *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231, 33 Am. Rep. 753, were approved and followed. See also *Baer Grocer Co. v. Barber Milling Co.*, 223 Fed. 969, 1 C. C. A. 449; *New Blue Grass Cannery Co. v. Dougan*, 151 Ky. 522, 152 S. 566 (*cf. Newton v. Bayless Fruit Co.*

ported by recent decisions of courts of the highest standing,<sup>77</sup> and no doubt many of the decisions, apparently adverse, can be explained on the ground of election or waiver.

**869. Right temporarily to withhold performance distinguished from right to refuse absolutely.**

So far as concerns the right to refuse performance of later instalments because the contract has been essentially broken regard to the earlier instalments, the results reached by the majority of the American decisions, it is submitted, are sound. In the discussion of the principles involved there is the matter, however, that is perhaps insufficiently brought out. When one party to an instalment contract violates in any respect his obligations, it is conceivable that the injured party may take one of two positions. He may assert that he will perform no further until the wrongdoer has made good his omission; or conceivably he may make a more vigorous assertion of right by refusing to go on with the contract in the future, irrespective of reparation for the injury. The distinction is between saying, "I will not further perform until you do" and, "I will never perform further because you have not performed on time what you agreed to do." It is submitted that situations often occur where the injured party is justified in taking the former stand when he might

5 Ky. 440, 159 S. W. 968); *Corey Co. v. Minch*, 82 N. J. L. 223, 82 Atl. 304. *McDonald v. Kansas City Bolt & Nut Co.*, 149 Fed. 360, 79 C. C. A. 298, 10 L. R. A. (N. S.) 1110. The delivery of defective instalments was held to justify the buyer in refusing to go on with the contract if prompt notice of his election was given to the seller. But in the instant case, the court held that in view of the buyer's receipt of several instalments and apparent satisfaction with an arrangement by which the seller was to replace defective goods, in reliance on which the seller had made and shipped a further supply, the notice was too late. In *Fullam v. Wright &*

*Colton Co.*, 196 Mass. 474, 82 N. E. 711, where the contract was for 900 cords of wood "largely chestnut," to be shipped and paid for in instalments, the shipment of five cars of wood which was largely soft wood was held to justify a refusal to go on with the contract altogether, though the seller intended to make up the proper proportion of chestnut and hard wood in later shipments. See also *Bobrick Chemical Co. v. Prest-O-Lite Co.*, 160 Cal. 209, 116 Pac. 747; *Newton v. Bayless Fruit Co.*, 155 Ky. 440, 159 S. W. 968; *Enterprise Mfg. Co. v. Oppenheim*, 114 Md. 368, 79 Atl. 1007; *Ungerer v. Louis Maull & Co.*, 155 Mo. App. 95, 134 S. W. 56.

not be justified in taking the latter. Thus if the seller fails to deliver goods on time, the buyer may say, "I will not pay until you deliver" and, he may say also, "I will not take the second instalment until you have delivered the first, for, by the terms of the contract, that was to precede the other." The mere fact that by the terms of the contract one performance is to precede the other makes the later obligation conditional on the performance of the earlier obligation. It is quite another proposition, however, to assert that because the earlier obligation was not performed on time, the later obligation is excused altogether. This is to assert that the mere failure of performance is a condition precedent to the performance of the later obligation. Whether time of performance is so vital that a breach of the contract in point of time is a sufficiently substantial or material default to go to the essence of the contract is a question of fact. As has been seen,<sup>79</sup> time is generally said to be of the essence of mercantile contracts. The decisions, however, do not warrant the conclusion that in an instalment contract the slightest default in time in regard to any instalment is fatal, but a considerable delay in delivering or accepting goods generally would be. It is in the case where the first breach consists in a failure to pay for one instalment at the time agreed to that the distinction here suggested finds its most frequent application. Where the contract provides that one instalment shall be paid for before the next instalment of goods is delivered, it is a most unjust decision if the seller is required to deliver more goods until he has been paid for what he has already delivered.<sup>80</sup> It by no means follows, however, that as s

<sup>79</sup> See *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304, stated in note 42, *supra*.

<sup>80</sup> See *supra*, § 845.

<sup>80</sup> In *National Contracting Co. v. Vulcanite, etc., Co.*, 192 Mass. 247, 255, 78 N. E. 414, the court said: "The plaintiff's failure to pay for the cement when the bills were due left the defendant with a right to insist at any time that these payments should be made. Such payments might be demanded as a condition precedent to the delivery

of any more cement. *Eastern Refrigerator Co. v. Corbin*, 182 Mass. 590, 593 N. E. 419; *National Machine & Co. v. Standard Shoe Machinery*, 181 Mass. 275, 279, 63 N. E. 117; *Stephenson v. Cady*, 117 Mass. 374, 47 N. E. 1020."

In *Savannah Ice Co. v. American Refrigerator Co.*, 110 Ga. 142, 35 S. E. 280, the court rightly held the stipulation making all bills pay

fault is made in payment for an instalment of goods the buyer is entitled to rescind the contract or totally refuse further performance, even though the default in payment continues until the time for the next delivery of goods is due. It might be that the seller, though entitled to delay further delivery until paid for what he had already delivered, would not be expected to continue to refuse to deliver after payment was made. The seller's right to take the latter course must depend on the materiality of the breach.<sup>81</sup> It is probable that time as to the payment of money on the day when it has been promised is not so vital as a failure to accept or deliver on the day promised.<sup>82</sup> It is obvious, however, that this is merely a question of degree; delay in the performance of a contractual obligation sooner or later must become so material as to justify a refusal ever to continue performance.<sup>83</sup>

It may be meant "that credit should be extended only as to such quantities of goods as it might require in a given period, during that period, prompt payment for which should be made at the end of the month as a condition precedent to the extension of further credit." See *Raabe v. Squier*, 148 N. Y. 516, 10 N. E. 516, it was held that the seller of goods under an instalment contract may refuse to deliver the next instalment until the first and previous instalments have been paid for, the contract providing for payment of the price of each instalment on delivery thereof.

*Ex parte Chalmers*, L. R. 8 Ch. 1. The buyer under an instalment contract had become insolvent. The contract provided for credit, and at the time of the insolvency the price for the next instalment was due and unpaid. The trustee in bankruptcy claimed the price of the next instalment. The court held that he was not entitled to it without tender of the price not only for the next instalment demanded but for the whole debt. That is that the seller cannot proceed with a subsequent

instalment until the prior debt was paid. See also *Ackerman v. Santa Rosa-Vallejo Tanning Co.*, 257 Fed. 369, (C. C. A. 1919); *De Vivo v. Gallerani*, 105 N. Y. Misc. 606, 174 N. Y. S. 13; *Collins-Plass Thayer Co. v. Hewlett*, 109 S. Car. 245, 95 S. E. 510, and see *supra*, § 829.

<sup>81</sup> So held under Sales Act in *Ambler v. Sinaiko*, 168 Wis. 286, 170 N. W. 270.

<sup>82</sup> See *supra*, § 844, also *Atlantic Lumber Co. v. Bucki*, 92 Fed. 864, 35 C. C. A. 59, 109 Fed. 1061, 47 C. C. A. 685; *Ackley v. Hunter*, 166 Ala. 295, 51 So. 964; *Beatty v. Howe Lumber Co.*, 77 Minn. 272, 79 N. W. 1013; *Barnett v. Elwood Grain Co.*, 153 Mo. App. 458, 133 S. W. 856. In the Minnesota case the plaintiff asserted the right totally to rescind the contract on the very day on which the defendant made a breach of its agreement to pay for an instalment of logs. It was rightly held that this was not permissible. It is by no means clear, however, that failure to deliver on the day one instalment of goods already paid for would be fatal to a whole instalment contract.

<sup>83</sup> See the discussion in *National*

### § 870. Effect of part performance of a divisible contract.

A question that has been somewhat discussed is whether it makes a difference if the breach of contract occurs in the first instalment. Such was the nature of the breach in one of the earliest English cases,<sup>84</sup> and the later English cases have been disposed to distinguish the earlier decision on this ground.<sup>85</sup> The American cases<sup>86</sup> have not generally been disposed to lay much stress upon such a distinction, and it seems rightly. Though it is generally true that a breach at the outset of a contract need not be so material as a breach after part performance in order to justify rescission or refusal to continue performance by the injured party, the reason upon which this general rule is based has little application to the class of cases here under consideration. The reason for the rule is this—that after a contract has been partly performed it is unjust to make even a wrongdoer lose the benefit of the performance already rendered by not allowing him to become entitled to receive the counter-performance.<sup>87</sup> In a divisible contract, however, such performance as has been rendered must ordinarily be paid for at the contract price, irrespective of whether the rest of the contract is performed or not. There is, therefore, not the same equitable reason for allowing a wrongdoer to continue.<sup>88</sup> A question of interpretation which sometimes arises where there has been a smaller amount of

*Machine & Tool Co. v. Standard Shoe Machinery Co.*, 181 Mass. 275, 63 N. E. 900; *Dudley v. Wye*, 230 Mass. 350, 119 N. E. 790, and the cases cited, *supra*, § 867, n. 67, 69, 70.

<sup>84</sup> *Hoare v. Rennie*, 5 H. & N. 19.

<sup>85</sup> See *supra*, § 865, n. 000. But in *Jackson v. Rotax Motor Co.*, [1910] 2 K. B. 937 (C. A.), a buyer was held entitled to refuse an instalment of inferior quality, though there had been part performance by the previous delivery and acceptance of an instalment of proper quality.

<sup>86</sup> See *supra*, § 867.

<sup>87</sup> See *supra*, § 841.

<sup>88</sup> In *General Billposting Company, Ltd., v. Atkinson*, [1909] A. C. 118, 122,

in speaking of a divisible contract of employment, Lord Collins said: "The reason for the rule itself [of part performance] is said by Serjeant Williams to be that 'where a person has received a part of the consideration for which he entered into the agreement it would be unjust, that because he has not had the whole, he should be permitted to enjoy that part without either paying or doing anything for it.' But in this case, as pointed out by Mr. Manisty, the respondent has given an equivalent in service for the remuneration he has received in salary. He stands, therefore, outside the reason of the rule." See also *Rosenthal Paper Co. v. National &c. Paper Co.*, 226 N. Y. 313, 123 N. E. 766.



goods delivered or accepted in one or more instalments than the contract calls for also deserves attention. If an offer of further instalments according to the contract is thereafter made, the question arises, Is the offer to be interpreted as an offer to fulfill the obligation to perform the remaining instalments according to the original terms of the contract, or is the proper interpretation rather that the whole amount of the goods is to be delivered making the default only a delay in delivery or accepting some of the goods? This is a question of fact, and each case must be considered upon its own circumstances.\*

\* In *Hull Coal Co. v. Empire Coal Co.*, 113 Fed. 256, 51 C. C. A. 213, the seller agreed to sell the production of its coke ovens and the buyer to take his production of not less than 20,000 tons during the year that the contract was to run. Orders and deliveries of coke were to be made in as nearly as possible equal weekly instalments, the price to be paid on the 20th of each month, "the usual strike, accident, and transportation clauses to mutually govern." The usual clause referred to provided that in case of contracts deliveries might be suspended, or, at the option of the party not in default, might be immediately canceled during the continuance of the interruption. A strike occurred and deliveries were suspended. It was held that the purchaser could not demand delivery of coke sufficient to make up a total of 20,000 after the expiration of the period originally fixed in the contract. In *Honck v. Muller*, 7 Q. B. D. 92, the court seemed to regard a failure of the buyer to take delivery of the first instalments of a contract extending over three months as amounting to a refusal to take the total amount of iron for which the contract called. The materiality of the breach may well depend upon which construction is proper. Ordinarily a failure to

deliver or take the amount called for by the contract will be a more material breach than a delay in performance as to some instalments.

In *Craig v. Lane*, 212 Mass. 195, 98 N. E. 685, the court said: "The defendant's contract was an entire one for the purchase of three cars of potatoes; and it was not severed by the fact that the plaintiff shipped them at different times and drew a separate draft for the alleged contents of each car at the agreed price. We assume without deciding that upon discovering the shortage which he claimed in the load of the first car he might have declined to accept it and rescinded his contract. But he chose not to do this. Instead of doing so he accepted that car load and sold it to a customer of his own, thus putting it beyond his power to return it to the plaintiff. He could not then rescind the contract by reason of the shortage. He must seek his remedy under the contract by way of set-off or recoupment, or by an independent action. *Morse v. Brackett*, 98 Mass. 205; *Mansfield v. Trigg*, 113 Mass. 350; *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; *Obery v. Lander*, 179 Mass. 125, 130, 60 N. E. 378; *Fullam v. Wright & Colton Co.*, 196 Mass. 474, 476, 82 N. E. 711."

### § 871. Whether the party first in default can ever recover

The statement is frequently made that the party first in default under a bilateral contract cannot recover for subsequent failure of the other party to perform.<sup>90</sup> Frequently a party first in default may recover the value of what he has done or given.<sup>91</sup> But so far as concerns an action on the contract the statement is true where the first default is material and there is dependency between the performances in question. It is obviously not true of independent promises, and even in contracts where there is a general dependency a particular promise may be so far independent of a counter promise that a breach of one will not excuse liability on the other. Thus, in divisible contracts a situation may arise where a debt becomes due for an instalment furnished and must be paid, though the creditor was the first party to break a provision of the contract. It may be supposed that payment for one instalment furnished under such a contract is not to be made until the expiration of a certain period of credit. Before that period of credit for one instalment has elapsed and, therefore, before the buyer is in default, the seller may fail to perform the second instalment when due, thereby committing the first breach of the contract. He will not, on that account, be deprived of his right to sue for the price of the first instalment. A debt arose for that price when the instalment

<sup>90</sup> In *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 433, 43 C. C. A. 270, the court said: "He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform. *Cresswell, etc., v. Cattle Co.*, 63 Fed. 84, 89, 11 C. C. A. 33, 38, 27 U. S. App. 277, 284, 285; *Norrington v. Wright*, 115 U. S. 188, 204, 205, 6 Sup. Ct. 12, 29 L. Ed. 366; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 261, 264, 7 Sup. Ct. 882, 30 L. Ed. 920; *Beck & Pauli Lith. Co. v. Colorado M. & E. Co.*, 52 Fed. 700, 3 C. C. A. 248, 10 U. S. App. 465, 470; *King Philip Mills v. Slater*, 12 R. I.

82, 34 Am. Rep. 603; *Smith v. Lewis*, 100 Ind. 98; *Hoare v. Rennie*, 5 Hurl. 19; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304; *Dwinel v. Howard*, 7 Me. 258; *Robson v. Bohn*, 27 Mass. 333, 334, 7 N. W. 357; *Reyboort v. Voorhees*, 30 Pa. St. 116, 121; *Stephenson v. Cady*, 117 Mass. 6, 9; *Brand v. Palmer*, 65 Ga. 210; *Fletcher v. Fletcher*, 23 Vt. 114, 119." See also *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623; *Forrest City Box Co. v. Sims*, 208 Fed. 109, 125 C. C. A. 337; *White Oak Fuel Co. v. California*, 257 Fed. 54, 56; *California & Co. v. Penoyar*, 167 Cal. 274, 139 Pac. 674.

<sup>91</sup> See *supra*, § 861, *infra*, §§ 862, 863, *et seq.*

furnished, and a subsequent breach of another instalment of the contract can have no effect on this liability.<sup>92</sup> So in a divisible contract of service a breach of contract by the employee will not deprive him of a right to recover a divisible portion of his compensation for a corresponding portion of the agreed service, which has been completely performed.<sup>93</sup>

**§ 872. Effect of stating a price for part of the performance in a contract not wholly divisible.**

In a completely divisible contract the whole performance on each side is divided into parts corresponding with parts of the counter promise. Not infrequently, however, a contract may contain a promise the performance of which is stated as the price or exchange for certain counter performance; and the contract may also contain other promises for which no special price is fixed. A common illustration is a sale of

<sup>92</sup> This was so held in *J. K. Armsby Co. v. Gray's Harbor Commercial Co.*, 32 Or. 173, 123 Pac. 32, 36, and the court supported its conclusion by saying: "The case of *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84, 96, 37 N. E. 676, 679, is very much in point upon this question. The action was upon a contract for the sale of bicycles, deliveries to be made in instalments, and payment for each shipment within 30 days. Both parties were in default. The court said: 'The question here distinctly presented as the controlling one is whether a vendee who has accepted goods delivered under an express contract, but not at the time or in the quantity required by it, with knowledge of the default of the vendor in those respects, but has himself failed, without legal excuse, to pay for them according to it, can maintain an action on the contract for such a default of the vendor. We think the general rule everywhere recognized is against it. . . . *Pennsylvania Coal Co. v. Ryan*, 107 Ill. 226; *Bradley v. King*, 44 Ill. 339; *Stewart v. Many*, 7 Ill. App. 508.

For appellant, the attempt is made to evade the force of these decisions by the claim that appellee was first in default, whereby appellant was damaged in the amount exceeding the price of the goods received, for which he failed to pay, and from that time until the suit was brought always had a just claim for damages by appellee's default exceeding the amount for which appellant was in arrears. . . . But the question is not whether, upon a fair settlement, offsetting damages against price, appellant really owed anything, but whether, accepting the machines under contract, it performed that contract on its part as to payment." *Cf. California &c. Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671. The contrary statement of Ray, J., in *Burgie v. Hicks*, 203 Fed. 340, 347, cannot be supported. See *supra*, § 844.

<sup>93</sup> *Button v. Thompson*, L. R. 4 C. P. 330; *Martin v. Everett*, 11 Ala. 375; *Tipton v. Feitner*, 20 N. Y. 423, 429; *Walsh v. New York &c. Co.*, 88 N. Y. App. D. 477, 85 N. Y. S. 83; *Peniston v. John Y. Huber Co.*, 196 Pa. 580, 46 Atl. 934.

chattels with a collateral warranty. The price is in the contract promised for the specific article purchased and if title is transferred an action for that price may be maintained without alleging or proving the fulfilment of the warranty.<sup>94</sup> For the same reason after a sale of real estate "Even a defect in title is no defence to the foreclosure of a purchase money mortgage or ground of abatement of price in the absence of fraud or eviction."<sup>95</sup> So, as part of a contract for the purchase of goods there may be a promise for an agency or for an exclusive market or for freedom from competition. Breach of such a promise will not excuse the buyer from paying the contract price for property which he has received,<sup>96</sup> or as part of a licensing contract there may be a promise to pay a royalty for each article sold. This royalty must be paid, though the collateral terms of the contract are broken by the licensee, unless the royalty was promised to a material degree in consideration of payment for the performance of these terms.<sup>97</sup> Other contracts similar in principle occasionally occur.<sup>98</sup> In such a case

<sup>94</sup> *Parker v. Palmer*, 4 B. & Ald. 387; *Rogers v. Brown*, 103 Me. 478, 70 Atl. 206. The buyer must recoup, counterclaim or take affirmative steps to rescind.

<sup>95</sup> *Ratkewics v. Kara*, (N. J. L. 1918), 103 Atl. 912. See also *Patton v. Taylor*, 7 How, 132, 159, 12 L. Ed. 637; *Peters v. Bowman*, 98 U. S. 56, 25 L. Ed. 91; *Byrd v. Turpin*, 62 Ga. 591; *Douglass v. Thomas*, 103 Ind. 187, 2 N. E. 562; *McLelland v. A. P. Cook Co.*, 94 Mich. 528, 54 N. W. 298; *Peabody v. Kent*, 213 N. Y. 154, 107 N. E. 51; *Hill v. Butler*, 6 Ohio St. 207; *Lessly v. Bowie*, 27 S. Car. 193, 3 S. E. 199; *Darling v. Osborne*, 51 Vt. 148.

<sup>96</sup> *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 115 N. E. 42; *Springfield Seed Co. v. Walt*, 94 Mo. App. 76, 67 S. W. 938; *Tichnor v. Evans*, (Vt. 1918), 102 Atl. 1031, L. R. A. 1918 C. 1025. Cf. *Rosenthal Paper Co. v. National &c. Paper Co.*, 226 N. Y. 123, 123 N. E. 766. See also *Moorman*

*v. Parkerson*, 131 La. 204, 59 So. Ann. Cas. 1914 A. 1150, and cases cited *supra*, § 841.

<sup>97</sup> See *Wilfley v. New Standard Concentrator Co.*, 163 Fed. 421, 90 C. A. 543; *Rosenthal Paper Co. v. National &c. Paper Co.*, 226 N. Y. 123 N. E. 766.

<sup>98</sup> Thus in *Cadwell v. Blake*, 6 C. 402 the defendant purchased certain machinery and a right to manufacture paper by a special process. The plaintiff sold the machinery and the right to manufacture and agreed to instruct the buyers in the art of making paper by the process in question. The defendant promised to pay "for said machinery," a fixed sum and for the right to manufacture, a share of the profits. No price was fixed for the instruction. In an action for the price of the machinery the defendant was held liable unless the instruction had been given. In view of the fact that the price of the machinery was payable for paper manufactured by the same

debt arises for the price stated in the contract for a portion of the performance as soon as that portion is rendered, and this debt is recoverable in spite of default in the rest of the contract. It may be urged that frequently the defendant

process, the decision seems right—there was a condition implied in fact. But had the price been payable in cash, it seems that the defendant while in possession of the machinery could not refuse to pay the contract price for

In *Pollak v. Brush Electric Assoc.*, 28 U. S. 446, 32 L. Ed. 474, 9 Sup. Ct. 19, the plaintiff sued on a contract which included a provision for the sale of certain machinery to the defendant at a fixed price and also for the payment by him of a sum of money in satisfaction of pre-existing claims and the transfer to him of certain shares of stock in the Brush Electric Light and Power Co. of Montgomery. The court said: "It is also contended that the plaintiff was not entitled to recover, except upon averment or proof that it had transferred or offered to transfer to the defendant the shares of stock held by it and by the Brush Electric Company of Cleveland, Ohio, and the Brush Electric Light and Power Company of Montgomery. This cannot be unless, as insisted, his promise to pay, in the contingency named in the third article of the agreement of November 13, 1883, the sum of \$6,180, was in consideration of the plaintiff's promise to transfer, or have transferred to him, the above shares. . . .

"It is manifest that the covenant of the plaintiff in relation to the transfer of stock in the Brush Electric Light and Power Company is wholly independent of the agreement in relation to the machine, dial and lamps in question. The consideration for such transfer, and for the settlement and satisfaction of all claims due by Pollak & Co. and by the Brush Electric Light and Power Company to the plaintiff, was

the payment by Pollak of a certain amount, part in cash on the execution of the agreement of November 13, 1883, and the balance on the 1st of January, 1884. On the other hand, the consideration for Pollak's agreement to pay, in a certain contingency, a specified sum for the machine, dial and lamps, was his becoming the absolute owner of those articles, upon the happening of that contingency. The cost of the articles was fixed by the agreement at a certain aggregate sum, without reference to the transfer of the above-mentioned stock."

See also *Loveland v. Epstein Drug Co.*, 227 Mass. 311, 116 N. E. 570. *Cf. Holbart v. Lauritson*, 34 So. Dak. 267, 148 N. W. 19, 20, where the court said: "It is contended by the appellant that, the defendants having received the horse and signed the note, they became bound to pay the money, and it was wholly immaterial to them whether they paid it to the bank or to Green or to some subsequent purchaser. This contention is not supported by the facts in this case. At the time the note was executed, Green had not completed his part of the transaction. He had not furnished the certificate of registration of the horse which was a part of the consideration for the note. It is clear, from the facts appearing from the record, that the defendants purchased the horse only because they thought they were getting a registered animal; that, without the certificate of registration, they did not want the horse at all; that, until such certificate was furnished, defendants were not liable on the note and had a good defence to the collection thereof."

would not have agreed to pay this price except on the assumption that the other promises in the contract were to be performed. This is true and because it is true the injured party should be allowed to refuse to go on with the bargain if it is wholly executory<sup>99</sup> and should be allowed to rescind it although executed, if he can restore to the other party the performance which has been received.<sup>1</sup> Thus for breach of warranty he should be allowed to rescind an executed sale. But so long as the defendant has received and retains the performance for which he promised to pay a fixed sum, he is going in the teeth of the express terms of the contract to excuse him from liability. Under such circumstances the plaintiff must seek redress for non-performance of other promises in a cross-action or counter claim, and this is true even though without fault on his part, he is unable to put the other party

<sup>99</sup> *Keith v. Herschberg Optical Co.*, 48 Ark. 138, 2 S. W. 777.

<sup>1</sup> *Freet v. American Electrical Supply Co.*, 257 Ill. 248, 100 N. E. 933; *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. 427; *Bride v. Riffe*, 93 Neb. 355, 140 N. W. 639; *Koerner v. Henn*, 8 N. A. App. D. 602, 40 N. Y. S. 1021.

<sup>2</sup> See *infra*, §§ 1461 *et seq.*

In *Freet v. American Electrical Supply Co.*, 257 Ill. 248, 100 N. E. 933, 937, the court said: "Appellant contends that the provision of the contract requiring him to sell, and appellee to purchase, 800 fire extinguishers at \$1.25 each, is severable from the other provisions of the contract; that the relation of vendor and vendee was thereby created; and that under the contract appellee became liable to pay the contract price for the goods upon delivery, even though there may have been a breach by appellant of all the other provisions of the contract. . .

"In our judgment the provision of the contract requiring appellee to purchase from appellant 800 fire extinguishers is so connected with and dependent upon the provision allotting

to appellee the State of Illinois territory over which its agency sales extend, that a breach of the provision by appellant would justify appellee in rescinding the contract refusing to perform the former promise. The principal object of the contract was the appointment of appellant as appellant's agent for the State of Illinois. That, together with the sales and commissions attached thereto, was the sole inducement for the purchase of 800 fire extinguishers by appellee. The fire extinguishers purchased by appellee were not for his own use, nor was appellee to assume the risk of reselling them. It was the plain intention of the parties that the 800 fire extinguishers should constitute appellee's stock as agent, of which orders taken in its territory could be filled, and that the so-called sale was, in fact, merely a deposit of \$1,000 by appellee as security for payment of that portion of the net proceeds derived from the sales of such stock to appellee as agent which, under the contract, appellant was entitled to receive."

*statu quo* by returning the performance which he has received. It should be observed that the difficulties presented by contracts of the kind in question are not entirely absent from wholly divisible contracts. The price for one instalment is fixed on the assumption that all the instalments are to be carried out. The price for a month's service is fixed on the assumption that the contract will be carried out for the full term, and if it were not for these assumptions, the price might well have been different.<sup>3</sup> The necessary adjustment of the rights of the parties, however, can be made with more justice and less violence to the terms of the contract by leaving the defendant to his remedy by cross action or counterclaim, rather than by excusing him from performing his own promise. But though the injured party is thus bound to perform the portions of the contract for which he has received the full agreed exchange, his obligation to perform the other executory portions of the contract will depend on the materiality of the breach.<sup>4</sup>

### 873. A bilateral contract to form a future contract or sale.

A bilateral contract may bind the parties thereto to enter into another contract in the future. If the parties both fulfil

<sup>3</sup> Thus in *Simpson v. Crippin*, L. R. Q. B. 14, the contract was to take monthly for a year a certain quantity of coal at a certain price per ton; the value of the coal is less in mid-summer than in mid-winter, yet a debt for the contract price would arise for coal furnished under the contract at any season.

<sup>4</sup> When a young graduate of a law school enters into a contract for a year's employment in an office at a certain salary for each month, he obtains a right to his monthly salary by serving the first week or month, irrespective of his future failure to perform the remainder of the contract, yet it is obvious that his services at the beginning of the term are of slight value.

<sup>5</sup> In *Rosenthal Paper Co. v. Na-*

*tional, etc., Paper Co.*, 175 N. Y. App. Div. 606, 162 N. Y. S. 814, the owners of letters patent granted the defendant an exclusive license in consideration of royalties at a specified rate for each article sold, which the seller agreed should not be less than \$500 for each year of the five-year contract. The licensor agreed to protect the patent from infringement. It was held that this agreement was not an independent covenant and that though the licensee was bound to pay the agreed royalty for each article sold, he was not bound, in view of the licensor's breach of promise, to pay the agreed minimum of \$500. The Court of Appeals allowed full recovery, on the ground that the defendant had continued to enjoy the benefit of the contract. 226 N. Y. 313, 123 N. E. 766.

their obligations two successive contracts will be formed. The second contract may be either bilateral or unilateral. A bilateral contract to issue and to take insurance is not common. When a policy of insurance is actually issued, the second contract is entered into. A contract to enter into a charter party, or to enter into a lease, or to make a conveyance are other illustrations. There can be no dependency between the obligations of a preliminary contract and those of the second contract. The performances of the mutual promises in the preliminary contract are the exchange for one another. Neither of these performances is the exchange for a performance under the subsequent contract. Therefore one who contracts for insurance, though entitled to such a policy, is customary, and justified in refusing any other, is liable for the premium if he actually accepts a policy of a kind which does not fulfil the obligation of the insurer in the preliminary contract.

One who agrees to charter a vessel, may refuse to take the vessel if it does not comply with the express and implied undertakings of the contract. But if the vessel is once taken, it is no defence to the obligation to pay the freight, that the vessel did not fulfill the terms of the preliminary contract. The promise to give such a vessel is in exchange for the promise to take such a vessel, not for the promise to pay freight. Similarly, one who contracts to take a lease, need not return so if the promises of the lessor in regard to the leased premises are not kept.<sup>6</sup> But having once taken the lease, he is bound to pay rent for the leased premises whatever breach of the preliminary contract the lessor may have committed. The same is true in the case of a contract to buy real or personal property. If such a sale is fully executed on both sides, there is no opportunity for the question to arise, but if the sale is on credit, or if the seller makes warranties either by deed or otherwise, the second transaction is at least in part an executory contract. It is no defence to the liability on such an executory obligation, that there has been a breach of

<sup>5</sup> The contrary decision of *Thompson v. Gillespy*, 5 El. & Bl. 209, is justly criticised in *Langdell, Summary of Contracts*, § 119.

<sup>6</sup> See *infra*, § 890.



liminary contract.<sup>7</sup> What has been said does not necessarily affect the right wholly to rescind the second transaction on account of a breach of the prior one. In case of mistake, or such mistake as justifies rescission, and even in case of a material breach of the promise in the preliminary contract, the second transaction should be set aside and rescission granted, if the parties can be put in *statu quo*, but not otherwise.

#### 4. Distinction between performance and preparation for performance.

A party to a contract frequently will not be able to perform unless he makes certain preliminary preparations, but he does not on that account bind himself contractually to make such preparation. One who contracts to sell goods of certain description cannot do so unless he first procures the goods, and he may be supposed if he procured them it would be necessary to give an order long in advance; yet the mere failure to give such an order has never been held a breach of contract. It is a question of construction where the line is to be drawn between the performance to which a party binds himself, and the preparation which, as a matter of fact, is necessary and preliminary to such performance. The failure to perform a necessary preliminary within the time when it must be performed though in itself not a breach of contract, may, nevertheless, justify the other party in refusing to perform and in not continuing performance on his side. It is at least an intimation justifying the belief that even should the promise on the other side be performed, the equivalent for the performance would not be given.<sup>8</sup>

#### 5. Prospective breach of promise excuses performance of the counter promise.

The same principle of justice which forbids the enforcement of a promise when the counter promise has been broken, also forbids enforcement when it is evident that the counter promise will be broken. Prospective failure of consideration is as good

<sup>7</sup> See the cases in the preceding section.

<sup>8</sup> *Ibid.*

<sup>9</sup> See the following sections.

an excuse as actual failure. The only difficulty is to determine when it is sufficiently certain that there will be performance of a counter promise due in the future, to justify non-performance of a promise due in the present. Certainly it can make no difference in the justice of the excuse, whether the reason for the apparent future non-performance may be prospective inability or prospective unwillingness of the party whose promise is not yet due must be the same, and the cases may be divided under those two heads. It is important to bear in mind in considering the matter that the question is not whether there has been an anticipatory breach of the contract. Prospective failure of consideration whether involving such a breach or not may be an excuse to one who refuses because of it to perform his own promise or condition;<sup>10</sup> but the prospective failure must not only

<sup>10</sup> See the following sections, also *infra*, §§ 1315, 1331. In *Freeth v. Burr*, L. R. 9 C. P. 208, and in *General Billposting Co. v. Atkinson*, [1909] A. C. 118, it was said that the test of whether a breach was sufficient to justify the other party in abandoning the contract was whether there was an intimation of an intention to abandon and altogether refuse performance of the contract, and though this statement is open to criticism, see *supra*, § 866, it is at least true, as said by Lord Blackburn in *Mersey Steel & Iron Co. v. Naylor*, 9 A. C. 434, that such an intimation is, if not "the only ground of defence . . . a sufficient ground of defence."

In *Wilkie & Turnbull v. Schultz*, 35 La. Ann. 491, the principle was applied to a charter party, "The refusal of the charterer to comply with his contract, except on condition of enforcement of a verbal alteration of the terms thereof, alleged to have been assented to by the master, dispenses with default. Under such state of facts, the master is not bound to hold the vessel until the last day stipulated for demurrage, but may seek his load

elsewhere, without forfeiting his claim to damages under the contract."

In *Moffat v. Davitt*, 200 Mass. 457, 86 N. E. 929, the court said: "The defendant became the owner of the foundry under an agreement to assume and pay the outstanding merchandise indebtedness of the vendor, which included bills due or to become due to the plaintiffs for iron and machinery delivered or to be furnished in the future. The plaintiffs do not contend that evidence of the defendant's intention to pay this indebtedness according to the terms of the sale had any connection with the contract, for the purpose of which the present action was brought, but they contend that such evidence is inadmissible on the issue of repudiation. Upon this question much evidence, including numerous letters between the parties, was introduced. If repudiation of the contract by one of the contracting parties may be shown by proof of an unqualified refusal to perform directly made to the other party, it also may be shown by evidence of such conduct on his part as to justify no other reasonable inference. The defendant purchased and carried

ently certain, but sufficiently material in character. Specially after part performance the prospect of a slight breach, no more than the actual occurrence of such a breach, justify refusal to proceed with the contract.<sup>11</sup> Any conduct of a party to a contract whether such conduct is

foundry, proof of her delay in making payments of debts connected with the business, as well as the letters from the manager, from which it could be inferred that the enterprise turned out to be unprofitable and that she was contemplating an early closing of the plant, while constantly insisting if not refusing to accept payment of any part of the five hundred dollars in iron, the market price of which had decreased, furnished evidence which the jury would be warranted in finding that she finally had decided not to perform, and was seeking to get out of a bad bargain."

decisions regarding repudiation are fully considered *infra*, § 1296

*Brady v. Oliver*, 125 Tenn. 595, 113 W. 1135, 1140, 41 L. R. A. (N. D.) 1913 C. Ann. Cas. 376, in speaking of a partly performed building contract in which the builder obviously was not going to be able to finish at the agreed time, the court said: "It is clear that time is of the essence of this contract, and is a material part of it, we do not hold that the complainant can anticipate a failure to perform within the time at so long a period from the time of the contract as in this case, and annul the contract, charging the defendant with disability to perform it. Con- sidering the purpose of the point, it was impossible for the defendant to do the work within the time, it cannot be said to be a total disability to perform the contract, nor a disability as that, if the contract was performed under it, it would be different from

the thing contemplated by the parties. Certainly the defendant was able to perform the contract by an extension of the time limit. There was no devaluation in the grade and quality of the work. The defendant was entitled to a *pro tanto* performance for the full time limit, as long as he complied with the specifications of the contract in the performance, in order to reduce his liability for the breach. Had he failed to complete the contract within the time, he would be liable for such damages as complainant would have sustained because of the default, and likewise he was entitled to the benefit of all the money he could earn under it within the time. The complainant was not justified in doing anything that would increase the liability of the defendant, notwithstanding an immaterial breach. In all of the cases which we have seen, where the injured party has anticipated a breach and claimed a default justifying an abandonment of the contract, the disability to perform has been total, or the defendant has renounced the contract and refused to proceed under it. But those are quite different cases to this. The defendant not only had not renounced the contract and had not refused to proceed under it, but was actively engaged in its performance. But merely because complainant had reason to believe that defendant would breach his contract, he was not justified in rescinding it in anticipation of the breach. In order to justify rescission there must be actual default, unequivocal renunciation, or legal disability to perform."

directly connected or not with the contract in question, shows that he does not intend to abide by the terms of the contract, in a material particular, will excuse the other party from his obligation to perform.<sup>12</sup>

**§ 876. Prospective failure of consideration where conditions are concurrent.**

Where the performances under a contract are due concurrently, it may seem that no substantial risk is incurred if in spite of prospective failure of consideration a party to the contract awaits the time of performance and then makes a conditional tender; since if there is then actual inability or unwillingness of the other party to perform, the tender cannot be accepted, and the contract will remain wholly unperformed on both sides.<sup>13</sup> It is true that the risk is far greater than where the contract requires some precedent performance from a party who fears with reason that he will not subsequently have the return for which he bargained. Even where the conditions are concurrent, however, the delay itself involves a risk, and sometimes a serious risk. At the time of performance it may be too late for the injured party to protect himself adequately by another contract. All the circumstances of the case should be taken into consideration in a particular case before a decision is reached.

**§ 877. Prospective inability.**

Where the contract requires for its performance special property or means of performance, prospective inability may arise from the non-existence, destruction or injury of the property,<sup>14</sup> from the destruction of the means of performance.

<sup>12</sup> *Trowbridge v. Jefferson Auto Co.*, 92 Conn. 589, 103 Atl. 843.

<sup>13</sup> This argument is advanced in *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080. See also *Smuts v. Holliday*, (Iowa, 1919), 172 N. W. 948.

<sup>14</sup> *Williams v. Miller*, 68 Cal. 290, 9 Pac. 166.

<sup>15</sup> *Kronprinzessin Cecilie*, 244 U. S. 12, s. c. *sub nom.*; *North German*

*Lloyd v. Guaranty Trust Co.*, S. C. Rep. 490, 61 L. Ed. 960, *infra*, § 1092, n. Cf. *Mitsui & Co., Ltd., v. Watts, Watts & Co.*, [1916] 2 K. B. 826. In that case the owners agreed to provide a vessel to receive a cargo at Marioupol on the Sea of Azoff, and to proceed with it to Japan. Loading at Marioupol was not to begin before September 1.

from the inability of the contracting party to secure the subject-matter of the contract because the title is in another. Prospective failure of consideration may also arise because of the insolvency or bankruptcy of a contracting party;<sup>16</sup> and (in case of a contract containing a promise personal in character) by an illness of the promisor which seems likely to be of long continuance or to terminate fatally.

This last situation generally arises in contracts of employ-

ment where the ship was not ready to receive cargo there by September 20 the charterers might cancel the contract.

On September 1 the defendants demanded to send a vessel, alleging that the Turkish Government had prohibited shipping to the Black Sea. This was not the case, but the Turkish Government closed the Dardanelles on September 5 and if the ship had begun to load on September 20 it could not have completed loading and passed through the Dardanelles before the closure.

Mr. Justice Lush, J., said (p. 831): "The defendants admit that they did not send a vessel to load at Marioupol under the said charterparty, but say that, owing to piratical seizures of cargo by the Turkish Government and a reasonable apprehension of Turkey becoming involved in the European war and of the Dardanelles being closed, they were justified in reason of the exception of arrests and restraints of princes, in not sending a vessel to load.' No authority was shown to me in support of the defendants' proposition that a breach of contract is excused by reasonable anticipation of the happening of an event which, if it happens, will excuse performance of the contract, and my opinion such a proposition will bear examination. The closing of the Dardanelles was too late for the defendants whether one treats their refusal to send the *Henley* as a repudiation of this contract accepted by the plaintiffs, or whether one regards the

contract as still open down to September 20."

Swinfen-Eady, L. J., said (p. 845): "This case is clearly distinguishable from *Geipel v. Smith*, L. R. 7 Q. B. 404. Where it is certain, or so nearly certain that in commercial matters it can be considered as certain, that the adventure cannot be successfully completed, the shipowner or charterer may be excused from taking preliminary steps which will obviously be futile. If the port to which the ship is to go is blockaded under an operation of war, the rule being that the termination of war is so uncertain that the state of war is to be regarded as indefinitely prolonged, there is no duty to prepare a cargo or to bring a cargo to the port which the ship will not be able to enter. But in this case there was at the moment no reason to suppose that the adventure might not be carried through, though at greater cost because there would be an obvious prudence in insuring against war risks. It was therefore the duty of both parties to perform the contract so long as they could up to the point when its performance would be excused."

The decision was affirmed in *Watts, Watts & Co., Ltd., v. Mitsui*, [1917] A. C. 227. See also *Piaggio v. Somerville*, Miss. 80 So. 342.

<sup>16</sup> But a mere suggestion of possible inability to pay will not avoid the necessity of tender by the buyer as a prerequisite to an action. *Smutz v. Holliday*, (Iowa, 1919), 172 N. W. 948.

ment and if an employee is in such condition as to make it probable that he will be incapacitated permanently, for a long time, a contract of employment may be terminated, though there has as yet been no material failure to perform on the part of the employee.<sup>17</sup>

**§ 878. The seller's lack of title to specific property existing at the time of the contract.**

If one who contracts to sell specific property is not the owner of it, the buyer evidently incurs some risk that the contract will not be carried out when the time for performance comes, even though the seller desires to carry it out. Whether the buyer should be required to incur the risk depends upon whether it was one which should have been within his contemplation at the time he entered into the contract. There is always some risk that a contract cannot be performed. It may be supposed that the seller's lack of title existed when the contract was entered into; or (2), subsequently. If the buyer was aware that the seller had no title when he entered into the contract, that fact can afford him no ground for refusing to proceed with the contract, until the time for the seller to perform, or at least until it is evident that he will be unable to acquire the title which he has promised to convey.<sup>18</sup> On the other hand, if the seller's lack of title was unknown to the buyer when he entered into the contract, the question must be asked whether a risk is being thrown upon him greater than he should have anticipated. This question must be answered in the affirmative unless the seller, though not owning the property, was in a position by contract or otherwise, to obtain or perfect a title irrespective of the consent of any other party.<sup>19</sup> If the seller owned the prop-

<sup>17</sup> *Cuckson v. Stones*, 1 E. & E. 248, per Lord Campbell; *Poussard v. Spiers*, 1 Q. B. D. 410; *Lyon v. Pollard*, 20 Wall. 403, 22 L. Ed. 361; cf. *Storey v. Fulham Steel Works Co.*, 23 T. L. Rep. 306, affd. 24 T. L. Rep. 89.

<sup>18</sup> *Wylson v. Dunn*, 34 Ch. D. 569; *Blanton v. Kentucky &c. Warehouse Co.*, 120 Fed. 318, affd. s. c. *sub nom.*, 149 Fed. 31, 80 C. C. A. 343; *Heller v.*

*McGuin*, 261 Ill. 588, 104 N. E. 104, and see *supra*, § 834.

<sup>19</sup> *Gray v. Smith*, 83 Fed. C. C. A. 168. The court quoted approval from *Burks v. Davis*, 110 Cal. 110, 24 Pac. 613, 20 Am. S. 213, where the court, citing *T. v. London*, 2 Eq. Cas. Abr. 68, said: "Where a person takes upon himself a contract for the sale of an estate,"

question at the time when the contract was made, but subsequently disposed of it, his conduct has a double aspect. On the one hand he is diminishing his ability to carry out the contract even if he so desires and, on the other hand, his conduct gives some evidence that he does not intend to carry out. Regarded in either aspect, the transfer should excuse the buyer from continuing the contract.<sup>20</sup>

It has been suggested in some cases, especially in California, that since it is perfectly legal to make a contract to sell property which one does not own, and since the seller may regain the property which he has disposed of before the time for performing his contract arrives, the buyer should not be excused.<sup>21</sup> But it is obvious that a conveyance subsequent to the contract imposes a risk of inability which the buyer did not assume, and it is also clear that such a conveyance justifies an inference of intent not to perform which would not be warranted by a lack of title at the time the contract was originally entered into; and this distinction is now recognized by the California Supreme Court.<sup>22</sup>

not absolute owner of it, nor is it his power, by the ordinary course of law or equity, to make himself so, though the owner offer to make the transfer a title, yet equity will not force the buyer to take; for any seller ought to be a *bona fide* contractor, and it would lead to infinite mischief if an owner were permitted to speculate in the sale of another's estate."

of similar import are *Weston v. Page*, 10 Ch. D. 736; *Brewer v. Chadwood*, 22 Ch. D. 105; *Bellamy v. Debenham*, [1891] 1 Ch. 412; *Carter v. Holcomb*, 105 Mass. 280, 285; *Frederice v. Miller*, 86 N. Y. 131; *Wheeler v. Elevating Co.*, 55 N. Y. 480. See also *Farrer v. Nash*, 35 Beav. 167. *New Iberia Sugar Co. v. Lagarde*, 1 La. 387, 58 So. 16; *Fort Payne Iron & Iron Co. v. Webster*, 163 Mass. 39 N. E. 786; *Meyers v. Markham*, Minn. 230, 96 N. W. 335, 787; *Wheeler v. Ohl*, 81 N. J. L. 626, 80 Atl. James v. Burchell, 82 N. Y. 108;

*Brodhead v. Reinbold*, 200 Pa. St. 618, 625, 50 Atl. 229, 1119, 86 Am. St. Rep. 735. See also *Leonard v. Bates*, 1 Blackf. 172; *Russ Lumber Co. v. Muscupiabe Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

<sup>21</sup> *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857; *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 Pac. 21; *Webb v. Stephenson*, 11 Wash. 342, 39 Pac. 952. See also *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Shively v. Semi-Tropic Co.*, 99 Cal. 259, 33 Pac. 848. These cases like those in the preceding note, relate to real estate.

<sup>22</sup> In *Brimmer v. Salisbury*, 167 Cal. 522, 140 Pac. 30, 34, the court said: "Where a vendee contracts with one having none or an imperfect title, he contracts in the hope or expectation that the vendor may be able to perfect the title. Such is not the case where the vendor has title and thereafter parts with it. Of the essence of the contract is the security to the vendee,

### § 879. Encumbered or incomplete title.

Where the seller is not wholly without title to the property which he has agreed to convey but his title is encumbered or defective in such a way that the buyer need not accept it unless the encumbrance is removed, the principle governing the situation is the same as where the seller is wholly without title, but the application of the principle is not so easy. If the defect cannot be removed it is clear that the buyer need not await the time of performance but has a present expectancy at least if he asserts it promptly on discovering the defect. But where the encumbrance can be removed, the question must resolve itself into one of degree and of probability. If encumbrances existed at the time when the contract was entered into and were such as could be removed before the time of performance without the assent of a third party, no such prospective inability exists as would excuse performance.<sup>24</sup> Subsequent encumbrances put upon the property by the seller must be judged by the same principle. Do

in his payments, of the title which the vendor has; and, if the vendor parts with that title to the impairment or destruction of that security, the vendee may be heard justly to complain, and it is, of course, no answer to say that the vendor thereafter may be able to go into the open market and repurchase the property. Common experience tells us that such an expectation is in its nature but a remote possibility, and that such a vendor has not the slightest intention of so doing."

<sup>23</sup> *Prenticet v. Erskina*, 164 Cal. 446, 129 Pac. 585 (the existence of a highway).

<sup>24</sup> In *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080, at the time of performance there was an outstanding lien on the property, of which neither buyer nor seller knew at the time of entering into the contract. The buyer, without demanding fulfilment of the contract, at once brought suit to recover part of the price which he had paid. The court held he could not

recover, as the encumbrance was one which was in the power of the seller to remove, and he might have done so if requested. This decision was followed in *Higgins v. Eagleton*, 150 N. E. 486, 50 N. E. 287. In the absence of any fraudulent concealment the same question should be,—"Would a reasonable man be warranted in supposing that the contract would be carried out?" See *Forrer v. N. B. Co.*, 167; *Brewer v. Broadway*, 105; *Blanton v. Kentucky Warehouse Co.*, 120 Fed. 311, 149 Fed. 31, 80 C. C. A. 343; *St. Rayner*, 92 Conn. 180, 102 A. 100; *Payne v. Pomeroy*, 21 D. C. 100; *Lytle v. Breckenridge*, 3 J. J. 663; *Caplan v. Buckner*, 123 Mass. 91, 91 Atl. 481; *Sleeper v. Nichols*, 113 Mass. 110, 113, 87 N. E. 473; *H. v. Speckenagle*, 9 S. & R. 212, 120 Dec. 704; *Espy v. Anderson*, 100, 308; cf. *Easton v. Jones*, 193 F. 44 Atl. 264.



indicate an intent not to perform? Do they impose a greater risk upon the buyer than he should have anticipated as a natural possibility when he entered into the contract?

The purchaser may, however, elect to take the risk of waiting until performance is due in the hope that the vendor will be able then to complete his title; and if the vendor acquires title before the purchaser takes objection, the difficulty is cured.<sup>25</sup> Indeed, it is said that the vendor when suing for specific performance may perfect his title until the time of decree.<sup>26</sup> This, however, can be so in only three cases: (1) Where the defect in title is of so slight a character that equity would enforce the contract specifically (with compensation if necessary) at the suit of the vendor,<sup>27</sup> or (2) where the defect in title though it would be fatal to the enforcement of the contract if not cured, does not impose so great a risk on the purchaser as to make it unnecessary for him to await the possibility of the vendor's curing it; and time is not of the essence of the contract; or (3) where the purchaser has by silence or otherwise, manifested an election to continue the contract or to take the risk of the vendor's seasonably curing the defect in his title. Such a defect as might justify the purchaser in repudiating the contract if he manifested an immediate election to do so, may not give him the right to do so if he unreasonably delays to repudiate the contract after learning the facts.<sup>28</sup> It has been suggested that the purchaser's right of repudiation "must be distinguished from the common-law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance."<sup>29</sup> But a suggestion that any different result would be reached in an action at law cannot be accepted. The purchaser's right or excuse is obviously based on the principle of prospective failure of consideration which is applicable in actions of law as well as in suits for specific performance. It cannot be admitted that a vendor whose title is so defective as to justify a purchaser in

<sup>25</sup> *Abbott v. Fellows*, 116 Me. 173, 100 Atl. 657.

<sup>26</sup> See *supra*, § 834.

<sup>27</sup> See *supra*, § 844.

<sup>28</sup> *Halkett v. Dudley*, [1907] 1 Ch. 590.

<sup>29</sup> *Ibid.* 596. As to mutuality, see *infra*, §§ 1433 *et seq.*

inferring that the defect is not likely to be cured can oblige the purchaser to wait until the day fixed for performance in order to see whether by any chance the vendor may be able to cure the defect, on penalty of being subject to an action for damages.

### § 880. Insolvency or bankruptcy.

If one party to a contract is insolvent or bankrupt, he probably will not be able to carry it out even if he so desires, unless his contract relates to specific property, and the solvent party has acquired a legal or equitable property right in the subject-matter of the contract which will be valid against the seizure by creditors or by a trustee in bankruptcy of the insolvent contractor,<sup>30</sup> or unless the contract requires of the bankrupt only personal services which insolvency will not prevent him from rendering. Accordingly, the rule is generally that a contractor need not trust to the credit of a co-contractor whom he finds to be insolvent, even though he has agreed to do so. As it is possible, however, that the insolvent contractor or his representative of his creditors may find it advantageous to carry out the contract, and as they may be able to do so, the fact of insolvency does not necessarily mean total lack of ability. The solvent party is not excused from the obligation to complete the contract altogether, but only from any obligation to advance credit,<sup>31</sup> unless the contract is of such a personal character

<sup>30</sup> A contract to subscribe to the stock of a corporation is not excused by the insolvency of the corporation. *Busch v. Stromberg-Carlson Telephone Mfg. Co.*, 217 Fed. 328, 133 C. C. A. 244.

<sup>31</sup> *Ex parte Chalmers*, L. R. 8 Ch. 289; *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Morgan v. Bain*, L. R. 10 C. P. 15; *Mess v. Duffus*, 6 Comm. Cas. 165; *Re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108; *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185; *Robertson v. Davenport*, 27 Ala. 574; *Brassel v. Troxel*, 68 Ill. App. 131; *Rappleve v. Racine Seeder Co.*, 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; *Hobbs v.*

*Columbia Falls Co.*, 157 Mass. 31 N. E. 756; *Lennox v. Murphy*, Mass. 370, 373, 50 N. E. 644; *v. Kanady*, 100 N. Y. 121, 2 N. E. 885; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 48 L. R. A. 685; *Diem v. Kobler*, Ohio St. 41, 29 N. E. 1124, 3 St. Rep. 531; *Dougherty Bros. v. Central Bank*, 93 Pa. St. 227, 3 St. Rep. 750; *Lancaster Bank v. Lincoln*, 114 Pa. St. 216, 6 Atl. 141; *Lind v. Charles Ashuler Mfg. Co.*, 14 Ala. 475, 125 N. W. 908, 28 L. R. A. 780. See also *Sale of Goods Act*, 1907, § 41. Compare *Ex parte Pollard*, 41 L. R. A. 411; *Stokes v. Baars*, 18 Fla.

at an assignee could not carry it out.<sup>32</sup> Mere doubts of the competency of the other party, even though reasonable, afford no defence.<sup>33</sup>

It has even been held that the solvent party must perform under a precedent act which the contract requires of him (such as carrying the goods to the point where a sale was to be made) and is not liable if it turns out that the insolvent or his representatives desire to perform the contract, and are able to do so.<sup>34</sup> But the contracts of insolvents and of bankrupts are not usually carried out, and the solvent contractor should be excused in assuming that they will not be carried out unless some indication is made to him that they will be. To require him to make expensive preparations or part performance which will be futile if the contract is not carried out, is an unreasonable hardship. The Supreme Court of the United States has held that bankruptcy is an immediate anticipatory breach of contract<sup>35</sup> and though this mode of statement seems to go too far<sup>36</sup> since, if the contract is not one of a personal character, the trustee in bankruptcy may assume it and carry it on, the decision at least shows an indisposition to require a tender by the solvent party.<sup>37</sup> If the contract

*Commercial Nat. Bank v. World's Columbian Exposition*, 170 Ill. 82, 48 N. E. 517, 34 N. E. 1087; *Bank Commissioners v. New Hampshire Trust Co.*, 169 N. H. 621, 44 Atl. 130. In all these cases the seller's performance is first due, but there can be no difference in result when the buyer's performance is first due.

*Mess v. Duffus*, 6 Comm. Cas. 111; *Ex parte Pollard*, 2 Low. 411; *Commercial Nat. Bank v. World's Fair Exposition*, 170 Ill. 82, 48 N. E. 331; *Comm. v. New Hampshire Trust Co.*, 169 N. H. 621, 44 Atl. 130.

*C. F. Jewett Publishing Co. v. ...*, 159 Mass. 517, 34 N. E. 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 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requires personal service by the insolvent which cannot adequately rendered by such a person, the co-contractor refuse to continue performance,<sup>38</sup> but with this qualification it seems that insolvency or bankruptcy of the employee will not excuse the employer from continuing to perform a contract of employment.

**§ 881. Inability to perform unless the other party performs**

It must generally be true that if one party to a contract is unable to perform unless he first receives performance from the other party which, by the terms of the contract, is due until the same time that his own performance is due, he cannot recover, and if he has indicated his inability to the other side will be liable himself without the necessity of tender. Thus one who has contracted to sell goods, cannot rely on obtaining the promised price as a means of purchasing the goods with which to fulfil his concurrent obligation. This principle has been applied in the case of contracts to sell real estate where the buyer's means of paying were insufficient unless he could raise money on the land to be conveyed to him. The rule has been broadly laid down that, under such circumstances, the buyer cannot recover if the seller

becomes insolvent. The insolvency of one of the parties to a contract does not relieve the other party from performance thereof, and would not excuse the refusal of defendant to carry out its contract. It is equally true, however, in this case that the steel company had become disabled from carrying on its contract, and that the same with all obligations of performance on the part of the defendant fell, unless the receivers were authorized by the court to approve and adopt the contract with defendant and insist upon its performance. It would not have been enough that after their appointments they did not repudiate and refuse to carry out said contract. It was necessary for them to do more than this and under authority of the court affirmatively indicate their election to proceed with the same and hold

the other party to the obligation thereof. *Stokes v. Hoffman* 120 N. Y., 46 N. Y. App. Div. 120, 121 N. Y. S. 821, *affd.* 167 N. Y. 821, 121 N. E. 667, 53 L. R. A. 870; *Bell v. Glasgow Co.*, 92 Fed. 760; *Kansas South Ry. Co. v. Lusk*, 224 Fed. 140 C. C. A. 244; *Chicago Dep. Co. v. McNulta*, 153 U. S. 515, 15 Sup. Ct. 915, 38 L. Ed. 819; *Pittsburgh Coal Co. v. Nixon*, 226 Fed. 215 C. C. A. 446; *United States Trust Co. v. Wabash Western Ry. Co.*, 155 U. S. 287, 299, 14 Sup. Ct. 86, 37 L. Ed. 1085."

<sup>38</sup> In *Kamps & Co. Drug Co. v. Kamps & Co. Drug Co.*, 164 Wis. 412, 160 N. W. 251, the defendant was held justified in refusing to continue its agency for the defendant's preparations.

ates the contract.<sup>39</sup> And a similar rule has been applied where the seller of land requires the buyer's money as a means perfecting the title which he was to convey.<sup>40</sup>

It may be questioned whether these statements are not too broad. All that should be necessary for the plaintiff's case to prove that he would have been able to carry through the transaction concurrently with the defendant. If one who has contracted to buy land has but half the agreed price, but can make arrangements to borrow the remainder on the security of the land to be conveyed, there is no practical difficulty in carrying out the transaction at one instant. The mortgage can be drawn from the buyer to the lender before the land is conveyed; then if the buyer and seller and borrower meet at the same place, the seller can be paid his money while simultaneously he delivers a deed to the buyer, and the buyer delivers a mortgage to the lender. In the same way if the buyer's money is needed to free the title which the seller must clear, a simultaneous execution of the transaction is possible if the person holding the title or encumbrance is willing to assist the seller in carrying out the bargain.<sup>41</sup> The question

*Gray v. Smith*, 76 Fed. 525, aff'd 83 Fed. 824, 28 C. C. A. 168, 48 S. App. 581. See also cases in the following note.

In *Brown v. Lee*, 192 Fed. 817, 113 C. C. A. 141, the court said, at page 817: "Lee, the vendor, contends that the proof shows that the Barefields had conveyed to him a deed conveying a clear, unincumbered title, and that the deed was so deposited that if Brown had complied with his agreement he could have used the cash received from Brown to have paid the Barefields, and that he would have been able to make a proper deed to Brown. We waive the consideration of Brown's contention that the title to the land from the Barefields would have been defective if delivered to him. Assuming that it would have been defective, Lee's right to recover would depend on his right to require Brown to advance the money with which he

would obtain the title from the Barefields. Brown had not contracted to do this. By his contract he was to pay the purchase money concurrently with his receipt of the title from Lee.

In *Gray v. Smith*, 76 Fed. 525, 83 Fed. 824, 28 C. C. A. 168, when that case was tried in the Circuit Court before Mr. Justice McKenna, then Circuit Judge (76 Fed. 525, 534), the plaintiff to show that he was able to perform his contract to convey, relied on proof of what he was to receive from the other party to the contract. But the court held that sufficient ability to perform the obligations of the contract must actually exist independent of the other party to the contract. But this qualification of this broad statement is made in *Thomas J. Baird Inv. Co. v. Harris*, 209 Fed. 291, 297, 126 C. C. A. 217.

<sup>41</sup> See *Brickles v. Snell*, [1916] 2 A. C. 599; *Thomas J. Baird Inv. Co.*

should be dealt with purely as one of fact. Could the plaintiff have performed concurrently with the defendant? The mere fact that the plaintiff needed the assistance of another person to enable him to do this is not proof that he could do it. If the defendant was not aware of the facts at the time he entered into the bargain and finding them out subsequently, before the time for performance, repudiated the agreement, a further question must be asked; namely, was the risk of non-performance which the other party is endeavoring to impose upon him greater than he should reasonably have anticipated as possible when he entered into the contract?

### § 882. Both parties unable or unwilling to perform.

If both parties to a contract are actually or prospectively unable to perform, and the performances of the parties were the price or exchange for one another, neither can recover from the other; and the order in which their performances were due by the terms of the contract is immaterial. For even though the party whose performance was first due broke his promise without excuse, the subsequent inability of the other party to perform indicates that had the first performance been rendered, there would have been a full consideration justifying the recovery back of that performance. And repudiation or other manifestation by either party of unwillingness has the same effect as inability. Therefore, a vendor of real property desiring to claim a deposit deposited by the other party to a contract for the sale of property, is not excused from showing that he was prepared (or would have been) to perform on his side by the fact

*v. Harris*, 209 Fed. 291, 297, 126 C. C. A. 217.

"In *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 612, the plaintiff sued the defendant for breach of a contract to buy silk on August 15th. The court said: "Conceding that the defendant's repudiation of the whole contract before August 15th absolved the sellers from the duty of

tendering an instalment on that date and gave them an immediate right of action against the defendant for breach of contract, nevertheless, if it appeared, as it did on the trial, by no possibility could the seller have made tender of the silk due on August 15th, because the silk did not arrive in New York until a later day, it is evident that as to that instalment the sellers suffered no loss by the breach.

purchaser repudiated his obligation before the time for completing the transfer.<sup>43</sup>

### 3. Rules of damages provide for cancellation of mutual obligations to exchange performances.

That performances in a bilateral contract are generally intended as an exchange for one another involves consequences besides those ordinarily classed under the rules of implied conditions. The law of damages takes the same principle into account. Where performances under a bilateral agreement are not intended as an exchange of one another as in the case of a promissory note given in exchange for an insurance policy, on default in the performance of one promise the promisee will recover full amount which was promised, and the defendant in his turn either by cross action, or counterclaim will recover the full amount promised to him.<sup>44</sup> Under the common law mutual debts or obligations do not cancel one another *pro tanto*.<sup>45</sup> Where, however, not only the two obligations in question, but the performances of them are in exchange for one another and the parties litigate, the court through the law of damages gives this effect.<sup>46</sup>

### 4. An accrued right of action for breach of contract may be discharged by the plaintiff's subsequent inability to perform.

Though a plaintiff whose performance is due subsequently to that of the defendant need not allege or prove either performance or tender on his part,<sup>47</sup> the same fundamental prin-

*Wells v. Page*, 48 Or. 74, 82 Pac. 103 (N. S.). The court at page 80: "A vendor of real estate cannot enforce the contract with a vendee who is in default or repudiated it, unless he himself is in condition to perform: *Sievers v. Morgan*, 34 Or. 454, 56 Pac. 170, 45 Or. 642; *Hampton v. Speckenagle*, 10 Or. 212, 11 Am. Dec. 704; *Gray v. Morgan*, 77 N. Y. 312; *Gray v. Morgan*, 83 Fed. 824, 28 C. C. A. 168; *Beach v. Beach*, 46 Ill. 311; *Wallace v.*

*McLaughlin*, 57 Ill. 53; *Peck v. Brighton Co.*, 69 Ill. 200; *Birge v. Bock*, 24 Mo. App. 330." See also *Eddy v. Davis*, 116 N. Y. 247, 251, 22 N. E. 362; *Catlin v. Jones*, 52 Or. 337, 97 Pac. 546; *cf. Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543.

<sup>43</sup> See *infra*, § 888.

<sup>44</sup> See *supra*, § 859.

<sup>45</sup> See *infra*, §§ 1350, 1351.

<sup>47</sup> *Reard v. Ephrata Orchard Homes Co.*, 78 Wash. 180, 138 Pac. 678, and see *supra*, § 829.

ciple is applicable that he ought not to be allowed to recover if the defendant will not get in return for his performance what he bargained for. Here, however, the burden is thrown upon the defendant to allege the failure of consideration which will excuse him from liability. To prevent a cause of action from arising originally on the defendant's promise at the time when performance is due, the only question can be of prospective failure of consideration rather than a failure which has already occurred; for by hypothesis the time for plaintiff's performance has not yet arrived. But where subsequent events show that the plaintiff could not have given or would not have given the performance due from him, even though the plaintiff had performed on his part, the defendant is excused and it makes no difference to the reason why the defendant failed to perform his part, whether his obligation had no connection with the subsequent inability or unwillingness of the plaintiff.<sup>48</sup> Even though the plaintiff had acquired a complete right of action on the failure of the defendant to perform as agreed, the right will be lost if subsequent events prove that the plaintiff could not or would not have performed even if the defendant had performed.

**§ 885. Actual or threatened failure of consideration will discharge charge liability already accrued.**

It may seem that where performance on one side of a contract is precedent to that on the other, and the time for prior performance has arrived and, no defence then existing, a right of action has arisen, this right of action cannot afterwards be destroyed except by payment, or release, or accord and satisfaction. Such, however, is not the case. Circumstances may arise subsequently which would justify

<sup>48</sup> *Gray v. Sims*, 3 Wash. C. C. 276, 280; *Gray v. Smith*, 83 Fed. 824, 28 C. C. A. 168; *Dosch v. Andrus*, 111 Minn. 287, 126 N. W. 1071; *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 612. See also *Winston v. Brown*, 247 Fed. 948, 160 C. C. A. 138. *Cp. Braithwaite v. Foreign Hard Wood*

*Co.*, [1905] 2 K. B. 543; *Mitsui & Co., Ltd., v. Watts, Watts & Co.*, [1916] 2 K. B. 826; *Watts, Watts & Co., Ltd., v. Mitsui & Co.*, [1917] 227 (stated *supra*, § 877).

<sup>49</sup> See *Gerli v. Poidebard Silk Co.*, 57 N. J. L. 432, 31 Atl. 401, L. R. A. 61, 51 Am. St. Rep. 612, stated *supra*, n. 42.



very back of the prior performance, if it had been given, therefore, if it had not been given but a cause of action arisen, to avoid circuity of action the court will deny recovery. Failure of consideration gives rise to such a situation.

If B agrees to pay on January 1st the price of a horse, to which A agrees to transfer on January 15th, a right of action will arise on January 2d for the price. B's obligation is conditional; yet if the horse dies on January 10th, A can no longer sue for the price. A right of action which was unconditionally his on January 1st, is lost.

Similarly, it may be stated, that if goods contracted to be sold are destroyed or injured before the time when it was agreed that title should pass, the buyer cannot be held to pay the price.<sup>50</sup> And if he has paid the price in advance it may be recovered.<sup>51</sup> The same principles are applicable to contracts for the sale of land, except so far as rules of equity protect a contracting buyer as owner from the time of the contract require a different result.<sup>52</sup> It is true that land is often totally destroyed, and therefore a total failure of consideration is not probable, but destruction of buildings is a frequent occurrence, and in a wholly executory contract a considerable partial failure of consideration is as effective a defense as a total failure. Where a building in course of construction is destroyed by fire, the builder is bound to rebuild,<sup>53</sup>

*McCutta Co. v. De Mattos*, 32 Cal. B. 322, 335; *Tillson v. United States*, 129 U. S. 101, 32 L. Ed. 101; *Days v. Pittsburg Co.*, 33 Fed. 25; *Peace River Phosphate Co. v. ...*, 58 Fed. 550; *Jones v. Pearce*, 58 Fed. 545; *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 Cal. 32, 25 L. R. A. (N. S.) 609; *Ord v. Smith*, 7 Dana, 59; *... v. Childs*, 2 Duv. 314; *Phillips v. ...*, 71 Me. 78, 80; *Lingham v. ...*, 27 Mich. 324; *Hahn v. ...*, 30 Mich. 223, 18 Am. Rep. 100; *Wilkinson v. Holiday*, 33 Mich. 100; *... v. Lee*, 94 Mich. 127, 53 N. W. 1110; *Drews v. Ann River Logging Co.*, 13 Minn. 199, 54 N. W. 1110;

*Fairbanks v. Richardson Drug Co.*, 42 Mo. App. 262; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450; *Terry v. Wheeler*, 25 N. Y. 520; *Kein v. Tupper*, 52 N. Y. 550.

<sup>50</sup> *Logan v. Le Mesurier*, 6 Moo. P. C. 116; *Stone v. Waite*, 88 Ala. 599, 7 So. 117; *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 322, 334, 104 Pac. 432, 25 L. R. A. (N. S.) 609; *Joyce v. Adams*, 8 N. Y. 291; *Williams v. Allen*, 10 Humph. 337, 51 Am. Dec. 709; *Kelly v. Bliss*, 54 Wis. 187, 11 N. W. 488; *Wong Ko v. Hawaiian Government*, 7 Hawaii, 690.

<sup>51</sup> See *infra*, §§ 927 et seq.

<sup>52</sup> See *infra*, § 1964.

and if the price "is payable in installments during the progress of the work, he cannot recover an installment earned but not paid at the time of the fire until the reconstruction has proceeded to the stage necessary to make it due."<sup>54</sup>

The English law in some cases certainly seems to deny the principles of this and the preceding section, at least where the failure of consideration is due to impossibility. Thus, where freight is payable in advance, the failure to carry the goods does not justify the recovery of freight money paid in advance, and if freight money has been promised as an advance, the failure of the carrier owing to excusable impossibility to complete the carriage of the goods would not excuse the shipper from liability.<sup>55</sup> Similarly in the so-called "coronation" cases the English court held that money paid for seats to view a coronation procession before its postponement had been decided upon could not be recovered;<sup>56</sup> and that if a payment had become due before postponement of the procession, it must be paid in spite of the postponement.<sup>57</sup> Inconsistent with these cases it is held that if goods are destroyed before the title has passed to a buyer, he is not only not liable for the price, but if he has paid it or any part of it, he may recover the payment.<sup>58</sup> There is no more reason to suppose that when money is promised before the performance on the other side is due that the promisor intends to pay for a mere promise in one case than the others. The assumption seems unfounded in all the cases alluded to.

#### § 886. Reviving of seller's lien upon actual or threatened failure of consideration.

A seller in possession who has sold goods on credit has a lien upon them and is bound to deliver them immediately and unconditionally. The very meaning of these words is

<sup>54</sup> Ahlgren v. Walsh, 173 Cal. 27, 31, 158 Pac. 748, Ann. Cas. 1918 E. 751.

<sup>55</sup> See *infra*, § 1101.

<sup>56</sup> Blakeley v. Muller, 19 T. L. Rep. 186; Chandler v. Webster, [1904] 1 K. B. 493, otherwise if payment had been made the decision to operate upon

the king. Griffith v. Brymer, 19 Rep. 434.

<sup>57</sup> Chandler v. Webster, [1904] K. B. 493.

<sup>58</sup> Logan v. Le Mesurier, 6 Moo. 116, and see American cases, note.

the seller binds himself to give the goods over to the buyer without receiving at that time pay for them.<sup>59</sup> But even where the parties agree upon a sale on credit, the seller's lien may revive. By the nature of such a sale, the buyer may take possession of the goods without paying the price; but if he fails to do so until the term of the credit has expired and the price becomes due, he loses the right which he theretofore had.<sup>60</sup> It may be urged that the original agreement shows that the seller did not rely upon his lien in such a case; but the existence of a lien does not depend upon the construction of the contract, but upon a rule of law which is imposed by reason of its inherent justice. After the term of credit has expired, the buyer is by the terms of the contract bound immediately to pay the price and the seller to deliver the goods; and in conformity with the general principle of contracts that wherever the parties to a bilateral agreement are each under an immediate obligation to perform, the performances are concurrently conditional, the obligations become mutually dependent.

The insolvency of the buyer also revives the lien of the seller, even though the time for payment of the price has not yet arrived.<sup>61</sup> This doctrine is only an application of the general principle that when one party to a bilateral contract is in-

<sup>59</sup> *Spartali v. Benecke*, 10 C. B. 112, 223; *Abraham v. Karger*, 100 Wis. 387, 76 N. W. 330.

<sup>60</sup> *Bunney v. Poyntz*, 4 B. & Ad. 668; *New v. Swain*, 1 Dans. & L. 193; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 16 C. C. A. 232; *Leahy v. Lobdell*, 80 Fed. 665, 667, 54 U. S. App. 35, 16 C. C. A. 75; *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. 899.

<sup>61</sup> *Bloxam v. Sanders*, 4 B. & C. 441; *Bloxam v. Morley*, 4 B. & C. 451; *Griffiths v. Perry*, 1 E. & E. 680; *Ex parte Chalmers*, L. R. 8 Ch. App. 289; *McElwee v. Lumber Co.*, 69 Fed. 302, 37 U. S. App. 266, 281, 16 C. C. A. 232; *Owens v. Weedman*, 82 Ill. 409, 417, 418; *Rapley v. Racine Seeder Co.*, 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139;

*Thompson v. Railroad Co.*, 28 Md. 396; *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Keeler v. Goodwin*, 111 Mass. 490, 492; *Ware River R. R. Co. v. Vibbard*, 114 Mass. 447, 454; *Lennox v. Murphy*, 171 Mass. 370, 373, 50 N. E. 644; *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113; *Benedict v. Field*, 16 N. Y. 595; *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885; *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. 348; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; *White v. Welsh*, 38 Pa. St. 396; *Wanamaker v. Yerkes*, 70 Pa. St. 443; *Arnold v. Carpenter*, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357; *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. 899; *Bohn Mfg. Co. v. Hynes*, 83 Wis. 388, 53 N. W. 684.

capacitated from performing his part of the agreement, other party also is excused from performing.

The same principle is illustrated by the doctrine of stoppage *in transitu*. Where that principle is applicable the seller parted with both title and possession, yet if the buyer becomes insolvent showing prospective failure of consideration of seller's performance, the seller is allowed to reclaim the goods while still in transit.<sup>63</sup>

### § 887. *Beecher v. Conradt*.

In a leading New York decision<sup>63</sup> the plaintiff had contracted to sell land, and to convey it on the payment of full price which was payable in five annual instalments. None of the instalments were paid, and after all had become due the seller brought suit for them. It was held that he could not recover any without tender of a deed of the promised land. Though he might have brought suit for each instalment as it fell due,<sup>64</sup> a rule of procedure would require the seller to set up in his action a claim for all instalments of the price due at the time when the action was begun; since to bring separate actions for each would be unnecessarily vexatious to the defendant without giving the plaintiff any advantage.<sup>65</sup> The only penalty, however, to which a plaintiff is subjected in not including in his action an instalment which has already become due, is that the right to that instalment is lost. Thus if when three instalments were due the plaintiff sued and recovered two, he could not thereafter recover the third,

<sup>63</sup> As to the limits of this doctrine, which though based on the same equitable principles as the dependency of mutual promises, is subject to somewhat technical limitations, see Williston on Sales, §§ 517 *et seq.*

<sup>64</sup> *Beecher v. Conradt*, 13 N. Y. 108, 64 Am. Dec. 535.

<sup>65</sup> *Gray v. Booth*, 64 N. Y. App. Div. 231, 71 N. Y. S. 1015.

<sup>66</sup> *Manton v. Gammon*, 7 Ill. App. 201; *Bandernagle v. Cocks*, 19 Wend. 207; *Wilson v. Mechanical Orguinette Co.*, 170 N. Y. 542, 63 N. E. 550.

In *Seed v. Johnston*, 63 N. Y. App. Div. 340, 343, 71 N. Y. S. 1015, the court said: "It is a well-established proposition of law that if a contract provides for payment by instalments due at different times, the instalments may, of course, be successively enforced as they become payable (*Van Rensselaer v. Lorillard*, 203 N. Y. App. Div. 203), but each action must include every instalment due at the time it is commenced, unless a suit is pending for the recovery of the whole or other special circumstances." *Lorillard v. Clyde*, 122 N. Y. 41.

he might recover the fourth when that fell due. It might seem therefore that in the case stated at the beginning of the section, the seller should recover for four instalments of the price. He would be barred from recovering the final instalment by his failure to tender a deed.<sup>66</sup> But this failure, it might be thought, should not affect his right of action for the previous instalments which have become absolutely due. Such indeed is the result reached by a number of decisions.<sup>67</sup> The New York Court of Appeals, however, decided otherwise,<sup>68</sup> and the weight of modern American authority supports the decision.<sup>69</sup> This result seems conformable with justice. If so great a time has elapsed since the buyer was in default as to justify the seller in refusing to go on with the contract, it is true that he ought to have not only the right of rescission, but a right of action without tender on his part, but not a right of action for the price. He ought to be entitled to say: "I would have accepted your performance if it had been made when it should have been, and I should have been ready and willing to perform on my own part, but I am not now ready and willing owing to your fault. I claim such damages from you as I

<sup>66</sup> See *supra*, § 837.  
<sup>67</sup> *Weaver v. Childress*, 3 Stew. 361; *Hays v. Hall*, 4 Port. 374, 387, 30 Am. Dec. 530; *White v. Beard*, 5 Port. 94, 100, 30 Am. Dec. 552; *Duncan v. Charles*, 5 Ill. 561; *Sheeren v. Moses*, 84 Ill. 448; *Gray v. Meek*, 199 Ill. 136, 139, 64 N. E. 1020; *Allen v. Sanders*, 7 B. Mon. 593; *Coleman v. Rowe*, 6 Miss. 460, 37 Am. Dec. 164; *Clopton v. Bolton*, 23 Miss. 78; *McMath v. Johnson*, 41 Miss. 439; *Bowen v. Bailey*, 12 Miss. 405, 2 Am. Rep. 601; *Biddle v. Coryell*, 3 Har. (N. J. L.) 377, 38 Am. Dec. 521. See also *Loud v. Pomona Land Co.*, 153 U. S. 564, 580, 38 L. Ed. 822, 14 Sup. Ct. 928; *Eastern Oregon Land Co. v. Moody*, 198 Fed. 7, 119 C. C. A. 135; *Bean v. Atwater*, 4 Conn. 3, 10 Am. Dec. 91; *Brenard Mfg. Co. v. Kingston Supply Co.*, 22 Ga. App. 280, 95 S. E. 1028; *White v. Atkins*, 8 Cush. 367; *Livesley v. Krebs*

*Hop Co.*, 57 Or. 352, 107 Pac. 460, 112 Pac. 1; *Kettle v. Harvey*, 21 Vt. 301.

<sup>68</sup> *Beecher v. Conradt*, 13 N. Y. 108, 64 Am. Dec. 535, and see New York cases in the following note.

<sup>69</sup> *Hill v. Grigsby*, 35 Cal. 656; *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558; *Irwin v. Lee*, 34 Ind. 319; *Soper v. Gabe*, 55 Kan. 646, 41 Pac. 969; *Brentnall v. Marshall*, 10 Kan. App. 488, 63 Pac. 93; *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362; *Booth v. Milliken*, 127 N. Y. App. D. 522, 111 N. Y. S. 791, 194 N. Y. 553, 601, 87 N. E. 1115, 88 N. E. 1115; *Security Title & Trust Co. v. Stewart*, 154 N. Y. App. D. 434, 437, 139 N. Y. S. 74; *Shelley v. Mikkelsen*, 5 N. Dak. 22, 63 N. W. 210; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910. See also *McElwee v. Bridgeport Land Co.*, 54 Fed. 627, 4 C. C. A. 525.

have suffered from your failure to carry out the bargain is your fault that it has not been carried out."

But the seller's claim for instalments of the price can be justified on the assumption that he does not propose to take advantage of his right to refuse to go on with the tract. If the seller recovers the price, the buyer must be entitled to the land.<sup>70</sup> There is no use in allowing the seller to recover even a single instalment of the price when all become due unless the contract is to be fully performed. Recovering even one instalment will operate as an election by the vendor to proceed with the contract despite any default which has thus far occurred.<sup>71</sup> If then the contract is to be fully performed, the time has come for performance, and there should be full performance. All the price ought to be paid and the land ought to be conveyed. This rule is recognized in equity where a decree for specific performance is made after the several performances under a contract have become due, though originally performable at different times,<sup>72</sup> and the rule at law should be the same; except that since it is impossible to protect the defendant by making the defence against him conditional on the plaintiff's simultaneous performance, the plaintiff must tender performance before action.

### § 888. Aleatory contracts.

Since the basis of excusing one party to a bilateral contract from liability because of default in the performance of the counter promise, is the assumption that not only are the promises in exchange for one another, but that each performance is intended as the price or equivalent of the other, the type of contract where this assumption does not hold

<sup>70</sup> See *supra*, § 791, *ad fin.*

<sup>71</sup> See *Manning v. Brown*, 10 Me. 49. The statement in regard to even a payment of interest made in *Eastern Oregon Land Co. v. Moody*, 198 Fed. 7, 27, 119 C. C. A. 135, by Gilbert, J., *diss.* seems accurate. "The acceptance of a payment on account of interest was wholly inconsistent with an intention to rescind the contract under the

notice of August 11th. It was a knowledge of the continued performance of the contract. It was the acceptance of a benefit thereunder, not the acceptance of an instalment, i. e., the affirmation of a prior notice that was called for the payment of the sum due" [by a certain time had elapsed].

<sup>72</sup> *Hunter v. Daniel*, 4 Hare, 42.

must be dealt with in a different way. "Whenever the performance of mutual covenants or promises are unequal in certainty, they will also be unequal in amount,"<sup>73</sup> and must have been so regarded by the parties. In an aleatory contract, therefore, unless each promise is subject to the same risk, it is obvious that the performances were not contracted for as equivalent to one another. The premium of insurance is not assumed to be equivalent to the face of the policy. The premium is paid for the risk, and risk is but another name for a binding obligation to pay upon a contingency. That is, the premium is the exchange for the promise, not for the performance of it.<sup>74</sup> Insurance policies are not usually bilateral, but not infrequently a promissory note is accepted for the premium. In such a case each party is under an executory obligation, but breach of the obligation by the insured will not excuse subsequent non-performance by the insurer.<sup>75</sup> The propriety of such decisions is obvious upon reflection. If the insured made default in payment of the note for the premium, it is clear that the insurer might, and would, if the premises were not burned during the term of the insurance, sue and recover the amount of the note. It cannot be permitted for the insurer to have the option of refusing to pay the insurance if the premises are destroyed, asserting as an excuse the non-payment of the premium (unless indeed the payment of the note made an express condition precedent of the insurer's liability) and, at the same time, be entitled to demand payment of the premium note if the contingency of fire does not occur. A contract to guarantee is similar in principle. A bilateral contract may be aleatory on one side only, as in the case of insurance in return for a promised premium; or, it may be aleatory on both sides, as where one promisor guarantees

<sup>73</sup> Langd. Summ. Cont., § 107.

<sup>74</sup> In *Perlee v. Jeffcott*, 89 N. J. L. 34, Atl. 789, speaking of a payment made for an option, the court said: "The consideration in a legal sense was Perlee's promise to keep the offer to open for a year. It was the promise, not the performance."

<sup>75</sup> *McMahon v. United States Life*

*Ins. Co.*, 128 Fed. 388, 63 C. C. A. 130, 68 L. R. A. 87; *Mutual Life Ins. Co. v. French*, 30 Oh. St. 240, 27 Am. St. Rep. 443; *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 30 N. W. 727. See also *Big Run Coal Co. v. Employers' Indemnity Co.*, 163 Ky. 596, 174 S. W. 25.

tinuing permission to occupy the premises. This is the view in which a lease is regarded in the Civil Law.<sup>79</sup> If it were so regarded there would seem no reason why the principles of dependency applicable to ordinary bilateral contracts should not likewise be applicable to leases. In fact they are not so applicable in English and American law. Partly because a lease is regarded primarily as a conveyance by the common law, partly because the law governing leases has been developed with in connection with the law of real estate, and because it was settled before the law of mutually dependent promises was established, and partly no doubt because leases have ordinarily been elaborately written documents in which the parties might be supposed to have expressed their intent with considerable fullness, covenants in leases have been held mutually independent unless in terms expressly conditional.<sup>80</sup> The breach on the part of a landlord of a covenant to repair does not excuse the tenant from liability on his covenant to pay rent.<sup>81</sup> Nor does destruction of the leased premises

<sup>79</sup> See *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. ed. 776, 7 S. Ct. 962.

<sup>80</sup> *Powell v. Merrill*, (Vt. 1918), 103 Atl. 259, 261, and see cases in the following note. Occasionally a decision is found where a lease is treated like an ordinary bilateral contract, and as an original question this method of treatment has much to commend it. *Berman v. Shelby*, 93 Ark. 472, 125 S. W. 124. In *University Club v. Deakin*, 265 Ill. 257, 106 N. E. 790, 791, 1915 C. 854, the court said that it was rightly ruled "at the request of plaintiff in error, that the lease sued upon was a bilateral contract, and upon a breach of an essential covenant thereof by the lessor the lessee had a right to refuse further to be bound by its terms and to surrender possession of the premises, and that a breach of the twelfth clause of the lease [in which the landlord agreed not to lease other shops in his building to any one conducting the same business as the lessee] would be a good defence to an

action for rent if the tenant rendered possession of the premises within a reasonable time after discovery of the breach." Cf. *Rubens v. Mullings Clothing Co.*, 238 Fed. 58, C. C. A. 134, L. R. A. 1918 A. 539, Fed. 667, the discussion by the court seems to indicate the assumption that a lease is an ordinary bilateral contract.

<sup>81</sup> *Belfour v. Weston*, 1 T. R. Dawson v. Dyer, 5 B. & Ad. 584; *Plum v. Farnsworth*, 7 M. & G. *Edge v. Boileau*, 16 Q. B. D. 117, *Tedstrom v. Puddephat*, 99 Ark. 137 S. W. 816; *Arnold v. Krigbaum*, 169 Cal. 143, 146 Pac. 423; *Lewis v. Chisholm*, 68 Ga. 40; *Palmer v. London Britannia Co.*, 188 Ill. 508 N. E. 247; *Rubens v. Hill*, 213 Ill. 72 N. E. 1127; *Harthill v. Cooke's*, 19 Ky. L. Rep. 1524, 43 S. W. *Leavitt v. Fletcher*, 10 Allen, *Taylor v. Finnegan*, 189 Mass. 575, 76 N. E. 203, 2 L. R. A. (N. S.) 973; *Meredith Mech. Assoc. v. A.*



ses.<sup>82</sup> Though an executory contract to take a lease of premises which the owner agrees to put in repair need not be performed if the premises are not repaired.<sup>83</sup>

So apart from statute or express provision in a lease, the tenant's non-payment of rent or other breach of covenant will not justify his eviction by the landlord.<sup>84</sup> Statutes in many States, allow the landlord this remedy for non-payment of rent. The independency of the parties' covenants is also shown by the fact that destruction of part of the leased premises by fire or other casualty in the absence of statutory or contractual exemption will not excuse the tenant from liability on a covenant to pay rent.<sup>85</sup>

### 891. Eviction.

It serves as a partial equivalent for the independency of covenants in leases, that there has been a tendency in the law to establish special rules relieving the landlord and the tenant respectively in the most troublesome situations which arise from non-performance by one or the other of them of his covenants. The most important of these rules is that excusing the tenant from the obligations of his covenants if the landlord evicts him.

The eviction does not terminate the tenancy but during its continuance the tenant's obligation to pay rent is suspended.<sup>86</sup>

*San Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330; *McCurdy v. Wyckoff*, 73 N. J. L. 368, 63 Atl. 992; *Stewart v. Childs Co.*, 86 N. J. L. 648, 92 Atl. 92; *Luts v. Goldfine*, 129 N. Y. S. 63, 12 N. Y. Misc. 25; *Kaufman v. Tarulli*, 136 N. Y. S. 36; *Thomson-Houston Co. v. Durant Land Co.*, 144 N. Y. 4, 39 N. E. 7; *Smithfield Imp. Co. v. Moley-Bardin*, 156 N. C. 255, 72 S. E. 12; *Prescott v. Otterstatter*, 85 Pa. 34; *Arbenz v. Exley, Watkins & Co.*, 12 W. Va. 476, 44 S. E. 149, 61 L. R. A. 57; cf. *Tedstrom v. Puddephat*, 99 Ark. 193, 137 S. W. 816.

<sup>82</sup> See *supra*, § 945.

<sup>83</sup> *Hickman v. Royl*, 55 Ind. 551;

*Hydeville &c. Co. v. Eagle R. Co.*, 44 Vt. 395. See also *Tildesley v. Clarkson*, 30 Beav. 419.

<sup>84</sup> *Shaw v. Coffin*, 14 C. B. (N. S.) 372; *Re Pennewell*, 119 Fed. 139; *Chapman v. Emeric*, 3 Cal. 273; *Brown's Adm. v. Bragg*, 22 Ind. 123; *Dennison v. Read*, 3 Dana, 586; *Johnson v. Gurley*, 52 Tex. 222.

<sup>85</sup> See *infra*, § 944.

<sup>86</sup> *Salmon v. Smith*, 1 Saund. 204; *Morrison v. Chadwick*, 7 C. B. 266; *Montanye v. Wallahan*, 84 Ill. 355; *Leishman v. White*, 1 Allen, 489; *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. Rep. 272; *Holmes v. Guion*, 44 Mo. 164; *Christopher v.*

An eviction occurs whenever a landlord wrongfully deprives a tenant of any part of the leased premises; and if the tenant is evicted from the entire, the tenant is excused from his obligation to pay rent for the continuance of the eviction though he continues to occupy the remainder of the premises. It is said that the landlord cannot by his own wrong apportion the rent.<sup>87</sup> And "on the rule *de minimis*," "no inquiry is open as to the greater or less importance of the parcel from which the tenant is debarred or debarred."<sup>88</sup> Nor can the landlord recover on principle of quasi-contract on a common count for the use and occupation of the occupied part of the premises if the lease was in writing. Rent, however, which has already become due must be paid in spite of eviction.<sup>89</sup> This principle has been applied to the rent in question was payable in advance for a period of the lapse of which eviction took place.<sup>91</sup> If the fundamental basis of the doctrine of eviction, namely, failure of consideration, were logically applied, rent payable for a period of which the tenant owing to the landlord's fault had no enjoyment of the premises, could not be collected though in terms payable in advance at a date prior to the eviction.<sup>92</sup> If the eviction is from the whole of the leased premises the tenant is excused from the performance

Austin, 11 N. Y. 216; McClurg v. Price, 59 Pa. 420, 98 Am. Dec. 356.

<sup>87</sup> Hodgkins v. Robson, 1 Vent. 276, 277; Page v. Parr, Style, 432; Neale v. Mackenzie, 1 M. & W. 747; New York Dry Goods Store v. Pabst Brewing Co., 112 Fed. 381, 50 C. C. A. 295; Skaggs v. Emerson, 50 Cal. 3; Okie v. Person, 23 D. C. App. 170; Smith v. Wise & Co., 58 Ill. 141; Sherman v. Williams, 113 Mass. 481, 18 Am. Rep. 522; Mirick v. Hoppin, 118 Mass. 582; Kuschinsky v. Flanigan, 170 Mich. 245, 136 N. W. 362, 41 L. R. A. (N. S.) 430, Ann. Cas. 1914 A. 1228; Dolton v. Sickel, 66 N. J. L. 492, 49 Atl. 679; Christopher v. Austin, 11 N. Y. 216; Duhain v. Mermod, etc., Co., 211 N. Y. 364, 105 N. E. 657; Fifth Ave. Bg. Co. v. Kernochan, 221 N. Y. 370, 117 N. E. 579; Powell v. Merrill, (Vt. 1918), 103

Atl. 259. But see Warren v. V. 75 Ala. 188, 51 Am. Rep. 446; son v. Winton, 136 Ala. 422, 34 and cf. Arafé v. Howe, 228 Mass. 116 N. E. 971.

<sup>88</sup> Smith v. McEnany, 170 Mass. 28, 48 N. E. 781, 64 Am. St. Rep. 100.  
<sup>89</sup> Grundin v. Carter, 99 Mass. 100.  
Smith v. McEnany, 170 Mass. N. E. 781, 64 Am. St. Rep. 100.  
Etheridge v. Osborn, 12 Wend. 100.

<sup>90</sup> Selby v. Browne, 7 Q. B. 100.  
Pepper v. Rowley, 73 Ill. 262; E. v. Page, 20 N. Y. 281.

<sup>91</sup> Hunter v. Reiley, 43 N. J. 100.  
Giles v. Comstock, 4 N. Y. 270.  
v. Isaacs, 21 N. Y. App. D. 100.  
N. Y. S. 594, affd. in 162 N. Y. 57 N. E. 1111; Manning v. 27 N. Y. Misc. 522, 58 N. Y. S. 3.

<sup>92</sup> In accord with this view a

is covenants during the period of eviction.<sup>93</sup> If, however, the eviction is partial only, the tenant though excused from payment of rent altogether, is not excused from the obligation of his other covenants.<sup>94</sup> Eviction involves a breach of duty on the part of the landlord, therefore the loss of the leased premises does not amount to an eviction if,—

1. The tenant's dispossession was by the tortious act of a third person;<sup>95</sup> or, 2, although by or under the authority of the landlord was justifiable.<sup>96</sup> As the landlord impliedly, and not expressly, warrants the quiet enjoyment of the demised premises,<sup>97</sup> eviction by title paramount is an excuse to the tenant; but in such a case if the eviction relates to part only of the demised premises, and the tenant remains in possession of the remainder, he is entitled only to abate the rent proportionally.<sup>98</sup>

The tenant is evicted by paramount title though he surrenders possession without disputing a valid claim,<sup>99</sup> or attorns to the holder of the paramount title as his tenant.<sup>1</sup> The tenant, however, acts at his peril in surrendering possession without judgment in favor of the paramount title, since if the alleged paramount title is invalid, the tenant will remain liable under his lease; and even though a valid adverse right

<sup>93</sup> *Brockman*, 171 Ill. App. 465; *Noyes v. Anderson*, 1 Duer, 342. See also *Porter v. Tull*, 6 Wash. 408, 33 Pac. 15.

<sup>94</sup> *Andrews v. Needham*, Cro. Eliz. 6 (covenant to repair excused).

<sup>95</sup> *Newton v. Allin*, 1 Q. B. 518; *Morrison v. Chadwick*, 7 C. B. 266.

<sup>96</sup> *Simons v. Farren*, 1 Bing. N. C. 186; *Chestnut v. Tyson*, 105 Ala. 149, 10 So. 723; *Barry v. Guild*, 126 Ill. 439, 10 N. E. 759, 2 L. R. A. 334.

<sup>97</sup> As where the landlord enters under authority of the lease; or where the lease provided that the acts of third persons might be done which interfered with the tenant's enjoyment. *Ham v. Carroll*, 147 N. Y. App. Div. 9, 132 N. Y. S. 4.

<sup>98</sup> *Tiffany*, Real Property, § 43.

<sup>99</sup> *Smith v. Malings*, Cro. Jac. 160;

*Tomlinson v. Day*, 2 B. & B. 680; *Buffum v. Deane*, 4 Gray, 385; *Duhain v. Mermod, etc., Co.*, 211 N. Y. 364, 105 N. E. 657; *Fifth Ave. Bg. Co. v. Kernochan*, 221 N. Y. 370, 117 N. E. 579. In *Gribbie v. Toms*, 70 N. J. L. 522, 57 Atl. 144, the landlord during the tenancy sold a portion of the premises in consequence of which the tenant was physically expelled from that part of the premises. The landlord was allowed to recover rent for the remainder.

<sup>99</sup> *Morse v. Goddard*, 13 Metc. 177, 46 Am. Dec. 728; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284. See also *Kramer v. Carter*, 136 Mass. 504, 509; *Wilson v. Cochran*, 46 Pa. 229.

<sup>1</sup> *Hinckley v. Guyon*, 172 Mass. 412, 52 N. E. 523.

to the property exists, a yielding of possession before right is in some way actually asserted cannot be relied on as an eviction.<sup>2</sup>

It has, however, been held that where part of the premises have been taken by eminent domain there is no even partial eviction, and the tenant is not released even *tanto* from his obligation to pay rent; the tenant receives sufficient compensation from the State to indemnify him for the property of which he has been deprived.<sup>3</sup> And in all jurisdictions restrictions imposed by the police power of the State not induced or incited by the landlord will not amount to a constructive eviction.<sup>4</sup>

In several States, however, the condemnation is held to dissolve the tenancy to the extent of the portion of the premises condemned.<sup>5</sup> If all the property is taken it seems admitted that the tenancy is dissolved.<sup>6</sup> "It is difficult to perceive how the quantity of the estate taken can vary the relation of the parties since in the one case as in the other, the act is the act of the state."<sup>7</sup>

It has been often stated that no act of the landlord constitutes an eviction unless so intended.<sup>8</sup> It is doubtless

<sup>2</sup> There can be no doubt that the rule is the same as between landlord and tenant is the same in this respect as it is between the grantor and grantee under a deed of conveyance with warranty of quiet enjoyment. *Hester v. Hunnicutt*, 104 Ala. 282, 16 So. 162; *Axtel v. Chase*, 83 Ind. 546, 558; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309; *Kellog v. Platt*, 33 N. J. L. 328; *McGrew v. Harmon*, 164 Pa. St. 115, 30 Atl. 265, 268; *Morgan v. Henderson*, 2 Wash. T. 367, 8 Pac. 491.

<sup>3</sup> *Stubbings v. Evanston*, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300; *Gluck v. Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515; *Parks v. Boston*, 15 Pick. 198; *Goodyear Shoe Machinery Co. v. Boston Terminal Co.*, 176 Mass. 115, 117, 57 N. E. 214; *Folts v. Huntley*, 7

Wend. 210; *Foot v. Cincinnati*, Ohio, 408, 38 Am. Dec. 737; *Wendell v. Mifflin*, 30 Pa. St. 362.

<sup>4</sup> *Taylor v. Finnigan*, 189 Mass. 573, 76 N. E. 203.

<sup>5</sup> *Hinrichs v. New Orleans*, 124 Ann. 1214, 24 So. 224; *Board of Commissioners v. Johnson*, 6 Mo. 248, 6 So. 199; *Biddle v. Huss*, 192 Mo. 597; *Uhl v. Cowen*, 192 Atl. 443, 44 Atl. 42.

<sup>6</sup> *Corrigan v. Chicago*, 144 Ill. 33, 33 N. E. 746, 21 L. R. A. 212; *Good v. Ball*, 119 Mass. 28; *Good v. Boston Terminal Co.*, 176 Mass. 116, 57 N. E. 214; *Lodge v. Mass.*, N. Y. App. Div. 13, 52 N. E. 385; *Dyer v. Wightman*, 66 Mass. 1.

<sup>7</sup> *Board of Levee Commissioners v. Johnson*, 66 Miss. 248, 256, 6 Miss. 1.

<sup>8</sup> *Upton v. Townsend*, 17 C. B. 1; *Warren v. Wagner*, 75 Ala. 1.

true that a mere trespass by the landlord will not amount to an eviction.<sup>9</sup> And in some cases whether an act is a trespass or an eviction will depend upon the landlord's intention; thus a wrongful entry upon the premises may be an eviction if made for the purpose of permanently ejecting the tenant from the whole or part of the premises, but may not be such an eviction if made for a temporary object. On the other hand, if the landlord's acts necessarily deprive the tenant permanently or for a long time of the enjoyment of the property it can hardly be material with what intention the landlord acts.<sup>10</sup>

### 892. Constructive eviction.

Not only actual expulsion may amount to an eviction, but there may be constructive eviction by wrongful acts, or failures to act on the part of the landlord which essentially deprive the tenant of beneficial enjoyment of the premises. Unlike the rule governing actual eviction by expulsion, it

Am. Rep. 446; *Potts-Thompson Liquor Co. v. Capital City Tobacco Co.*, 137 Ala. 648, 74 S. E. 279; *Hayner v. Smith*, 3 Ill. 430, 14 Am. Rep. 124; *Rubens v. Mill*, 213 Ill. 523, 539, 72 N. E. 1127; *Loyce v. Guggenheim*, 106 Mass. 201, Am. Rep. 322.

<sup>9</sup> *Upton v. Townsend*, 17 C. B. 30, 64; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Lynch v. Baldwin*, 69 Ill. 210; *Skally v. Shute*, 132 Mass. 367; *McFadin v. Rippey*, 8 Mo. 738; *Counsberry v. Snyder*, 31 N. Y. 514.

<sup>10</sup> This is ordinarily expressed by saying the intent to evict is in some circumstances conclusively presumed. See, e. g., *Powell v. Merrill*, (Vt. 1918), 103 Atl. 259. It might better be said that in such a case the intent is immaterial. In *Skally v. Shute*, 132 Mass. 367, 370, the court said: "The question of actual intent arises only when the acts are such as do not of themselves afford a presumption of intent. Generally the question whether acts of the landlord in conse-

quence of which the tenant abandons the premises amount to an eviction, is a question of law, and includes the question whether they constitute proof of the intent. A person is presumed to intend the natural and probable consequences of his acts; and when the acts of a landlord upon the demised premises are such as naturally and probably exclude the tenant from the possession and enjoyment of the premises, and assert a title in the landlord himself, the law presumes an intent to do so; and, if the natural consequence follows, the acts are said to amount to an eviction. From the physical exclusion of the tenant from the premises, the law presumes an intent to evict; and wrongful acts of the landlord upon the premises, which render them permanently unsafe and unfit for occupancy, so that the tenant loses the enjoyment of them, carry with them the presumption of the intent to deprive the tenant of that enjoyment."

is here necessary in order to take advantage of acts as a constructive eviction for the tenant altogether to abandon premises. His action must have been caused by the acts which he asserts operated as an eviction,<sup>11</sup> and the right to abandon for constructive eviction must be exercised promptly. The abandonment of the premises is not essential to seek equitable relief.<sup>12</sup> In the absence of a covenant to that effect a landlord is under no obligation that the premises shall be tenantable at the time they are leased, or that they shall be made tenantable by repairs or abatement of supervening nuisances during the tenancy;<sup>13</sup> and, as has been seen,<sup>14</sup> even if the landlord covenants to repair, a breach of the covenant will not excuse the tenant from the performance of his covenants; but if the landlord in violation of such a covenant permits the premises to become actually untenable it is a constructive eviction, justifying the tenant in abandoning the premises thereby terminating his liability for rent.<sup>15</sup>

<sup>11</sup> *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973; *Metropole Const. Co. v. Hartigan*, 83 N. J. L. 409, 85 Atl. 313; *Bowder v. Gillis*, 132 Minn. 189, 156 N. W. 2; *Edgerton v. Page*, 26 N. Y. 281; *Tham v. Carroll*, 147 N. Y. App. Div. 229. As to the necessity of the abandonment being caused by the acts claimed to amount to an eviction, see *Edwards v. Candy*, 14 Hun, 596; *Tham v. Carroll*, 147 N. Y. App. Div. 229, 233.

<sup>12</sup> *Epstein v. Dunbar*, 221 Mass. 579, 109 N. E. 730.

<sup>13</sup> *Hart v. Windsor*, 12 M. & W. 68; *Keates v. Cadogan*, 10 C. B. 591; *Gott v. Gandy*, 2 E. & B. 845; *Little Rock Ice Co. v. Consumers' Ice Co.*, 114 Ark. 532, 170 S. W. 241; *Gately v. Campbell*, 124 Cal. 520, 57 Pac. 567; *Roehrs v. Timmons*, 28 Ind. App. 578, 63 N. E. 481; *Lewis v. Clark*, 86 Md. 327, 37 Atl. 1035; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Taylor v. Finnigan*, 189 Mass. 568, 573, 76 N. E. 203, 2 L. R. A. (N. S.) 973; *Mills v. Swanton*, 222 Mass. 557, 111 N. E. 384; *Pets v. Voigt Brewery*

*Co.*, 116 Mich. 418, 74 N. W. 651; *Am. St. Rep.* 531; *Griffin v. Freeborn*, 181 Mo. App. 203, 168 S. W. 2; *Rheims v. Dolley*, 93 N. Y. Misc. 157 N. Y. S. 213; *Wood v. Carson*, Pa. 522, 101 Atl. 811. See also *P. v. Grafton Elec. Co.*, 182 Mass. 65 N. E. 63. The law is otherwise in Louisiana, C. C. Art. 2692-2694; in New York, though the landlord cannot warrant tenantable condition, statute the tenant may surrender premises without liability if they come untenable by physical destruction or deterioration. *May v. G.* 169 N. Y. 330, 62 N. E. 385; *cf. Flood v. Jones v. Schaan*, 129 N. Y. App. 182, 113 N. Y. S. 472. The question of a landlord's liability in tort for knowingly or negligently leasing dangerous property is not here under discussion.

<sup>14</sup> *Supra*, § 890.

<sup>15</sup> *Lewis v. Chisholm*, 68 Ga. Bissell v. Lloyd, 100 Ill. 214; *Dolph Barry*, 165 Mo. App. 659, 148 S. 196; *Sheary v. Adams*, 18 Hun, (statutory); *McCardell v. Williams*

Similarly it is a constructive eviction to fail to furnish heat,<sup>16</sup> water,<sup>17</sup> in accordance with an obligation imposed by the lease. Permitting adjoining property of the landlord to be used for purposes inconsistent with the purpose for which the property in question was rented,<sup>18</sup> or permitting such adjoining property to be used for immoral purposes,<sup>19</sup> or creating any continuing nuisance,<sup>20</sup> refusing to allow a new window to be made to replace one lost by the tenant,<sup>21</sup> or in any way substantially depriving the tenant of the enjoyment of the leased premises in violation of a duty assumed by the landlord, amounts to an eviction.<sup>22</sup> But building on adjoining land of the landlord an ordinary structure with no purpose of evicting the tenant does not amount to eviction though it renders unfit for use part of the leased premises.<sup>23</sup> In all the cases thus far supposed, wherever there has been held constructive eviction there has been a violation of duty on the part of the landlord which would justify the tenant not only in abandoning the premises but in suing for breach of the landlord's covenant of quiet enjoyment; but there seems a disposition to regard the lease of an apartment or flat as imposing liabilities upon the parties somewhat different from those imposed by a lease of a whole building. Where "an intolerable condition which the tenant neither causes nor can remedy" arises, there has been held in New York to be con-

R. I. 701, 36 Atl. 719. But see *Boyd v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322.

*Morse v. Tochtermann*, 21 Cal. App. 132 Pac. 1055; *Bass v. Rollins*, 63 N. H. 226, 65 N. W. 348; *Berlinger v. Macdonald*, 133 N. Y. S. 522, 100 N. Y. App. Div. 5; *Russell v. Smith*, 22 N. Dak. 410, 133 N. W. 1030, 10 L. R. A. (N. S.) 1217; *McSorley v. Smith*, 36 Pa. Super. 271.

*Boston Veterinary Hospital v. Smith*, 219 Mass. 533, 107 N. E. 426. *Wade v. Herndl*, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855.

*Weiler v. Pancoast*, 71 N. J. L. 414, 10 Atl. 1084; *Wolf v. Eppenstein*, 71 N. J. L. 1, 140 Pac. 751.

*York v. Steward*, 21 Mont. 515,

55 Pac. 29, 43 L. R. A. 125; *Barnard Realty Co. v. Bonwit*, 155 N. Y. App. Div. 182, 139 N. Y. S. 1050.

<sup>21</sup> *Smith v. Tennyson*, 219 Mass. 508, 107 N. E. 423.

<sup>22</sup> *Grabenhorst v. Nicodemus*, 42 Md. 236; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117.

<sup>23</sup> *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322. For the same reason, where the tenant knows that the leased land is subject to the servitude of a railroad viaduct, the fact that he is deprived for part of the term of the use of part of the premises by repairs on the viaduct, cannot be regarded as an eviction. *Friend v. Oil Well Supply Co.*, 179 Pa. 290, 36 Atl. 219.





cede the lease or purchase, and the mutual performances of leasing or selling a repaired house were intended as an exchange of one for the other.

### 93. Conditions implied in fact.

Frequently a covenant or promise cannot be performed by the nature of things except upon or after the happening of a certain event. Conceivably the meaning of such an obligation may be (1) that the promisor undertakes that the necessary event shall happen; (2) that the promisee undertakes that it shall happen; or, (3), that though neither party is under an obligation that the event shall happen, the promisor will be excused if it does not happen. It is a question of construction which of these three meanings is to be given to a particular contract. The necessary starting point of the inquiry is that the promisor must fulfil his promise according to its terms unless some legal excuse can be found. When A contracts to sell Blackacre, if his wife's signature is necessary in order to enable him to convey a good title he binds himself to procure that signature. The nature of the case may be such, however, in view of mercantile custom, that a reasonable person would not understand that the promisor undertook that the necessary event should happen. Thus where A promises to sell goods at a valuation fixed by a third person, he does not undertake the obligation of making the valuer give a price.<sup>30</sup> A promise to perform building or construction work requiring plans is qualified by a condition that the owner shall furnish the necessary plans.<sup>31</sup>

Where the necessary event is peculiarly within the power of the promisee, the obligation of the promisor is conditional upon the promisee's bringing the event to pass; and if the contract is bilateral there is an implied obligation on the part of the promisee that he will bring the event to pass. Thus wherever the coöperation of the promisee is necessary for

<sup>30</sup> See *supra*, §§ 800, 801.

<sup>31</sup> In *Barnum v. Williams*, 115 N. Y. App. Div. 694, 102 N. Y. S. 874, the court held that when the owner contracted to furnish plans of the work, so as to enable the contractor to perform

within the time set, the contractor was justified in abandoning the contract and might recover on a *quantum meruit* for the work done up to that time.

the performance of the promise, there is a condition in fact that the coöperation will be given, and if the contract is bilateral there is an obligation to give it. Where, for instance, a seller contracts to deliver goods to a buyer he cannot deliver unless the buyer will receive them, and he is not only bound by his own obligation, but acquires a right of action if the buyer refuses to receive them. So an employee's promise to perform is impliedly conditional on the coöperation of the employer in the discharge of the work contracted for. A promise to ship a cargo of coal at a certain port is qualified by a condition that the promisee shall furnish the ship.<sup>22</sup> A promise to pay out £100 under the direction of a competent surveyor named by the plaintiff, requires the appointment of such a surveyor as a condition of the promisor's liability.<sup>23</sup> A promise to pay \$4,000 in paper to be manufactured by a secret process which the promisee had agreed to teach the promisor, contains the necessary condition that the instruction shall first be given.

It is not essential that performance of a promise shall or will be actually impossible in order to justify the implication in fact of conditions. Such conditions are similar in nature to express conditions, except that the parties have not expressed their intentions not in words but in the nature of their undertakings. Wherever, therefore, there is a necessary inference that an act must be done by the promisee before the promisor's performance is due, a condition will be implied. Sometimes the implication is both that the thing shall be done by the promisee and also that it shall be done before the promisor shall be liable; sometimes the promisee's obligation to do the thing in question is expressed, and the only

<sup>22</sup> *Armitage v. Insole*, 14 Q. B. 728, cited and followed in *Davis v. Columbia Coal Mining Co.*, 170 Mass. 391, 49 N. E. 629; *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586. See also *Sutherland v. Allhusen*, 14 L. T. 666; *Stanton v. Austin*, L. R. 7 C. P. 651; *Stuart v. Lumber Co.*, 66 Or. 546, 132 Pac. 1; *Dwight v. Eckert*, 117 Pa. St. 490, 12 Atl. 32. In *Pinkham v. Haynes*, 103 Me. 112, 68 Atl. 642, the sellers agreed to deliver potatoes on board

cars to be furnished by the buyer or before a certain date. It was held that the sellers were entitled to notice of the arrival of the cars, which would enable them with reasonable diligence to load the potatoes, and having received such notice were released from their obligation to deliver potatoes.

<sup>23</sup> *Coombe v. Greene*, 11 M. & W. 480.

<sup>24</sup> *Cadwell v. Blake*, 6 Gray, 4

ing in implication is that performance of the promisee's obligation must precede the promisor's liability. Where a contract for the sale of land requires the seller to furnish an abstract of title, performance of this promise must precede obligation to pay the price, since otherwise the abstract would have little value.<sup>35</sup> So where parties to a contract agreed that each should give a bond to the other as security for his performance, the implication is necessary that each should give his bond before liability of the other arose on his principal promise, since otherwise the bonds could not fulfil their purpose of giving security.<sup>36</sup>

In *Martin v. Roberts*, 127 Iowa, 102 N. W. 1126, the court said: "The terms of the contract, the defendant was to furnish the vendee an abstract showing good and sufficient title, and, while no particular time for tender was fixed, the law requires that it be furnished in reasonable time before the contract was to be performed. It was a condition precedent, and the defendant was not entitled to the balance of the money under the contract until he had complied therewith. *Wilhelm v. Fimbel*, 1 Iowa, 131, 7 Am. Rep. 117; *Allen v. Clay*, 62 Iowa, 452, 17 N. W. 283; *Bartle v. Curtis*, 68 Iowa, 202, 26 N. W. 73; *Lessenich v. Sellers*, 119 Iowa, 133 N. W. 348; *Webb v. Hancher*, 127 Iowa, 269, 102 N. W. 1127.

Such a case must be distinguished from one where the purchaser seeks to enforce an option which will expire at a certain day. In *Pollock v. Riddick*, 161 Iowa, 280, 282, 88 C. C. A. 326, the court said: "We think this case is fully controlled by the decisions in *Kelsey v. Hancher*, 162 U. S. 404, 408, 16 Sup. Ct. 8, 40 L. Ed. 1017, and *Kentucky Cattle Co. v. Warwick Co.*, 188 U. S. 280, 283, 48 C. C. A. 363. In each of these cases an option to sell land, etc., was involved, and a proceeding to enforce the option. In each an abstract of the land covered by the option was to be furnished, and the

failure on the part of the giver of the option to furnish the abstract was made the excuse for not paying or tendering the price of the land within the time fixed by the option. But the court held that the duty to tender the price of the land under the option and according to its terms existed regardless of the failure on the part of the giver of the option to furnish the abstract if the would-be purchaser desired to lay the ground for the suit for specific performance. Said the court, speaking by Mr. Justice Shiras (page 408 of 162 U. S., page 810 of 16 Sup. Ct. [40 L. Ed. 1017]). 'If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract and might have formed a successful defence to an action for damages brought by Crowther. But, if they wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance. To entitle themselves to a decree for a specific performance of a contract to sell land, it has always been held necessary that the purchasers should tender the purchase money.' "

<sup>36</sup> *Roberts v. Brett*, 11 H. L. C. 337.

### § 894. Promises impliedly conditional upon notice.

One of the commonest necessary conditions is that of some fact. "The rule to be collected from the cases

See also *Kehlor Flour Mills Co. v. Linden*, 230 Mass. 119, 119 N. E. 698. Other illustrations may be found: Where a railroad company, having agreed to deliver to a contractor (who had undertaken to furnish ballast for the railroad) a crushing plant of a specified capacity and water and coal to operate it, delivered a plant of less capacity and failed to deliver suitable coal and water, the contractor could abandon the contract, performance of the railroad company's obligation being a condition precedent. *El Paso & S. W. R. Co. v. Eichel & Weikel* (Tex. Civ. App.), 130 S. W. 922. Where a contract to sell an automobile provided that the seller should find a source of credit to enable the buyer to borrow the price, the buyer was not liable until this had been done. *Sandruck v. Wilson*, 117 Md. 624, 84 Atl. 54. In *National Cable, etc., Co. v. Filbert*, 31 So. Dak. 244, 140 N. W. 741, 743, a hardware and implement dealer bought a quantity of lightning rod cable, material, and fixtures, under a contract giving him an exclusive agency, and providing that the seller should furnish a salesman to assist in starting the business, who should be paid a share of the profits for his services. The contract further provided that the dealer should not attempt to put up any rods until the seller's agent was present, and it clearly appeared that the stipulation with reference to the salesman was inserted because of the dealer's inexperience, both in selling and putting up lightning rods, and for the mutual benefit and protection of both parties. It was held that the furnishing of a salesman by the seller was a condition to be performed by it before it could be entitled to the purchase price.

In *Davis v. Jeffris*, 5 S. D. N. W. 815, the court said: "Whether or not a covenant is dependent must be ascertained from the contract and attending circumstances; the rule being that covenants will be construed independent, unless a contrary intention appears from the terms of the contract." This was an action on a contract for the construction of a creamery and cold storage plant according to the plans and specifications contained in the contract. The contract provided that the cold storage department should be constructed under the McCray Cold Storage Refrigerator patents, and contained the following covenant: "We agree to furnish with said contract a patent deed from the McCray Refrigerator Company, conveying all the rights under said patents." The provisions of the contract, so far as the construction and equipment of the plant concerned, were carried out by the plaintiff, but the patent deed for the McCray Cold Storage and Refrigerator was not furnished; plaintiffs claimed that the stipulation to furnish said patent deed was an independent stipulation or covenant, and that plaintiffs were not required to show that they had furnished or taken such deed to entitle them to sue on the contract. The contract provided that the defendants should construct the creamery and cold storage when "completed." The court held that the completion of the plant without the patent deed was not a condition of the contract, and that the patent deed had been furnished was essential to plaintiffs' recovery, holding that, although the contract, so far as the completion

this, that where a party stipulates to do a certain thing certain specific event which may become known to him, which he can make himself acquainted, he is not bound to any notice, unless he stipulates for it; but when to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." <sup>37</sup> This principle has been applied in the law of landlord and tenant.

Where a landlord covenants to repair and reserves the right of entry in the lease, his promise is impliedly conditional on notice from the tenant that the premises are out of repair. <sup>38</sup>

Where the landlord has the right to enter to view and make repairs, no condition will be implied. <sup>39</sup> And still more is this true where the landlord retains under his control possession of the premises in which the defect occurs. <sup>40</sup>

Where an option is given in a contract to one party or another, he must give notice of the exercise of the option. The notice frequently given relates to the time or place of

the defect was concerned, had been implied with by the plaintiff, could be of no value, and could be of no use to the defendants, the patent deed conferring upon the tenant the right to use the McCray Ice Machine and Refrigerator process was not fulfilled; that they contracted for the machine knowing that they knew would be defective when they got it, or that the landlord covenanted to furnish the patent machine as one of the essential elements of the contract.

See *Wenger, C. B.*, in *Vyse v. Wakefield*, 11 M. & W. 442. Early authorities are discussed.

*Watkinson*, L. R. 6 Exch. 100; *London & S. W. Ry. Co. v. Flower*, 12 Q. B. 77; *Manchester Warehouse Co. v. Barr*, 5 C. P. D. 507; *Tredway v. The London & S. W. Ry. Co.*, 91 L. T. 310; *Chambers v. The London & S. W. Ry. Co.*, 171 Ala. 158, 55 So. 150; *Johnson v. Cummings*, 156 Mass. 100, 31 N. E. 127; *Gerzebek v. The London & S. W. Ry. Co.*, 133 N. J. L. 240; *Thomas v. The London & S. W. Ry. Co.*, 12 Daly, 315; *Sinton v.*

*Butler*, 40 Ohio St. 153. The principle seems to have been grotesquely misapplied in *Hugall v. M'Lean*, 53 L. T. Rep. 94. In that case the jury found that the tenant did not know and had not the means of knowing that the premises were out of repair and that the landlord though he did not know of the fact had the means of knowing, nevertheless the court held the landlord's promise to keep the drains in repair was impliedly conditional on notice from the tenant. *Brett, M. R.*, added: "I doubt whether, if the landlord had notice *aliunde* he would be liable, but it is not necessary to decide this." But see *Melles v. Holme*, [1918] 2 K. B. 100. In *Thomas v. Kingsland*, 12 Daly, 315, there is an implication that knowledge by the landlord, however secured, would be enough to render him liable.

<sup>38</sup> *Hayden v. Bradley*, 6 Gray, 425, 66 Am. Dec. 421.

<sup>40</sup> *Melles v. Holme*, [1918] 2 K. B. 100.

performance. Sometimes this is given to the seller; sometimes to the buyer.<sup>42</sup> Similarly where a buyer is bound to take goods when completed by the seller, his obligation is qualified by the condition that notice be given of the completion of the goods;<sup>43</sup> and where there is no definite time in a contract for its performance or where the time or date fixed has been waived, there will often be implied a condition of reasonable notice before performance can be demanded. Not only is a condition of notice implied in fact but in a bilateral agreement, where there is such a condition on one side only, there is also an obligation implied to give notice.<sup>45</sup> Breach of this obligation will give rise to an action for such damages as may be caused thereby.<sup>46</sup>

<sup>42</sup> *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Hirsch v. Georgia I. & C. Co.*, 160 Fed. 578, 95 C. C. A. 76; *Majestic Milling Co. v. Copeland*, 93 Ark. 195, 124 S. W. 521; *Colvin v. Weedman*, 50 Ill. 311; *Posey v. Scales*, 55 Ind. 282; *Bell v. Hatfield*, 121 Ky. 560, 89 S. W. 544, 2 L. R. A. (N. S.) 529; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147, 51 N. W. 197; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Drake v. White Sewing Mach. Co.*, 118 N. Y. S. 178, 133 N. Y. App. Div. 446; *Pease Oil Co. v. Monroe County Oil Co.*, 138 N. Y. S. 177, 78 Misc. Rep. 285; *Krebs Hop Co. v. Livesley*, 55 Or. 227, 104 Pac. 3; *Lockhart v. Bonsall*, 77 Pa. St. 53; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836. See also *Lincoln v. Gallagher*, 79 Me. 189, 8 Atl. 883.

<sup>43</sup> *Kawin v. American Colortype Co.*, 243 Fed. 317, 156 C. C. A. 97; *Veitch v. Atkins Co.*, 5 Ala. App. 444, 59 So. 746; *Dimmick v. Hendley*, 117 Md. 458, 84 Atl. 171; *Gourd v. Healy*, 206 N. Y. 423, 99 N. E. 1099; *Levant American Commercial Co. v. Wells*, 186 N. Y. App. D. 497, 174 N. Y. S. 303. See also *State's Prison v. Hoffman*, 159 N. C. 564, 76 S. E. 3. *Cf. British Aluminium Co. v. Trefts*, 163 N. Y. App. Div. 184, 148 N. Y. S. 144.

The contract there in suit provided for shipment at times "specified by the buyers between October 1 and Dec. 31, 1911." The court held that the buyer failed to specify the time of shipment of all the goods, that the obligation became absolute on Dec. 31, and that tender was necessary on that date in order to put the buyer in default. The contract was held like a contract to sell goods on Dec. 31st with an obligation to take any part earlier.

<sup>44</sup> *Bliss v. United States Gas Co.*, 149 N. Y. 300, 43 N. E. 856; *Wagstaff v. Wagstaff*, 48 Pa. St. 300.

<sup>45</sup> See *supra*, § 741.

<sup>46</sup> Where either party may waive the requirement of notice fix the time for performance, this affords each sufficient protection without the implication of an obligation.

<sup>47</sup> *Kingman v. Hanna Wagon Co.*, 176 Ill. 545, 52 N. E. 328. The contract agreed to sell a large number of wagons to be delivered monthly "as ordered by the buyer. The failure by the buyer to order the number specified in the contract was held to give the seller the right of action without the necessity of making tender. So in *Weillman Metal Co.*, 182 Ill. 128, 1050, when goods were to be sold at the direction of the buyer, and

for directions, the failure of the  
r to send such directions was held a  
ch of contract.

under a contract whereby the  
tiff was to transfer all passengers  
baggage from the station of de-  
ant road to another station in the  
it was held that there was an

implied obligation on the part of the  
defendant to present passengers for  
transportation, for breach of which  
the plaintiff might recover. *Chicago,*  
*R. I. & G. Ry. Co. v. Martin* (Tex. Civ.  
App.), 163 S. W. 313. See also *Krebs*  
*Hop Co. v. Livesley*, 55 Or. 227, 104  
Pac. 3.

## CHAPTER XXVII

### DEPENDENCY OF MUTUAL PROMISES IN THE CIVIL LAW

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#### § 895. Mutual promises were independent in the Roman Law.

The universality of the problems presented by the breach by one party of his undertaking in a bilateral contract has led to the still somewhat uncertain groping for fundamental principles in the matter by English and American courts. It seems to justify some examination of the Civil Law in this connection. In the early Roman law, as in the early English law, mutual promises in a bilateral agreement seem to have been reg-



is independent of each other so far as performance was concerned. If the agreement was by stipulation, two stipulations were necessary, and there were formed two independent unilateral contracts. If the agreement was consensual, but could not be classed with the nominate contracts of sale, hiring, partnership, or agency, no obligation arose from it until one party had performed.<sup>1</sup> Such obligations, also, were therefore necessarily unilateral when they arose. So that the question fairly presented in regard only to the nominate contracts just mentioned, which, however, came to include the great bulk of contractual dealings. The proof that in these contracts the promises were at first regarded as independent is contained in a passage from Varro's treatise, *De Re Rustica*, written about 36 B. C. After dealing with the delivery of herds which have been sold the author continues, "And the buyer can obtain judgment against him in an action on the sale, if he does not deliver, although he himself has not paid the money, as in like manner the seller may against the buyer the latter does not pay the price."<sup>2</sup>

The next certain historical evidence is contained in a passage from the Institutes of Gaius, which were published 161 A. D. "Or suppose an auctioneer sues for the price of a thing he has sold by auction, and that the exception is taken that the defendant ought not to be condemned unless the thing he has purchased has been delivered to him, the exception is good; but if it was one of the conditions of sale that there should be no delivery until payment of the price, the auctioneer may have this replication: 'or if it was announced previous to the sale that the thing would not be delivered to the purchaser until he had paid the price.'"<sup>3</sup>

<sup>1</sup> The law as to stipulations and nominate contracts remained fixed in the Roman law, as stated.—Windheid, *Lehrbuch des Pandektenrechts*, § 321, note 9.

<sup>2</sup> Quum id factum non est, tamen ex dominium non mutavit nisi est numeratum. Nec non emptor pote empto vendito illum damnare, si non tradet, quamvis non solverit summos, ut ille emptorem simili

judicio sinon reddet pretium.—Varro, *De Re Rustica*, II. 2, § 6.

<sup>3</sup> Item si argentarius pretium rei quæ in auctionem venierit persequatur, obicitur ei exceptio ut ita demum emptor damnetur si ei res quam emerit tradita est; et est justa exceptio: sed si in auctione prædictum est ne ante emptori traderetur quam si præteritum solverit, replicatione tali argentarius adjuvatur: "Aut si prædictum est ne

There has been some conflict of opinion as to whether the passage was based on a special law aimed against auctioneers or whether the case of an auctioneer was taken merely as an illustration of a universal principle.<sup>4</sup> Assuming the former view to be correct (and subsequent quotations will show that if the principle had not become general by the time of the passage it soon became so), the passage indicates both that the ground for an exception if the seller sought to recover the price without delivering the subject-matter of the sale was further that by special agreement as to the respective obligations of performance of the parties, such an exception could be made. Presumably in case of an action by the buyer, the seller would have been given relief on like principles.

#### § 896. Passages in Digest and Code.

There are several passages in the Digest and Code, throwing light on the topic. The jurists to whom the passages are attributed all flourished about 200 A. D.; so that by that time the general theory at least of the mutual dependency of obligations arising from one of the nominate consensual contracts lateral contracts must have been recognized. The most important passages are as follows:

"If, of the farms which you have bought, any have been mortgaged and have not been delivered, you shall have an action *ex empto* in order that they may be released from the creditor. Likewise, if the buyer sues for the price in an action *ex vendito* you will set up the exception of fraud."<sup>5</sup>

"If one who has bought a harvest of growing grain is forbidden by the seller to gather them he can make good this exception against the seller, if the latter sues for the price: 'if this money for which the suit is brought was paid for the harvest which has arrived at maturity and has not been delivered. . . .'"<sup>6</sup>

aliter emptori res traderetur quam si prætium emptor solverit."—Gaius, IV. 126a.

<sup>4</sup> Dernburg, Pandekten, II. § 20, supports the former view; Bechmann, Der Kauf, I. 570, the latter.

<sup>5</sup> C. 8. 44. 5. Ex prædiis, quæ mercata es, si aliqua a venditore obligata et

nequid tradita sunt, ex empto consequeris, ut ea a creditore liberetur. Idem etiam fiet, si venditorem, ex vendito actionem petentem, doli exceptio posueris.—Antoninus.

<sup>6</sup> D. 19. 1. 25. Qui pendemiam emit si uvam legere p

. . . One may likewise defeat a suit for the price brought by the buyer who has sold goods belonging to another by setting up the exception of goods not delivered, although he who is sued to sell them has already paid the price to the owner. The plaintiff in this case recourse against the owner. It is the same, according to Pedius, in the case of one who has sold goods assuming to act in our affairs."<sup>7</sup>

When the buyer brings an action against the seller, the thing is brought to be offered by the buyer, and although he offers the price, not yet does he have an action against the seller for the seller can retain the thing which he sold, as if he had pledged."<sup>8</sup> A few other passages<sup>9</sup> are referred to in connection, but their bearing on the subject seems somewhat remote; and it must be admitted that the materials are too meagre to make it profitable to discuss in much detail the theories of Roman jurists on the reciprocal rights and duties in the performance of bilateral contracts of sale, hiring, partnership and agency.<sup>10</sup> It seems evident enough, however, that non-performance by the plaintiff of his promise in such a bilateral contract afforded generally a defence. The particular cases stated relate to sales exclusively, but the assumption made by the writers, that the principle was a general one that sales furnished the readiest illustration, seems fair. It is a probable supposition too, that the defendant's defence was taken by exception, rather than by denial of any allegations

adversus eum petentem exceptione uti poterit "si ea qua de agitur, non pro ea re quæ venit neque tradita sunt."—Julianus.

4. 4. 5. § 4. The passage in full: "si servus veniit ab eo, cui hoc sibi permisit, et redhibitus sit, non potest agenti venditori de pretio actionis opponitur redhibitionis, licet si qui vendidit dominum pretium non accepit (etiam mercis non traditæ actione summovetur et qui per alium domino jam solvit) et ideo is qui vendidit agit adversus dominum. Non potest causam esse Pedius ait eius, si agitur de pretio nostrum gerens venditor."—Paulus.

<sup>7</sup> D. 19. 1. 13. § 8 Offerr ipretium ab emptore debet cum ex empto agitur, et ideo etsi pretii partem offerrat, nondum est ex empto actio: venditor enim quasi pignus retinere potest eam rem quam vendidit.—Ulpianus.

<sup>9</sup> D. 18. 1. 34. § 3; D. 18. 4. 22; D. 18. 5. 7. § 1; D. 21. 1. 57; D. 21. 1. 59; C. 2. 3. 21.

<sup>10</sup> This has, of course been attempted by the German writers, but the results seem hardly adequate to the learning expended upon the problem. The best brief commentary on the passages quoted and others is contained in André, *Die Einrede des nicht erfüllten Vertrages* (Leipzig, 1890), pp. 30 *et seq.*

expressed or implied in the plaintiff's pleading. That plaintiff's performance was not strictly a condition precedent to his right of action, but his obligation to perform was on the basis of a counter-right on the part of the defendant, and if this obligation was not fulfilled, it effected the destruction of the plaintiff's claim.<sup>11</sup> Whether there was a special exception recognized as *exceptio mercis non traditæ*,—the one used in the extract quoted above from Paulus—or whether it was regarded as a kind of *exceptio doli*, as might be inferred from the passage quoted from the Code, is not so clear; but both assumptions are often made.<sup>12</sup>

**§ 897. Inconsistency of dependency and rule governing recovery of loss.**

Besides the negative difficulty due to the slightness of the materials which the Corpus Juris affords, there is a positive difficulty in working out a complete theory. In a contract of sale the buyer was bound by the Roman law to pay the price though the subject-matter of the sale were destroyed by accident before the transfer of title.<sup>13</sup> From this it might be supposed that the theory of the Roman jurists was that in order to make out an excuse for non-performance on the part of one party to a bilateral contract, not merely failure but an excused failure to perform by the other side was essential; that it was the wrongful breach of contract, not the non-receipt of what was promised, that afforded ground for an *exceptio*.<sup>14</sup> But this supposition does not square with

<sup>11</sup> This proposition, though now generally admitted, was formerly much doubted in Germany and stress was laid on the words in the last passage cited from the Digest, "nondum est ex empto actio" as showing that performance by the plaintiff was a condition precedent to his right of action. But it was shown by Heerwart, *Archiv für die Civil. Praxis*, vii. 344, 345, that analogous expressions are used in many other places in the Digest where an exception was unquestionably necessary to protect the defendant. See also Dernburg, *Pandekten*, ii. § 20, note 4.

<sup>12</sup> The exception is classed by modern writers as a kind of *exceptio* though frequently with recognition that the classification is not fortunate. André, 122. *Leçons de Théorie des Obligations* (ed. III. 266; Giorgi, *Teoria delle Obligazioni* (4th ed.), IV, 207. See also article on the *exceptio doli* by R. Zeitschrift für Handelsrecht, X.

<sup>13</sup> Inst. of Justinian, lib. I. XXIII. 3. The subject of risk after a contract of sale in the Law is discussed, *infra*, § 947.

<sup>14</sup> And so the rule is often stated.

in regard to risk in contracts of leasing and hiring, whether property or of personal services. In these cases non-performance, though excused by impossibility, was a defence in action for the stipulated price.<sup>15</sup> There is here an inconsistency from which no amount of juridical learning has been able to effect an escape.<sup>16</sup>

### 8. Right of rescission in the Roman Law.

Connected with the right to refuse performance of a contract where the other party has not performed, is the right to have the contract rescinded or dissolved for that reason and any performance already given restored if the nature of the case requires. If no performance by either party has been made, the performance by the party in default no longer can be required, either because the proper time has elapsed or for any other reason, it makes little practical difference whether it is required that the other party has the right to rescind the contract or merely that he need not perform until he receives performance. The result is the same. But where performance has been partly rendered, or is still possible, the difference is important. The right to rescind the transaction does, it is true, imply the right to refuse to perform unless counter-performance is rendered, but the converse statement does not hold good.

Roman law did not authorize dissolution of a sale because of non-payment of the price, and the same principle is applicable to the other consensual contracts under discussion.<sup>17</sup> If the seller trusted to the credit of the buyer he had no other

other, *Contrat de Vente*, § 307; Aubry, *Pandekten*, ii. § 20. The view is well stated by André, *supra*, seq. See also *infra*, § 950.

Fig. 19. 1. 50, Hunter, *Roman Law* (3d ed.), 508, 512.

See Hofmann, *Periculum beim Kauf* (Vienna 1870) pp. 18-21. *Österreichischer Mehrfacher Verkauf*. (Stuttgart, 1899), p. 66; Tödter, *Die Allgemeinen Bestimmungen des Bürg. Gesetzbuchs über den gegenseitigen Verkauf* (Erlangen, 1899), p. 31. The rule

in regard to risk of loss after a contract of sale is of great antiquity (see Hofmann, pp. 169-188), and perhaps the most satisfactory way of dealing with that rule is to regard it as a survival in a particular class of cases of the early doctrine of the independence of mutual promises, indicated by the quotation from Varro, *supra*, in spite of the later development of a general doctrine of inconsistent nature.

<sup>17</sup> Windscheid, *Lehrbuch*, II. § 321, note 9.

remedy than a personal action for the price.<sup>18</sup> In order to give the seller the right of rescission if the buyer failed to fulfill his obligations it was necessary to insert a special clause which was called *lex commissoria*.<sup>19</sup> In later Roman law the seller was allowed to rescind a sale without this special agreement in case the article sold had latent defects, but not simply because the seller had broken his contract.<sup>20</sup>

### § 899. General provisions of the French Law.

Modern civil law has developed and in some respects changed the doctrines of the Roman law.

In France it is well recognized that one party to a bilateral contract has the right to refuse performance until the other party has performed or offered to do so. This is called the right of retention, being considered analogous to the right of a pledgee or lien holder.<sup>21</sup> The Code Civil expressly recognizes the right only in the case of sales and in favor of the seller only,<sup>22</sup> but it is not questioned that it exists in all bilateral contracts.<sup>23</sup>

This right, however, has been very little considered in French law, and has never received elaborate treatment by French writers. The reason for this is not far to seek. The right of one party to a bargain to rescind it for non-performance or imperfect performance by the other party,—a right which, as previously stated, did not generally exist in Roman law,—had already by legal usage been greatly extended at the time when Pothier wrote,<sup>24</sup> and Article 1184 of the Code Napoléon made the principle universal. That a

<sup>18</sup> *Actio tibi pretii, non eorum quæ dedisti repetitio competit.* C. 4. 38. 8. See also C. 4. 44. 14.

<sup>19</sup> Larombière, III. 84; Moyle, *Sale in Civil Law*, 169; Hunter, *Roman Law*, 591.

<sup>20</sup> Larombière, III. 85; Moyle, *Sale in Civil Law*, 201; Hunter, *Roman Law*, 498-502.

<sup>21</sup> Saleilles, *Annales de Droit Commercial*, VII. 25; Larombière, III. 266.

<sup>22</sup> Art. 1612. *Le vendeur n'est pas*

*tenu de délivrer la chose, si l'acheteur n'en paie pas le prix, et que le vendeur ne lui ait pas accordé un délai pour le paiement.* See also Arts. 1651, 1749, 2102-2104.

<sup>23</sup> Larombière, III. 266; Saleilles, *Ann. de Droit Comm.* VII. 25. In the language and illustration of Larombière indicate that it exists in reciprocal obligations, whether arising from contract or not.

<sup>24</sup> *Contrat de Vente*, § 475. This work was published in 1762.

made it an implied condition subsequent in every bilateral contract that each party satisfy his obligation to the other. The provision is unchanged in the Code Civil at the present day.<sup>25</sup> It is true the right of retention gives a technically different remedy and one which might possibly be more desirable in a particular case.<sup>26</sup> But practically the remedy of specific performance or that of rescission with damages seems to have been found sufficient. As a general rule these remedies afford more effective redress for the injured party than those of the Roman or of the English law. He may have the contract dissolved with the result that he no longer is bound to perform, or, if he has already performed, that he gets back what he has given, in either case with damages, or he may have the other party compelled to perform, if that is possible.<sup>27</sup> The right to have the contract dissolved, like the right of retention, applies to all bilateral contracts, though not absolutely without exception.<sup>28</sup>

<sup>25</sup> Art. 1184. La condition résolutive est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement.

Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'il est possible, ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice, et il peut être accordé au demandeur un délai selon les circonstances.

In this connection too should be noted:

Art. 1610. Si le vendeur manque à faire la délivrance dans le temps convenu entre les parties, l'acquéreur pourra, à son choix, demander la résolution de la vente, ou sa mise en possession, si le retard ne vient que du fait du vendeur.

Art. 1654. Si l'acheteur ne paie pas le prix, le vendeur peut demander la résolution de la vente.

And there are analogous provisions in regard to exchanges in Arts. 1704, 1705.

<sup>26</sup> For instance, if one party after partly performing makes default, the most profitable course open to the other party may be simply to do nothing. Dissolution under Art. 1184 involves return of whatever has been received. The negative right of retention does not.

<sup>27</sup> In France, as well as in Germany, the right to specific performance of obligations is limited only by actual impossibilities. There are not technical difficulties in addition, as in English law. *Infra*, § 954.

<sup>28</sup> In sales of movable property, if the buyer becomes bankrupt after acquiring possession of and before paying for the goods, the seller cannot have the sale dissolved and thereby regain the goods. Cour de Cassation, 13 Mar. 1888, Journal du Palais, 1890, 1, 393. This doctrine applies to incorporeal movables. Cass. 3 Mar. 1890, JI. du Pal. 1891, 1, 140. But in general, bankruptcy leaves unchanged

Non-performance of one contract may even afford ground for dissolution of another, but only in case the two agreements are related to each other, as, if the making of one was consideration of the other.<sup>29</sup>

**§ 900. Application for dissolution must be made to the court.**

The provisions of the French law have some peculiarities of detail. In the first place, the dissolution is not effected by the mere non-performance of one party. An application to the court is necessary.<sup>30</sup> This may be made by a defendant as a means of defending himself from a suit;<sup>31</sup> but the express provision of the statute is for a direct application by the party claiming dissolution. He would therefore normally be plaintiff rather than a defendant. Nor is the mere non-performance of the defendant sufficient foundation for a suit for dissolution. The party claiming dissolution must first put him in default by legal summons to perform or by an equivalent act.<sup>32</sup> The very nature of some contracts,

the rights given by Art. 1184; one who has made a lease or exchange of property or a sale of immovable property may have the transaction dissolved for non-performance by the other party due to bankruptcy, even after transfer of possession and title. See note to case last cited. In case of bankruptcy before delivery of the goods, the syndic may take them on paying the contract price. If he refuses to do this, the seller may have the contract dissolved. Whether he is also entitled to a claim for damages, provable against the bankrupt's estate, has been somewhat disputed. In Belgium this right is allowed. *Cass. Belgique*, 7 Feb. 1889; *Jl. du Pal.* 1890, 2, 1, and a similar decision is *Paris*, 4 Mar. 1886, *Jl. du Pal.* 1887, 1, 194. But the rule in the French *Cour de Cassation* is otherwise, *Cass.* 16 Feb. 1887, *Jl. du Pal.* 1887, 1, 353 (reversing the decision of the *Cour de Paris* just cited); *Cass.* 8, Apr. 1895, *Jl. du Pal.* 1895, 1, 268. This general question is elaborately

considered, including references to the legislation of other countries in *Droits du Vendeur à livrer de la Faillite de l'Acheteur*, by C. Apollon (Paris, 1887).

There are some minor exceptions to the general rule of Art. 1184. *Larombière*, III. 108; *Code Civil*, 1978.

<sup>29</sup> *Larombière*, III. 101.

<sup>30</sup> Thus a master cannot dismiss summarily a servant or employee whose conduct is unsatisfactory until the expiration of the time fixed in the contract of employment. The master must apply to the court to have the contract dissolved. *Cour de Cassation*, 1 Feb. 1873, *Jl. du Pal.*, 1873, 44.

<sup>31</sup> *Saleilles*, *Annales de Droit Civil*, VII. 25.

<sup>32</sup> Art. 1139. Le débiteur est tenu de satisfaire, soit par une déclaration ou par autre acte équivalent, soit par l'effet de la convention, lorsqu'elle porte que, sans qu'il y ait besoin d'acte et par la seule



is such that mere non-performance necessarily involves default. If performance to be effectual must be before a certain day or fixed time, for instance if the contract was for furnishing provisions to a ship which was to sail on a fixed day, the mere lapse of time without performance puts the debtor in default.<sup>33</sup> The same result follows if performance is promised at the creditor's domicile or some specified place other than the debtor's domicile, and at the time when the debtor should perform he is not at the agreed place prepared to do so.<sup>34</sup> Again, if the debtor by his words or conduct has caused the creditor to believe performance would not be made, this will serve instead of a formal putting in default. The debtor cannot take the objection that his adversary has not done what his own conduct had authorized him not to do.<sup>35</sup>

### 1. Discretion of the court in granting dissolution.

Originally, it may be expressly stipulated in the contract that in case of non-performance there shall be dissolution *de plein droit*.<sup>36</sup> The effect of this provision is more than to make it

du terme, le débiteur sera en demeure.

in commercial matters a letter or demand has been held to serve to put a debtor in default. Rouen, 23 Dec. 1880, JI. du Pal. 1882, 1095; Paris, 6 Nov. 1882, JI. du Pal. 1877, 1026, and note; to the contrary was held in Paris, 1 Dec. 1874, JI. du Pal. 1877, 1026. See also Caen, 13 March, 1876, JI. du Pal. 1877, 1027. It must be subsequent to the expiration of the time fixed by the contract for performance, and must be a demand for performance and not primarily to a dissolution of the contract. Rouen, 23 Dec. 1880, JI. du Pal. 1882, 1095.

Larombière, III. 149. Similarly in the performance of a contract which necessarily requires time, as to cutting timber, failure to begin the work until it has become impossible to complete it in a reasonable time makes a formal putting in default unnecessary. Paris, 17 Feb. 1869, JI. du Pal. 1869,

386. See also Rennes, 10 Dec. 1875, JI. du Pal. 1876, 1014. But if the contract merely specifies that wheat is to be delivered in a certain month, the seller must be put in default formally before the buyer can have the sale dissolved. Rouen, 23 Dec. 1880, JI. du Pal. 1882, 1095.

<sup>34</sup> Larombière, III. 150.

<sup>35</sup> *Ibid.*, 152.

<sup>36</sup> This clause is legal, but it must be expressly stated. If the contract provides merely that there shall be dissolution for non-performance this is taken to be but an expression of what the law implies. Larombière, III. 152. In regard to immovable property, further, by Art. 1656 of the Code Civil, even though it is stipulated in the contract that there shall be dissolution *de plein droit* it is still necessary to put the delinquent formally in default, unless it is also stipulated that dissolution shall be "sans sommation ou mise en demeure." In contracts relating to

unnecessary to put the debtor in default, though that it has. It deprives the court of any discretion in decreeing dissolution or granting the defendant delay. The only question the court can consider is whether the contract has been broken.<sup>27</sup>

Except in the case of contracts which are expressly subject to dissolution *de plein droit*, the plaintiff has no absolute right to have the contract dissolved. If the failure to perform is merely delay, and the contract still admits of substantial performance,<sup>28</sup> the defendant, if he sees fit, may postpone the action, at any time before judgment of dissolution is pronounced. Indeed, by taking an appeal, he may postpone after that time, that is, until judgment on appeal.<sup>29</sup> But

movable property the better view is that these last words are unnecessary: *Cass.* 29 Nov. 1886, *Jl. du Pal.* 1887, I, 137 and note.

The contracting parties may also agree that the contract shall not be dissolved for non-performance, or only for non-performance of a certain kind. *Larombière*, III. 113.

<sup>27</sup> *Larombière*, III. 155; *Aubry-Rau*, *Cours de Droit Civil Français* (4th ed.), IV. § 302, b; *Cass.* 2 July, 1860, *Jl. du Pal.* 1860, 1101. But it does not make application to the court unnecessary to secure dissolution, *Aubry-Rau*, IV. § 302, b; *Larombière*, III. 149, though this view was maintained by the older writers. See authorities cited above.

Besides the case where it is part of the contract that the dissolution shall take place *de plein droit*, in sales of chattel property the seller has, by a particular provision of the Code (Art. 1657), an absolute right to have the contract dissolved without delay. This provision is only in favor of the seller. A buyer has not a corresponding right in case of the seller's default. In such sales, if goods ought to be taken by the buyer in instalments, failure to take one instalment gives rise to a right to have the whole contract dis-

solved, as it is held to be indissoluble for this purpose. *Larombière*, III. 147, 148.

<sup>28</sup> In *Cass.* 13 Feb. 1872, *Jl.* 1872, 133, there was involved a contract for the manufacture of goods. The manufacturer was prevented from furnishing the goods at the stipulated time. The buyer sought dissolution of the contract with damages while the manufacturer claimed to be wholly released from the contract by impossibility. It was held that the parties not having made it appear that the time was essential, it could be performed after the interruption by the war had ceased, and no performance was ordered.

<sup>29</sup> *Larombière*, III. 144; *Demolombe*, *Traité des Contrats*, II., §§ 515-516. In Holland, however, it is held that by putting a delinquent party in default, the contract formally in default, the party acquires a right to have the contract dissolved, which cannot be destroyed by subsequent performance. See a decision of the High Court of the Netherlands, 14 Dec. 1889, *Jl. du Pal.* 1894, 4, 29.

So in Louisiana it is held that a party has been put in mora by a demand followed by the filing of a suit to rescind, an offer of perfor-

ess provision too of the article of the code under consideration (1184), the court may grant such delay as it sees fit, within which the defendant may perform.<sup>40</sup> This may be done by referring to give judgment, or judgment may be given with a proviso that it shall not take effect for a certain time, or subject to the condition that the defendant fail to perform within a certain time.<sup>41</sup> But one delay is allowable, however. The court cannot extend the period originally granted.<sup>42</sup>

## 2. Delayed or imperfect performance.

The nature of some contracts is such that, though there is no express provision for the case in the Code Civil, delayed performance or offer of it need not be accepted and will not always avert the dissolution of the contract. If the contract relates to a mercantile matter,<sup>43</sup> especially if it is for the purchase and sale of commodities which fluctuate in price from day to day,<sup>44</sup> or if for any reason the exact time specified in the contract is of importance, a stricter rule prevails. In such cases the normal and proper course to be taken by a party to a contract who wishes to avoid it because of the failure of his co-contractor to perform at the time specified in the contract, is immediately to make formal demand for performance, and, not receiving it, to give notice that if performance is not rendered within a stated short time, the dissolution of the contract will be claimed. The time thus fixed is not necessarily conclusive; the court may grant such delay as seems to it proper under the circumstances,<sup>45</sup> and although the time is fixed in the formal demand for performance, subsequent offers to perform not made within a time reasonable under all the circumstances of the case may be refused and the dissolution of the contract insisted upon.<sup>46</sup> Nevertheless

too late. *Clover v. Gottlieb*, 50 N. H. 568, 23 So. 459.

There is a special provision to the same effect in regard to sales of immoveable property, contained in Art. 1609 of the Code Civil.

*Combière*, III. 145, 146.

*Id.*  
Paris, 12 Aug. 1870, JI. du Pal. 756.

<sup>40</sup> Paris, 30 Jan. 1873, summarized in Sirey & Gilbert's annotated Code Civil, ¶ 33 of note to Arts. 1609-1611.

<sup>41</sup> Bordeaux, 8 Aug. 1829, summarized in ¶ 17 of the note above referred to; Cass. 15 Apr. 1845, JI. du Pal. 1845, 1, 591.

<sup>42</sup> Paris, 12 Aug. 1870, JI. du Pal. 1872, 756.

it is well to specify in the demand the extreme period of within which performance will be accepted.<sup>47</sup> In contract the delivery of merchandise twenty-four hours is fixed custom as a reasonable time.<sup>48</sup>

Analogous to the case of performance delayed beyond stipulated time is the case of an offer of performance, imperfect or incomplete, from other causes than delay. It is laid down that where the agreement consists of a positive engagement to do or give a particular thing, the performance being specific and indivisible, the agreement may be dissolved if the engagement is not exactly fulfilled.<sup>49</sup> But a slight deficiency or error in the amount of a quantity of goods forming the subject-matter of a contract is held not to warrant its dissolution.

If the defendant fails to perform seasonably or within the period of delay granted by the court, the contract may ordinarily be dissolved.<sup>51</sup> Though the defendant's non-performance was due to supervening impossibility, which v

<sup>47</sup> See Cass. 13 June, 1876, *Jl. du Pal.* 1877, 413.

<sup>48</sup> Paris, 12 Aug. 1870, *Jl. du Pal.* 1872, 756.

<sup>49</sup> Larombière, III. 96; Aubry-Rau, IV. 83, § 302. Cf. Demolombe, II., §§ 498, 499. In Cass. 12 Apr. 1843, *Jl. du Pal.* 1843, 2, 8, the plaintiff was held entitled to the dissolution of a contract to buy a steam engine because the defendant delivered it without a smoke-stack. It was held immaterial that the deficiency could be easily supplied and that therefore damages would be a sufficient indemnity. In Cass. 4 Dec. 1871, *Jl. du Pal.* 1871, 589, it was held of no avail that the seller after having made an offer of defective goods, subsequently put them in satisfactory condition and offered them again. In a later stage of the same case, Aix, 8 Aug. 1872, *Jl. du Pal.* 1873, 1088, the court refused to give effect to a custom by which goods if above a minimum quality, though below that stipulated for in the contract, must be accepted by the buyer, with a money indemnity

for the deficiency in quality. If the goods are to be made according to a sample, non-conformity to the sample is a ground for dissolving the bargain. Rouen, 22 July, 1872, *Jl. du Pal.* 1872, 1086; Cass. 20 Jan. 1873, *Jl. du Pal.* 1873, 1161; Rouen, 26 July, 1873, *Jl. du Pal.* 1873, 1127.

The principle seems to have been established, however. In Cass. 4 Mar. 1872, *Jl. du Pal.* 1872, 1140, there was involved a contract for sub-letting an apartment and shop, and for the sale of certain articles of furniture in the shop. Non-delivery of these articles was not deemed a ground for dissolution. It was held that the agreement for the sale of the furniture was merely an accessory stipulation, and failure to deliver one article did not afford a ground for dissolution of the bargain.

<sup>50</sup> Cass. 12 Feb. 1877, *Jl. du Pal.* 1877, 782. See also ¶ 37 of the *Code de Commerce* to Arts. 1612, 1613 in the annotation in the *Code Civil* of Sirey and Gilbert.

<sup>51</sup> If the contract is divisible, the court may in its discretion dissolve it as to part only. Cass. 12 Apr. 1870, *Jl. du Pal.* 1870, 663.

him from liability in damages, the plaintiff is none the less entitled to such dissolution.<sup>52</sup> If, however, by accidental mischance it had become impossible for the performance made at the stipulated time merely, the cause of the delay would be taken into consideration by the court and greater leniency in granting delay would be shown than if the delay were wilful. But in such a case if by special agreement the nature of the case performance must necessarily take place, if at all, at the time originally fixed, delay, though caused by accident, is fatal.<sup>53</sup>

Even though the plaintiff himself was guilty of the first breach of the contract, and this breach was the reason that the defendant subsequently committed a breach, the plaintiff may have the contract dissolved. The defendant may in such a case, it is said, suspend the execution of his agreement until the plaintiff performs, but he may not be guilty of a positive infraction of the agreement, if he does not want it dissolved. If the plaintiff is guilty of such a positive infraction, the plaintiff may have the contract dissolved though he is liable in damages for his own prior breach of contract.<sup>54</sup>

#### **2. Part performance and immaterial breach.**

There is nothing in the words of article 1184 to indicate that part performance of a contract by the party ultimately guilty of a breach affects the right of the other party to have the contract dissolved. But the obvious harshness of applying

frombrière, III. 92; Aubry-Rau, II. 202, 83, and note 82; Demolombe, II. 397; Cass. 30 Apr. 1878, JI. du 1879, 493; Cass. 14 April, 1891, JI. du 1891, 391. In the case of the defendant, the lessee of a mine, was prevented from carrying out the stipulations of the lease by an infestation of phylloxera. The lessor was held entitled to have the lease dissolved.

frombrière, III. 93.

frombrière, III. 102; Cass. 8 April, 1850, JI. du Pal. 1850, 2, 100. In such a case the plaintiff, the owner of the mining rights, had entered into a con-

tract with the defendant, by which the defendant was given the right to carry on mining operations but agreed among other things not to do so before being authorized by the prefect—this authorization being essential by law. The plaintiff, among other things, agreed to take the steps necessary to secure the authorization. He subsequently refused to do so, and the defendant thereupon began to mine. It was held that the plaintiff was entitled to have the contract dissolved, but without prejudice to the defendant's claim for damages.

the rule universally has led to exceptions, the extent of which has not been and perhaps from the nature of the case cannot be very exactly defined, though some definition has been attempted. On the one hand it has been said that non-performance of a stipulation which is purely accessory and dependent of the principal contract cannot afford ground for dissolution, such non-performance being sufficiently compensated by damages.<sup>55</sup> Also if the infraction is of a purely negative stipulation the judge will weigh the gravity of the breach, and if not of serious importance will allow the injured party damages only.<sup>56</sup> And in any case a breach of trifling importance will not justify a claim for dissolution.<sup>57</sup> Further, if the performance has not become impossible, either before the time was of the essence of the contract or for other reasons, the court by granting the defendant a delay may avoid the dissolution of the contract.<sup>58</sup> Perhaps the most difficult case is where the infraction in question is a serious one and of an essential part of the agreement, but where so much that cannot be undone has been done under the contract, that serious injustice would arise if the contract were dissolved. It is probable that the court would deal with such a case as equity requires, without allowing itself to be hampered by general rules.<sup>59</sup>

<sup>55</sup> Cass. 29 Nov. 1865, JI. du Pal. 1866, 32; Amiens, 3 Aug. 1881, JI. du Pal. 1882, 1, 695. Demolombe, II., §§ 498-500, is of opinion that even in such a case the court may grant dissolution, but that it has discretion to refuse.

<sup>56</sup> Cass. 26 May, 1868, JI. du Pal. 1868, 890. In this case the defendant had sold the plaintiff his stock-in-trade and business, agreeing not to compete. He was subsequently guilty of some acts of competition which caused little damage. The court held that the plaintiff could not have the bargain dissolved. See also the case stated *infra*, n. 59.

<sup>57</sup> Larombière, III: 95. Cass. 29 Nov. 1865, JI. du Pal. 1866, 32; Cass. 10 June, 1856, JI. du Pal. 1857, 867.

<sup>58</sup> Larombière, III: 96. Mercur in the absence of special circumstances it is said, cannot in the nature of things be better repaired than by performance, even though it be tardy, if the infraction in the agreement forbids.

<sup>59</sup> Paris, 21 Apr. 1896, JI. du Pal. 1897, 2, 9. In this case the Théâtre Français sought an injunction conditionally the dissolution of the contract with Coquelin the elder. Under this contract the actor had bound himself, among other things, to appear only where except at the Théâtre Français. The latter agreed among other things to pay the actor a retiring pension after a specified period. The contract was carried out on both sides for more than twenty years, and Coquelin had become entitled to his retiring pension.

#### 4. Waiver and right to damages.

The injured party may waive or renounce his right to a dissolution of the contract either expressly or by conduct reconcilable with the idea of an intention to exercise or reserve the right. The fact that a plaintiff has previously brought action for the enforcement of a contract and obtained a decree that it be specifically carried out does not, however, operate as a waiver of the right to bring a subsequent action for dissolution.<sup>60</sup> Nor does merely receiving performance without objection necessarily imply a recognition of the validity of the performance and hence operate as a bar.<sup>61</sup>

Although the literal construction of Art. 1184 might seem to lead to a different conclusion, a party seeking a remedy for breach of contract by the other party is entitled to appropriate damages as well in the case where he seeks or is awarded judgment that the contract be specifically enforced as in the case where he asks that the contract be dissolved.<sup>62</sup>

#### 5. Prospective non-performance.

Analogous to the case where a party to a contract has failed to perform his obligations, is the case where before the time for such performance, it becomes certain or probable from a party's words, actions, or circumstances that he will

not have asserted the right to act otherwise. The court granted an injunction and damages for every breach of agreement, but refused to dissolve the contract further. Cass. 14 Apr. 1891, *Jl. du Pal.* 1894, 1, 391; Cass. 11 Apr. 1894, *Jl. du Pal.* 1888, 1, 520; Cass. 29 Apr. 1865, *Jl. du Pal.* 1866, 32.

Cass. 27 Mar. 1893, *Jl. du Pal.* 1893, 1, 443; Larombière, III. 209. This was otherwise in the Roman law. The seller in demanding the price was not to have waived the right of rescission bargained for by a commissory contract and conversely if he demanded dissolution he waived his right to demand the price: *Si venditor pretium legi commissariæ renūciatum habuerit, nec variare et ad hanc redire*

*potest*, D. 18. 3. 7.; Papinianus . . . scribit . . . nec posse si commissoriam elegit postea variare. D. 18. 3. 4. § 2.

<sup>61</sup> Paris, 18 Mar. 1870, *Jl. du Pal.* 1870, 1179. Saleilles, *Ann. de Droit Comm.* VII. 42. In contracts of sale the seller is liable for latent defects, Code Civ., Art. 1641, even though not aware of them himself, Art. 1643; but not for defects which the buyer might discover by examination, Art. 1642.

<sup>62</sup> Larombière, III. 140. The Italian Codice Civile, Art. 1165, which is otherwise a literal translation of Art. 1184 of the French Code Civil, avoids the ambiguity of the latter by adding the words "in ambedue i casi" after the provision for damages.

not perform when the time arrives. The French code contains no general provision for this sort of case. There are, however, special provisions which cover part of the ground. In the event of a threatening insolvency or a diminution by a debtor of any security given to the creditor by him deprive him of any term of time given by the contract. The creditor can demand complete performance, unless the debtor will give him security.<sup>63</sup> In the case of sales not only a buyer who is vexed by an insolvency in regard to the subject-matter of the sale, but one who has no reason to fear being vexed in the future by such an insolvency may suspend payment of the price until the seller stops to the cause of the trouble or gives security.<sup>64</sup> In the absence of threatened non-performance not within these provisions it seems probable that the court would grant an appropriate delay, and if the threat then had become a reality a decree of dissolution, otherwise not.<sup>65</sup>

#### § 906. Dissolution takes effect by relation.

Judgment for dissolution when given takes effect by relation from the date of the contract,<sup>66</sup> and each party is bound to return what he has received. Each may, however, retain what he has received until the other party concurrently returns.<sup>67</sup> If return is impossible, damages are awarded instead;<sup>68</sup> but one who has put it out of his power to return

<sup>63</sup> Code Civil, Arts. 1188, 1613; Cass. 9 Jan. 1854, *Jl. du Pal.* 1856, 2, 552; Paris, 22 Jan. 1856, *Jl. du Pal.* 1856, 1, 217. This provision is not confined to cases of actual bankruptcy. If a buyer's solvency is so precarious as to make payment by him doubtful it is enough. Paris, 11 July, 1853, *Jl. du Pal.* 1853, 2, 376. But merely the seller's fears or a report of the buyer's insolvency will not justify a refusal to deliver. Cass. 26 Nov. 1861, *Jl. du Pal.* 1862, 332; Cass. 24 Nov. 1869, *Jl. du Pal.* 1870, 280; Cass. 8 Aug. 1872, *Jl. du Pal.* 1870, 157.

A right to have security or be freed from the contract is likewise provided for in the Swiss Federal Code of Obligations, Art. 83.

<sup>64</sup> Code Civil, Art. 1653. But this difficulty affects only a small part of the property sold, the buyer may retain the whole price, but on condition corresponding to the value of the part. Troplong, *Vente*, II. The threat or fear of eviction is not a ground for dissolution of the contract only for delay in paying the price. Cass. 2 Jan. 1839, *Jl. du Pal.* 1839, 18.

<sup>65</sup> Larombière, III. 100.

<sup>66</sup> Cass. 31 Dec. 1856, *Jl. du Pal.* 1857, 337; Cass. 5 Dec. 1881, *Jl. du Pal.* 1882, 248.

<sup>67</sup> Cass. 2 June, 1886, *Jl. du Pal.* 1890, 1, 930.

<sup>68</sup> Cass. 14 Dec. 1875, *Jl. du Pal.* 1877, 31.



has received cannot ask for dissolution, though it may be decreed at the suit of the other party.<sup>69</sup>

#### 907. Influence of the French Law in other countries.

The wide influence of the Code Napoléon on the legislation of other countries has made the preceding discussion of the law of France applicable not to that country alone. In Belgium the Code Napoléon as such is in force, and the law of the country is regarded as French law.<sup>70</sup> In Holland the Code Napoléon is the foundation of the civil code in force, and Art. 1302 of the latter corresponds to Art. 1184 of the former.<sup>71</sup> In Italy the Codice Civile has the same basis. Art. 1665 of the latter corresponds to the French Art. 1184,<sup>72</sup> and Art. 1469 to the French Art. 1612.<sup>73</sup> In Baden and some of the German Rhine provinces the Code Napoléon remained in force until the year 1900.<sup>74</sup> In Spain the first part at least of the French Art. 1184, authorizing dissolution for breach seems to have been early adopted<sup>75</sup> and the provision was carried across the ocean in that form to Mexico, Peru, and doubtless other Spanish-American colonies.<sup>76</sup> In Spain itself, however, Art. 1124 of the latest Civil Code,<sup>77</sup> contains in substance the whole of the French Art. 1184, and the French Art. 1612

<sup>69</sup> Bordeaux, 7 Mar. 1845, *Jl. du Pal.* 1845, 2, 67.

<sup>70</sup> Saleilles, *Ann. de Droit Comm.* (1891), I. 27; Zachariä von Lingenthal und others, *Handbuch des Französischen Zivilrechts* (8th ed.), I. 49, note 4.

<sup>71</sup> Zachariä von Lingenthal, I. 49, § 4. A decision of the High Court of the Netherlands, 14 Dec. 1893, *Jl. du Pal.* 1894, 4, 29, shows a minor difference between the law of the Netherlands and France referred to, *supra*, § 39.

<sup>72</sup> The Italian article is a literal translation of the French, except that our words are inserted for greater clearness. See *supra*, n. 62. Giorgi *Trattato delle Obbligazioni*, IV. 212, § 1.

<sup>73</sup> Giorgi, IV. 203.

<sup>74</sup> Aubry-Rau, I. 20; *Entscheidungen des Reichsgerichts*, I. 217.

<sup>75</sup> Schmidt, *Law of Spain and Mexico*, 2, 96. "If the contract be synallagmatic, or one by which the contracting parties have assumed reciprocal obligations, the failure of one to comply with his agreement entitles the other to demand the rescission of the contract."

<sup>76</sup> Schmidt, 98: *Code Civil Méxicain, Résumé analytique*, R. de la Grasserie (Paris, 1895), 114; *Code Civil Péruvien, Résumé analytique*, R. de la Grasserie (Paris, 1896), 166. The Mexican Code also expressly provides a right to recover damages in connection with the dissolution of the contract, and gives a right to specific performance as an alternative.

<sup>77</sup> Promulgated July 24, 1889.

is repeated in the Spanish Art. 1466. In Poland the Napoléon was introduced and is still in force for the part.<sup>78</sup> In America the Code of Louisiana, drawn from the same source, repeats, almost literally, the provisions of the French law on the matter in question.<sup>79</sup> And in Canada the Civil Code allows at least a general right to a broken contract as dissolved.<sup>80</sup>

### § 908. German Common Law.

In Germany (except in the Rhine country where Roman law prevailed), the law until changed by Imperial codes, following the rule of the Roman law, denied to one party to a bilateral contract the right to withdraw from it or treat it as dissolved because of breach of the contract by the other party.<sup>81</sup> Except of express or implied warranty of goods sold authorized remedy and it was also allowed where performance by one party in default had no longer any value for the other party. Further, where performance had become impossible by

<sup>78</sup> Lehr, *Droit Civil Russe*, Introduction; Zachariæ von Lingenthal, I. 50; Foucher, *Code Civil de Russie*, Art. 890.

<sup>79</sup> Arts. 2046 and 2047 are equivalent to Art. 1184; and Art. 2487 is equivalent to Art. 1612 of the French Code. Arts. 1911 *et seq.* of the Louisiana Code provide for formal methods of putting a party in default, similar to those of the French law. Specific performance is not allowed in Louisiana when compensation can be made in damages. Code, Art. 1927; *Mirandona v. Burg*, 49 La. An. 656.

<sup>80</sup> Art. 1065 provides that the party aggrieved may have damages, or specific performance if that is possible "or that the contract from which the obligation arises be set aside." Art. 1066 allows him to "require also that anything which has been done in breach of the obligation shall be undone, if the nature of the case will permit."

<sup>81</sup> Although Windscheid regards the

right to treat a contract as dissolved and recover back whatever has been given under it because of the breach of the other party to perform, contrary to the fundamental principle of the bilateral contract, in that a right of action is all that has been bargained for and that is still enforceable (Lehrbuch, II. § 321, 2, note 1). He maintains that the doctrine of modern law in regard to mistake necessarily lead to the conclusion that only one who performs under the mistaken idea that the other party has already performed, but also one who performs under the mistaken notion that the other party is going to perform, is entitled to treat the contract as dissolved and recover what he has given. Lehrbuch, II. § 321, note 10 a. But, as Windscheid himself admits, the prevailing view is otherwise. For this see Dernburg, § 21, note 6; Römer, in *Zeitschrift für Handelsrecht*, XIX. 123.

of time or other reason, in effect, if not in name, the aggrieved party by refusing to perform until he received performance secured the same result.<sup>82</sup> But many cases were outside these limits.<sup>83</sup> The right to treat the contract as dissolved might be secured by special agreement (*Lex commissoria*),<sup>84</sup> and

<sup>82</sup> See cases *infra*, n. 84.

<sup>83</sup> In a decision of the *Amtsgericht*, Celle, 1 July, 1879, *Seuffert's Archiv*, XXXV. 19, the plaintiff agreed to sell and the defendant to buy real estate. A small instalment of the price was paid and the rest was deferred. Possession was to be given on payment of the second instalment of the price. This was not paid and possession was not given, and the defendant became wholly irresponsible financially. Two years or more later the plaintiff sued for the dissolution of the contract, alleging these facts, and that he was unable to sell his property while the contract was in force. The suit was dismissed. The remedy sought, it was said, is only permissible when, owing to the default, performance of the contract is no longer valuable. If a party wishes the right to dissolve a contract in any case of breach he must make a commissory pact.

Nearly as strong a case is a decision of the *Oberlandesgericht*, Cassel, 9 Apr. 1891, *Seuff. Arch.* XLVII. 147, where the seller, after making one offer of performance, which on suit was held insufficient, was allowed to enforce specifically a contract for the sale of land, though it was more than four years and a half after the contract before a proper offer was made by the plaintiff. See, however, *contra*, a decision of the *Obergericht*, Wolfenbüttel, Oct. 1877, *Seuff. Arch.* XXIII. 404.

In a decision of the *Reichsgericht*, 5 June, 1896, *Seuff. Arch.* LII. 144, it appeared that the plaintiff bought from the defendant the business of publishing the Munich Directory, part of the payment being deferred. The plaintiff

made default in an instalment of the price, and the defendant at once started a rival publication. The plaintiff sued for the suppression of this and for damages. The defendant made counterclaim for the unpaid price. The court held the plaintiff could not recover because he had not performed. The defendant could not treat the contract as dissolved, but as he had made performance impossible, he could only recover the value of what he had given and the burden was upon him to prove what this was and that it was more than he had received.

See also a decision of the *Obers. tgerichtshof für Bayern*, 30 Apr. 1875, *Seuff. Arch.* XXXI. 158.

<sup>84</sup> See *Bürgerliches Gesetzbuch*, §§ 346-361. If one entitled by commissory pact to dissolve a contract, and also entitled to sue for its breach, manifests a definite election of one right (as by suit) he loses the other as in the Roman law (see *supra* note 60). *Reichsgericht*, 21 May, 1897, *Seuff. Arch.* LII. 425. But it was held in this case that a dunning letter after default was not a definite election to abide by the contract.

In a decision of the *Oberamtsgericht*, Wiesbaden, 19 Dec. 1856, *Seuff. Arch.* XI. No. 232, it was held that in the case of perishable goods the agreement upon a fixed time within which the contract must be fulfilled indicates an intention to allow either party to withdraw from the contract for default of the other in performing within this time. A similar decision as to goods intended for consumption or resale and subject to frequent change of price is that of the O. A. G. Mün-

in some of the states of Germany, notably Prussia of the common law was changed prior to the enactment of the Imperial codes.

### § 909. Provisions of the commercial codes.

Imperial legislation, whenever it has dealt with the subject, has enlarged the scope of the right in question. The Imperial commercial code (*Handelsgesetzbuch*), in force until 1900, contained important provisions in regard to contracts coming under the head of commercial transaction. In such contracts, the buyer was in default with the seller if the goods had not been delivered, the seller had no remedies that of acting as if the contract had not been entered into.<sup>87</sup> If the seller was in default the buyer had a similar right, and in this case it was not essential that the contract should not have been fulfilled by the party who was not in default.<sup>88</sup> Whatever had been given in fulfillment of the contract was required to be returned.<sup>89</sup> If a party sought to avail himself of this right he was required to give the other party notice of the fact after performance was due. In the nature of the case allowed, grant a specified term for performance.<sup>90</sup> This was unnecessary where the contract provided that the goods should be delivered at a time or within a fixed period; and in such a case performance was required if it was intended to compel the other party to specific performance, rather than to the payment of damages or the dissolution of the contract.<sup>91</sup> If performance on both sides was divisible, a party could only rescind as to the unfulfilled portion of the contract.<sup>92</sup>

case, 21 July, 1856, *Seuff. Arch.* XI. No. 141. The court, distinguishing the case from a contract in regard to land, say the non-performance is not simply *mora* but breach of contract.

<sup>85</sup> Förster-Eccius, *Preussisches Privatrecht* (4th ed.), II. 90 (note 75), 307, 318; *Entsch. R. G.* XXXVI. 222; *Seuff. Arch.* XXIV. No. 228; *Ibid.* XXI. No. 114.

<sup>86</sup> Such contracts are substantially contracts for the purchase and sale of

personal property in order to determine whether in the same it is the *Handelsgesetzbuch*, Arts. 354, 355; Hahn, *Commentar zum Handelsgesetzbuch*, II. 3-42, 76.

<sup>87</sup> H. G. B. Art. 354; E.

<sup>88</sup> H. G. B. Art. 355; E.

<sup>89</sup> Hahn II. 358.

<sup>90</sup> H. G. B. Art. 356; E.

<sup>91</sup> G. H. B. Art. 357; E.

<sup>92</sup> H. G. B. Art. 359; E. But he may withdraw from

Besides being applicable to but a limited number of cases, the value of the remedy of withdrawing from the contract or treating it as dissolved was much decreased by the rule that one who adopted this remedy not merely freed himself from any obligation to perform, but discharged the other party from liability in damages for failure to perform.<sup>93</sup> The remedy was, therefore, of practical value only when the party seeking it had made a bad bargain, and was consequently not damaged by the loss of it. Further a party who had received anything under a contract could not treat it as dissolved unless able to return uninjured what he had received.<sup>94</sup> Since January 1, 1900, statutory rules have become of wider application. On that day a practically complete codification of German law took effect. The then existing Commercial Code was superseded by a new one, and the Civil Code, which had been in process of formation for nearly twenty years, became operative. Owing to the general provisions of the Civil Code the new Commercial Code does not contain the special provisions of the previous one. Commercial contracts are thus made, so far as the matter in question is concerned, subject to the same rules as other contracts. One special provision, however, is retained. If a commercial sale provides for delivery at a fixed time or within a fixed period, the buyer may withdraw from the contract if delivery is not made promptly; and if he desires specific performance instead of damages or dissolution of the contract, he must notify the other party promptly.<sup>95</sup>

ance of all the remaining instalments. Failure by either the buyer or seller to perform as to any instalment justifies the other party in refusing to deliver or receive any further instalments. Reichsoberhandelsgericht, 7 Mar. 1871, Entsch. II. 84; 14 Mar. 1874, Entsch. XIII. 78; 21 Mar. 1874, Entsch. XIII. 102; 5 Apr. 1875, Entsch. XVI. 190, 193; Oberlandesgericht, Braunschweig, 9 Jan. 1891, Seuff. XLVI. 339.

In a decision of the R. O. H. G. 25 Jan. 1873, Entsch. VIII. 423, it was even held that failure on the part of the seller to deliver the stipulated quantity,

justified refusal to pay for what had been delivered until the remainder was delivered, though the price was not a lump sum.

<sup>93</sup> Hahn, II. 358; Entsch. des R. O. H. G. XVII. 422, 13 Feb. 1875; Entsch. des Reichsgerichts, XXXIX. 170, 11 May, 1897.

<sup>94</sup> Thus temporary use of a machine debars the buyer from returning it after it has proved unsatisfactory. Case last cited.

<sup>95</sup> § 376. This corresponds to § 357 of the present H. G. B.

**§ 910. Provisions of the German Civil Code.**

The following are in substance the sections of the German Civil Code relating to the subject:

320. One, who is bound under a bilateral contract, may refuse the performance due from him until the counter-performance is effected. If the performance is to be rendered to several parties, the part coming to any one may be withheld, until the entire counter-performance is rendered.

If one party has partially performed, the counter-performance cannot be refused if under the circumstances, particularly in view of the proportionate insignificance of the part in arrear, the refusal would be a violation of good faith.

321. One, who is bound under a bilateral contract to render the first performance, may, if after the conclusion of the contract the means of the other party have suffered an essential deterioration, by which the claim for counter-performance is endangered, refuse the performance due from him until the counter-performance is rendered or until security is given for the same.

322. If one party brings suit for the performance due to him under a bilateral contract, the right belonging to the other party to refuse performance until counter-performance is rendered has only the effect that the other party is to be adjudged to perform move for move (*Zug um Zug*).

If the party plaintiff has to perform first, and if the other party defaults in the acceptance, the plaintiff may, upon receipt of the counter-performance, sue for performance.

323. If the performance which one party owes under a bilateral contract becomes impossible through a circumstance for which neither he nor the other party is responsible, he loses the right to the counter-performance; in case of partial impossibility the counter-performance is reduced in conformity with §§ 472, 473.

If the other party, according to § 281, demands delivery of the compensation [received from a third person] for the thing due or assignment of the claim to compensation, he remains liable to counter-performance; the latter is, however, reduced in conformity with §§ 472, 473, in so far as the

value of the compensation, or of the claim for compensation, is less than the value of the performance.

In so far as the counter-performance, not due under these provisions, already has taken place the re-delivery of that, which has been rendered, may be demanded according to the provisions relating to the surrender of an unjust enrichment.

324. If the performance owing by one of the parties under a bilateral contract becomes impossible through a circumstance, for which the other party is responsible, he retains the right to counter-performance. He must, however, consent to be charged with what he saves by reason of being freed from performance, or with what he acquires by other use of his resources, or wilfully omits to acquire.

The same is applicable if the performance to be rendered by the one party, owing to a circumstance for which he is not responsible, becomes impossible at a time when the other party is in default as to acceptance.

325. If the performance owing by one of the parties under a bilateral contract becomes impossible through a circumstance for which he is responsible, the other party may demand damages for non-performance or may withdraw from the contract. In case of partial impossibility, if the partial performance of the contract is of no interest to him, he has the right under § 280, par. 2, to demand compensation by reason of the non-performance of the entire obligation or to withdraw from the whole contract. In place of the claim for compensation and of the right to withdraw (*Rücktrittsrecht*), he may also enforce the rights applicable to the case of § 323.

326. If in case of a bilateral contract, one party delays the performance owing from him, the other party may for the purpose of obtaining performance fix a reasonable time and give notice, that he will refuse performance after the expiration of the time fixed. Upon the expiration of that period he is entitled to demand damages for non-performance or to withdraw from the contract, if the performance is not rendered in time. A claim for performance is barred. If no part of the performance has been rendered before expiration of the time, the provision of § 325, par. 1, sentence 2, is correspondingly applicable.

If the performance of the contract in consequence of the delay is of no interest to the other party, he is entitled to the rights designated in par. 1, without the necessity of fixing a term.

**§ 911. Effect of the statutory provisions.**

The provisions of the German Civil Code will generally enable a party to a contract to treat it as dissolved for non-performance by the other side. Unless he himself has parted with something under the contract which he wishes to recover, his attitude if he avails himself of the remedy will be that of a defendant, not as in France that of a plaintiff. In some cases, however, no such right is given. Certainly where the plaintiff's default in performance whether total or partial may still be made good, time being of the essence neither from the nature of the contract, nor because of notice given as provided by § 326, the defendant must protect himself in some other way. And even where the contract may be treated as dissolved, here as in the case of the provisions of the Commercial Code, there is no right given the party aggrieved to assert a claim for damages. Nor can he, presumably, treat the contract as dissolved if he cannot return what he has received, except in the single case of its chance destruction.<sup>66</sup>

**§ 912. *Exceptio non adimpleti contractus*.**

The remedy of dissolving the contract or withdrawing from it will not, therefore, in Germany have the same almost exclusive importance as in France. The negative right of refusing to perform unless or until the other party shall do so retains and is likely to retain its importance. It has been a well recognized right for a long time, and for more than a century there has been active discussion in regard to it under the name of the *exceptio non adimpleti contractus*.<sup>67</sup> Article 320 of the Civil Code adopts the principle and the article

<sup>66</sup> Bürg. Gesetzbuch, § 350, expressly provides that chance destruction of an article received shall not prevent rescission.

<sup>67</sup> The use of this name for the de-

fence, or of *exceptio non impleti contractus*, the earlier form, and that still used in Italy—dates from the end of the seventeenth century.



will doubtless be construed with reference to the common law existing before the statute.

The discussion of the common law<sup>88</sup> has for the most part turned rather on the theoretical nature of the defence than on its practical applications. The main point in dispute has been whether it is part of the plaintiff's case to allege and prove performance. It seems to have been generally conceded from the outset that the plaintiff in order to win his case must prove performance, and it has been general practice at least for the plaintiff's declaration or complaint to contain an allegation of performance.<sup>89</sup> The natural inference would be that the allegation of performance is essential to the plaintiff's case and that such performance is a condition precedent to any actionable right on his part. Such was the prevailing doctrine in the early part of the nineteenth century.<sup>1</sup> It was a consequence of this doctrine that the so-called *exceptio* was not a proper *exceptio* but merely a denial of an allegation in the plaintiff's declaration. In 1824 an essay by Heerwart<sup>2</sup> supported by new reasoning a contrary view. His theory was that the plaintiff, in proving that he had performed, was proving matter which, if the pleadings were fully carried out, would be alleged not in the declaration, but in the replication. He maintained that the plaintiff makes out his original case by proving the defendant's matured promise; the defendant in turn makes out his defence by proving the plaintiff's counter promise. This gives rise to a cross-claim equivalent to, and

<sup>88</sup> A complete and to some extent annotated bibliography of the German literature relating to the subject till the year of publication (1890) may be found in André, *Die Einrede des nicht erfüllten Vertrages*, 3-13, 23-27. A less complete but good bibliography, especially of more modern writers, is contained in Windscheid, *Lehrbuch des Pandektenrechts* (7th ed., 1891), II., § 321, note 2.

By far the most complete and satisfactory discussion of the common law is contained in the book of André. The best short treatment is still that of Heerwart, *Archiv f. d. Civil. Praxis*,

VII. 335 (1824). All the general handbooks of German law deal with the subject. Among the best of these, so far as the point in question is concerned, are Dernburg, *Pandekten*, II. §§ 20, 21, and Windscheid's *Lehrbuch*, cited above, II. § 321.

The effect of the codification in the Civil Code is discussed in Staudinger, *Kommentar zum Burg. Gesetzbuch*, and reference is made before Art. 320 to the literature of the subject.

<sup>89</sup> André, 27, 45.

<sup>1</sup> André, 24, and authorities cited.

<sup>2</sup> *Archiv f. d. Civ. Praxis*, VII. 335.

counterbalancing the plaintiff's right; as if to an action on a debt the defendant should plead in set-off an equal debt due him by the plaintiff. In order to meet the defence of a counter promise set up by the defendant, the plaintiff should by replication allege that he has fulfilled his own promise; just as in the case of set-off it would be the duty of the plaintiff to allege in a replication that he had paid the debt claimed by the defendant, not the defendant's duty to allege that the plaintiff had not paid the debt.<sup>3</sup> So it would be matter for replication if the plaintiff's promise was discharged in any other way than by being performed, as by release, waiver or prevention by the defendant or by impossibility of which the defendant bore the risk. *Exceptio non adimpleti contractus* is a misnomer for the defence, upon Heerwart's theory, as the words imply that the plaintiff's non-performance is part of the defendant's exception. *Exceptio prius adimplendi contractus* has been suggested as a more appropriate name.

This theory of the defence became the prevailing one, both with legal writers<sup>4</sup> and with the courts.<sup>5</sup> But whether the

<sup>3</sup> The burden is universally on the debtor to prove that he has performed. Dernburg, II. § 21, I. 1.

<sup>4</sup> André, 24, marshals the writers. But legal opinion is by no means unanimous. The method of argument ordinarily followed is to establish by historical or analytical reasoning the nature of a bilateral contract and then deduce the consequences. Two views have divided most of the writers: (1) Two independent obligations are created by a bilateral contract but each is to perform not in any event but in return for counter performance. Each obligation is, therefore, conditional on the performance of the other. (2) Two independent obligations are created, but on grounds of justice a defence is given to each party by means of which he can compel performance by the other party precedent to or concurrent with his own. For the first of these views Keller is regarded as the ablest cham-

pion. The second is supported by Windscheid, Dernburg and most recent writers. German ingenuity has not been exhausted by these two views. Though little support has been given other views, the further suggestion has been made; (3) that the promises create wholly independent obligations; (4) that there is but a single united obligation, namely, that both performances shall take place. See Windscheid § 321, note 2; André, 28. Bechmann (Der Kauf, I. 568) distinguishes the "genetic synallagma" or bilateral contract in its creation where mutuality is essential from the "functional synallagma" or bilateral contract in its performance where mutuality is not essential but merely equitable. Bechmann believes that neglect to observe this distinction has led Keller and those who take the same view into the position they occupy.

<sup>5</sup> André, 17. And see the case stated in the following note.

plaintiff must allege and prove performance as part of his original case or as a reply to a defence is a question of little practical importance. Its principal direct bearing is stated by André to be in case of judgment by default against the defendant, when the plaintiff in his declaration does not allege that he has performed his part of the contract.<sup>6</sup> As the ordinary practice of plaintiffs is to allege that they have performed<sup>7</sup> whether it is or is not essential to do so, it is obvious that decision is not often required as to whether the allegation should be in the declaration or in a replication.

§ 913. *Exceptio non rite adimpleti contractus*.

Most of the cases which present any real difficulty are those where the plaintiff has either offered to perform or actually performed wholly or partially, and the defence is not that there has been no performance at all but no sufficient or satisfactory performance. The name *Exceptio non rite adimpleti contractus* was invented for this defence about the middle of the eighteenth century. Its distinguishing feature was that the burden of proof was upon the defendant. Though the conception found favor for a time, it was soon criticised by the writers. It was pointed out that performance of something other than what the contract requires is no performance as far as that contract is concerned, and that the defendant may safely assert that the plaintiff has not performed. If, however, the writers added, the defendant, as often happens, seeks not merely to defeat the plaintiff's claim but to establish an independent right of his own, as the dissolution of the contract, or damages for the plaintiff's defective performance, the burden of making out the facts on which such a right is based rests upon him. This way of dealing with the subject

<sup>6</sup> André, 27. It was of decisive importance also in a decision of the Reichsgericht, 10 Oct. 1890, Seuff. Arch. XLVI. 225. Certain procedure is allowed exclusively for cases where the plaintiff's claim is based wholly on documentary evidence. In this action, which was on a bilateral contract, the defendant claimed that as the plaintiff could not prove by documentary

evidence that he had performed on his part, the form of procedure was inapplicable and that consequently the action must be dismissed. The court held the contrary, on the ground that proof of performance was not part of the plaintiff's original case. O. L. G. Celle, 6 Oct. 1886, Seuff. Arch. XLII. 109, is to the same effect.

<sup>7</sup> André, 45.

found pretty general acceptance,<sup>8</sup> but a modification strenuously contended for in the work of André. A frequent reference has been made. He admits that if the plaintiff has performed but half what he was bound to do, if he performed at the place or time he should, the defendant takes no initiative at the trial, for the plaintiff must show performance and the facts evidently indicate that he has performed. But if the plaintiff agrees to sell a specific thing and actually delivers it or builds a house or other thing, apparently the thing he promised to do, André would shift the proof and would throw upon the defendant the burden of showing that the apparent performance was not really performance, because the article sold lacked the required qualities or the house was defectively built.<sup>9</sup> Dernburg reports this distinction<sup>10</sup> and many judicial decisions have accord with it.<sup>11</sup>

#### § 914. How far the defence is merely dilatory.

The defence of the *exceptio non adimpleti contractus* is usually called a dilatory one,<sup>12</sup> and the defendant's position is compared to that of a pledgee, who holds the pledge to enforce payment by the debtor. The defendant is

<sup>8</sup> According to this view since the same facts might be relied on either for the assertion of an independent claim or for a defence the defendant's pleading "must set out the object he is seeking by his defence, not merely the facts, leaving the court in the dark with what aim he does so,—whether he wishes to deduce the right to dissolve the contract or to a diminution of the price or to a retention of the price until completion of performance, or finally to indemnity by way of damages." From a decision of the Oberamtsgericht Dresden, 5 May, 1859; Seuff. Arch. XIII. No. 184.

<sup>9</sup> A large part of André's book is devoted to establishing this thesis. The distinction suggested seems from the standpoint of the Common Law to amount to this: in one class of cases the

plaintiff has made out a case, which will, in the absence of evidence, sustain the burden upon him of proving performance. In the other class of cases the defendant must show that he has performed. But the German writers, because their procedure does not distinguish law and fact carefully or because their reasons do not seem to be based here between the burden of proving forward evidence to meet a case, and the burden of establishing the essential elements of the claim or defence.

<sup>10</sup> II. § 21 (3d, 4th, 5th editions).  
<sup>11</sup> See citations given by Dernburg, 120.

<sup>12</sup> André, 127; Dernburg, 120.

will not perform as long as you do not," but as André points out this must frequently change into the formula "I will not perform because you have not." This will be so in every case where performance by the plaintiff is or has become impossible;<sup>13</sup> and also where the plaintiff claims that he has performed and does not intend to do anything more in any event. Sometimes it will be uncertain whether the plaintiff may, if he chooses, perform again, as where it is not clear whether time is an essential part of the contract. It follows from the theory that the defence is dilatory, that the judgment rendered when it is successfully set up is against the defendant subject to the condition of the plaintiff's performance.<sup>14</sup> But here again when the plaintiff has failed to perform irretrievably the judgment must in effect be absolute.

**§ 915. Whether the plaintiff must have performed completely.**

A party is said to be entitled to refuse to perform at all until his co-contractor has completely performed,<sup>15</sup> and, as before, theory has to receive essential modification in practice. If the performances are divisible or payments are to be made

<sup>13</sup> In *Entsch. R. G. XXXVI. 228* (11 Oct. 1895), the court resorted to rather technical reasoning to make out performance was impossible and thereby to deprive a party of a right to perform again. Under a contract for the sale of rice flour he had furnished inferior goods. After some dispute and delay he offered different flour. The court held that a contract for the sale of unspecified goods became a contract for the sale of specified goods, as soon as goods were furnished under the contract, and that, therefore, if the goods so specified were not in accordance with the contract performance was impossible and the buyer need not accept other goods.

<sup>14</sup> André, 129; *Dernburg, II. § 21*. So provided in the *Bürgerliches Gesetzbuch, § 322*. Cf. *Hasenöhrl, Österreichisches Obligationenrecht, II. 411*.

<sup>15</sup> André, 135; *O. A. G. Lübeck, 18 June, 1840, Seuff. Arch. IX. No. 216*; *O. A. G. Darmstadt, 27 Nov. 1866, Seuff. Arch. XXI. No. 222*. So in a decision of the *Reichsoberhandelsgericht, 17 Jan. 1874, Entsch. XII. 229*; *Seuff. Arch. XXXI. 219*. The plaintiff sold a clothing business to the defendant and contracted not to go into competing business. The action was for an instalment of the contract price of which but a small part had been paid. The defence was that plaintiff had joined a competing firm. The court rejected the plaintiff's suit, saying the agreement not to compete was not collateral but essential to give value to the goods. The defendant could not be compelled to accept damages, as he would be obliged to if the deficiency of the plaintiff's performance could no longer be cured.



in instalments the right of retention is limited to an apportionment.<sup>16</sup> And in any case where the defendant has received the essential benefits of the contract he can retain a part of his own performance by reason of a particular defect which does not seriously impair the benefit of what he has received, not, it is said, because the defence is not technically applicable, but because it would be fraudulent for the defendant to make use of it.<sup>17</sup> This is not the equivalent of obliging the defendant to a counterclaim for damages, but of leaving him obviously approaching it. The theory of the defence, as generally, is based on the supposition that performance is still possible and the defendant's retention is only temporary, permanent but merely until the plaintiff's performance is completed.<sup>18</sup> The defendant is, however, restricted to

<sup>16</sup> André, 136; O. A. G. Darmstadt, 27 Nov. 1866, Seuff. Arch. XXI. No. 222; O. L. G. Braunschweig, 1 May, 1889, Seuff. Arch. XLVI. 358. But see as to right of withdrawing from future performances of an instalment contract, *supra*, § 909, n. 92.

<sup>17</sup> André, 137. Here again the question of burden of proof comes up. Must the defendant prove how much he may retain or must the plaintiff prove the limitations of the defendant's right? André favors the latter view, p. 137. In an action in the Obertribunal, Berlin, 9 Oct. 1877, Seuff. Arch. XXXIV. 281, the plaintiff sued for rent of a mill leased by him to the defendant for a term of years. The defence was that the mill was in such bad repair that the defendant had been unable to do but a part of the work he might have fairly expected to do, and that a meadow forming part of the premises contracted for had not been delivered to him but had been leased to another. The court held that the defendant could not be restricted to a counterclaim for damages, and that though plaintiff might fairly be entitled to some rental, yet as the fault was the plaintiff's the defendant could not be compelled to prove how much

the plaintiff's breach of contract had lessened the contract price. It was the plaintiff's duty to inspect. The amount he was entitled to was in view of all the circumstances. The defendant did not do this his suit was dismissed. See also R. G. I. 1888, Seuff. Arch. LII. 144, and § 908, n. 83.

<sup>18</sup> This theory is brought into line with the decision of the Reichsgericht, 1881, Entsch. R. G. IV. 19, Seuff. Arch. XXXVII. 25. The defendant, for the balance unpaid on a contract, retained it because of defects. The contract price was 675 marks had been paid 675 marks. The defendant claimed that it would have cost 650 marks to do the work. It was held that the defendant was entitled to retain the balance of 25 marks, the difference between the contract price and the amount and that necessarily the contract not being complete the defendant was entitled to make it "dolus" for the defendant to exercise the right.

The Bürgerliches Gesetzbuch provides that "if performance is partially rendered by one party and the other's performance cannot be completed so far as the refusal would c

claim for damages, when the unfulfilled promise of the plaintiff is collateral to the main object of the contract.<sup>19</sup>

**§ 916. Whether the defence is applicable in case of impossibility.**

In addition to these limitations of the defendant's right another very comprehensive one has been suggested and sometimes laid down by the courts. It is argued that as the defence is dilatory and has for its object forcing the plaintiff to perform, it is not appropriate where the plaintiff's performance has become impossible, whether with or without his fault. This reasoning is equally applicable whether the plaintiff has partly performed or has done nothing; but the cases where it has been applied have been cases of part performance.<sup>20</sup>

good faith under the circumstances—especially because of the comparative insignificance of the portion in arrears." B. G. § 320.

See also a decision of the Oberamtsgericht, Wiesbaden, 4 May, 1842, Seuff. Arch. I. No. 39.

<sup>19</sup> For instance, breach of promise to repair leased premises will not ordinarily afford ground for non-payment of rent, or for any other right than a counterclaim for damages. O. A. G. Darmstadt, 27 Nov. 1866, Seuff. Arch. XXI. No. 222.

<sup>20</sup> R. O. H. G. 31 May, 1879; Seuff. Arch. XXXVI. 41. The plaintiff had undertaken to have an advertisement of a lottery inserted in 58 specified Italian newspapers. In some the advertisement was to appear six times, in others four times, in others twice. The defendant agreed to pay 6¼ francs for each insertion, though the advertising rates of the papers differed. The plaintiff's declaration alleged that the advertisement had appeared in but forty papers and of these five refused to repeat it, the refusals to insert or repeat the advertisement being due to the fact that dealing in foreign lottery tickets was contrary to the law of Italy.

The plaintiff was allowed to recover on condition of proving the deficiency in performance was not due to her fault, especially as the attainment of the object of the contract did not require insertion in each paper. O. L. G. Darmstadt, 4 Feb. 1880; Seuff. Arch. XXXVIII. 25. The plaintiff had sold the defendant her entire establishment with its contents, including wine and supplies for an agreed price of 171,428 marks, payable in instalments. This action was for an instalment of 91,428 marks. The defence was that the quantity of wine and supplies was much less than the inventory had shown. The plaintiff was allowed to recover subject to the defendant's right to recoup damages for the plaintiff's breach of agreement, the court saying: "It is a recognized doctrine of the courts that a contracting party who is sued may set up as a defence the plaintiff's partial failure to perform, and is not restricted to a counterclaim for damages but this is always provided that the remaining performance is still possible. The defence is essentially dilatory and can never take a peremptory character."

In a decision of the O. L. G. Ham-

André opposes the theory. As he says, if a man contracts for the use of a carriage on the first Sunday in August and does not get it, yet is sued for the hire, it is immaterial to him whether the plaintiff would not or could not furnish the carriage.<sup>21</sup> Decisions of the Reichsgericht, too, have refused to limit in this way the application of the defence even in cases where the plaintiff had performed a large part of what he had agreed.<sup>22</sup> The Civil Code, however, seems in part at least technically to have adopted the limitation. For though the general provision for the defence of unfulfilled contract is broad enough to include cases where the plaintiff's performance is not possible,<sup>23</sup> the later elaborate provisions for cases of

burg, 21 Feb. 1885; Seuff. Arch. XL. 288, similar language is used and the plaintiff allowed to recover on a building contract, subject to the defendant's recoupment of damages for incomplete work, since the defendant had had the work completed, making completion by the plaintiff impossible.

The same doctrine is applied by the Oberst L. G. f. Bayern, 21 Oct. 1867, Seuff. Arch. XLIII. 153, in an action for a balance of the price of an estate, which proved, contrary to the agreement, subject to an incumbrance.

<sup>21</sup> André, 163.

<sup>22</sup> R. G. 21 Jan. 1887, Seuff. Arch. XLII. 282. The plaintiff and the defendant entered into a contract by which the former sold and the latter bought 200 hundred-weight of wire nails at an agreed price. The plaintiff further agreed not to have a representative travel for trade through the surrounding towns. This action was for the price and the defence was that the plaintiff had allowed an agent to travel through the surrounding towns and had sold nails there. The court refused to allow recovery, holding the stipulation an essential part of the contract, and that the defendant's rights were not restricted to a counterclaim for damages. "Though the defence of unfulfilled contract is in its

nature dilatory only, yet its effect is peremptory if the seller has by his own wrongful act made it impossible to fulfil the contract. . . . Even if the plaintiff had sent an agent through the forbidden territory only after the defendant was in default in taking the goods contracted for, still the suit should be dismissed, because if the plaintiff wished to require fulfilment she must on her part be ready to fulfil."

R. G. 28 May, 1888, stated by Schall, in Arch. f. Civ. Praxis LXXIII. 429. The plaintiff sued for royalties promised annually for twelve years by the defendant in a contract by which the plaintiff on his part agreed (1) to teach the defendant a secret process, (2) to give him an exclusive license under a patent. The plaintiff taught the process, gave the license and received the royalties for some years, but before the expiration of twelve years the patent was declared void and as the defendant refused to pay further royalties, this action was brought. It was held that the plaintiff, though not liable in damages, and though the royalties were payment for something besides the license, could recover nothing, as there was no way to apportion the payments.

<sup>23</sup> Art. 320.



impossibility are presumably exclusive;<sup>24</sup> and only in case of total accidental impossibility is it stated that counter performance may be refused.<sup>25</sup> Injustice to the defendant has been avoided as far as possible by enlarging and defining the right of the defendant to treat the contract as dissolved in this class of cases.<sup>26</sup> He is allowed to do so in any case where the plaintiff has not performed at all or where his performance is of no value to the defendant.<sup>27</sup> But in case of partial accidental impossibility of performance by one party, apparently the exclusive right of the other is a reduction in price.

### § 917. Defence excluded by tender or prevention.

The defence of unfulfilled contract is applicable to all bilateral contracts.<sup>28</sup> A proper offer of performance, though not accepted, excludes the defence of unfulfilled contract.<sup>29</sup> It is customary to distinguish between "verbal" and "real" offers, and it is said that a bare oral offer is insufficient. There

<sup>24</sup> Arts. 323, 325.

<sup>25</sup> See Art. 323.

<sup>26</sup> Where there has been no performance the difference between this affirmative right if allowed and the right of the *exceptio non adimpleti contractus*, is that the defendant must prove non-performance in the first case, while the burden is upon the plaintiff in the second. Where there has been part performance a dissolution of the contract involves a return of whatever has been given by either party. In the case of the *exceptio non adimpleti contractus* such a return must be obtained, if at all, by independent proceedings. Besides these differences, the measure of damages in such a case as the first cited in *supra*, note 20, would be different. If the contract were dissolved any recovery would be based on unjust enrichment, not on the contract price.

<sup>27</sup> B. G. §§ 323, 325. See *supra*, § 910.

<sup>28</sup> Dernburg II. § 21. It is not necessary that the stipulated performances are intended as an equivalent ex-

change. In *Entsch. R. O. H. G. VIII. 423*, 25 Jan. 1873, the buyer was allowed to retain the price of goods delivered because of the seller's failure to deliver all the goods, though the price was not a lump sum. But in a decision of the O. L. G. Hamburg, 2 Oct. 1891, *Seuff. Arch. XLVII. 257*, the principle was limited. The plaintiff had sold his business to the defendant, the latter agreeing among other things to pay annually for some years 2% of the amount of gross business, and to make statements of the business. The plaintiff sued for one of the promised statements. The defendant set up in defence that certain money was due him on the transaction. It was held that though this would have been a defence if the plaintiff had been suing for the 2%, it was not a defence to the merely "preparatory suit" for the statement.

<sup>29</sup> Because it would be fraudulent to make use of the defence under such circumstances. The offer is technically matter for replication.

are no fixed rules, however, as to what is necessary beyond that. The formality required by the French law for putting in default does not obtain, but the party offering to perform must be so prepared for performance that the other party has but to receive it, and this must be made manifest.<sup>30</sup> It is immaterial whether refusal of the offer is due to wilful default or to impossibility from subjective causes. One who because of illness cannot use a room engaged in an inn, one who is prevented from taking a music lesson because of a lame hand, must none the less pay the stipulated price, less any saving made by the other party from being freed from performing.<sup>31</sup>

Preventing performance by the other party has the same effect as refusing to accept proffered performance. Indeed, the boundaries between an unconditional refusal to accept performance, that is, to coöperate in carrying out the contract, and a prevention of performance, are not always definite.<sup>32</sup>

### § 918. Acceptance of defective performance.

As in the French law, mere receipt of performance does not necessarily imply such an approval of it as will prevent subsequent objection. Defects not apparent on ordinary examination, at least, are not thereby excused.<sup>33</sup> Approval of performance also may indicate not an intention to treat the performance as full compliance with the contract, but merely to accept the performance as a partial or incomplete fulfilment

<sup>30</sup> The Civil Code lays down some general rules which have been operative since 1900. §§ 284, 293-299. A verbal offer is made sufficient if the other party declares that he will not accept, or if his coöperation is necessary to make the performance effectual, as by calling for and taking goods. See further Windscheid, § 278.

<sup>31</sup> André, 141, 144; Bürg. Gesetzbuch, § 325.

<sup>32</sup> André, 142.

<sup>33</sup> André, 175. Even defects which would be apparent on examination, it is said, are not excused, if not in fact discovered. Windscheid, II. 446, § 394.

But the Handelsgesetzbuch (Art. 347) requires in the case of goods sent from another place, that the buyer shall make prompt examination and give immediate notice of any defects, and in case of failure to do so shall be regarded as having approved the goods, so far as concerns defects which would have been discovered by ordinary examination. Latent defects must be notified to the seller as soon as discovered, or will be regarded as waived. § 377 of the new Handelsgesetzbuch repeats these provisions, and extends them to sales in the same place.

of the contract, with a reservation of the right to demand damages or diminution of the price because of any defects. In the latter case, any right to dissolve the contract, and also the right to set up the *exceptio non adimpleti contractus*, are lost, but not the right to an action or counterclaim for damages. In case of doubt André holds that as it is a question of the surrender of rights, the latter interpretation should be put upon the facts.<sup>34</sup>

### § 919. Prospective breach.

Where a party to a bilateral contract agrees to perform before the other, there seems to be recognized no general rule that the prospective inability or expressed intent not to perform by the other party excuses performance of the precedent obligation. The Civil Code provides<sup>35</sup> that the party bound to precedent performance may, if an essential impairment in the circumstances of the other party occurs after the conclusion of the contract, refuse performance unless the counter performance, or security for it, is given concurrently. This, however, does not apply when the irresponsible party was irresponsible when the contract was made. And the case of one whose prospective failure to perform is due to other causes than failing circumstances is not covered.<sup>36</sup>

<sup>34</sup> André, 173. See a decision of the Reichsgericht, 12 June, 1885; Seuff. Arch. XLI. 15.

<sup>35</sup> § 321.

<sup>36</sup> The question does not seem to have been discussed. The following decisions show perhaps a tendency to allow prospective inability as a defence.

R. G. 27 Apr. 1892, Seuff. Arch. XLVIII. 441. Plaintiff agreed to buy, defendant to sell, rice flour, to arrive by vessel at Hamburg, payment to be "cash on delivery of the bills of lading." The bills of lading when offered to the plaintiff had written on them, "bag sewings insufficient." The plaintiff refused to accept the bills and sued for damages. It was held that he was entitled to sue. Though he was bound

to pay cash before delivery of the goods, and could not claim to hold the price till they were proved good, but must pay, and if they were bad sue to recover what he had paid, yet the bills of lading must at least give him the expectation that the goods were conformable to contract. R. G. 22 Apr. 1893, Seuff. Arch. XLIX. 191. In case of a similar contract, the goods had arrived at the time the bills of lading were offered. It was held that the buyer was entitled to examine the goods before making payment, and reject them if of defective quality.

A party who has acquired a right of action on a contract may lose his right by his own subsequent breach of contract.

### § 920. Diminution of the price.

In addition to the right to enforce specific performance, the right to treat a contract as dissolved, the right to damages either in a direct action or counterclaim, and the *exceptio non adimpleti contractus*, there is still another remedy in Germany, of occasional application, for breach of contract. This is "Preisminderung," an appropriate diminution of the price or performance to which the party in default would otherwise be entitled by the terms of the contract.<sup>37</sup> In many cases this remedy is equivalent in its results to the ordinary right of a defendant to have any damages to which he is entitled because of the plaintiff's imperfect performance deducted from the contract price. But this is not always so. It may be that the imperfection of the plaintiff's performance was due to an accident for which neither he nor the defendant is responsible, and for which, consequently, the plaintiff is not liable in damages; yet the defendant ought not to be compelled to pay the full price.<sup>38</sup> A second case is where the imperfection of the plaintiff's performance, though wrongful, has not caused the defendant any damage.<sup>39</sup> Further, loss of profits

In R. G. 15 June, 1896, Seuff. Arch. LII. 144 (stated *supra*, § 908, n. 83, impossibility of performance by the defendant was held to excuse performance by the plaintiff, though at the time when the plaintiff's performance was due, the defendant's performance was continuing and had not become impossible. See also R. G. 21 Jan. 1887, Seuff. Arch. XLII. 282 (stated *supra*, n. 22).

<sup>37</sup> This is derived from the *actio æstimatoria* or *quantı minoris* of the Roman law. In contracts of sale, at least, it was an alternative remedy to the *actio empti* and the *actio redhibitoria*. Hunter, Roman Law, 505; Salkowski, Roman Law, 602; Moyle, Sale in Civil Law, 194, 210-212. The remedy exists in France, Code Civ. Art. 1644, Aubry-Rau, IV. 389, 392, and presumably in other countries whose law is derived from Roman sources, see,

*e. g.*, McVeigh v. Lussier, 13 Lower Canada Rep. 265, but seems of wider and more frequent application in Germany than elsewhere. It does not exist in Austria, see *infra*, § 921, n. 42.

<sup>38</sup> Bürg. Gesetzbuch, §§ 323 *et seq.*

<sup>39</sup> An interesting illustration of this is found in a decision of the Reichsoberhandelsgericht, 6 June, 1877, Seuff. Arch. XXXIV. 426. The defendant hired a steamer of the plaintiff for the purpose of carrying passengers to see the manoeuvres of the German navy on a certain day. The plaintiff warranted that two hundred passengers could sit on the deck, allowing ten square feet for each. The defendant agreed to pay eight hundred marks. The action was for this price, the defence that there was deck room for but one hundred and twenty-five passengers, and that the defendant was therefore liable for but  $\frac{1}{4}$  of the

which the defendant would have gained, though an element of damage, is not considered in this remedy.<sup>40</sup>

§ 921. Austrian Law.

In Austria the same general principles prevail, for the most part, as in Germany. The right of treating a contract as dissolved because of default of performance of the other party is confined to cases covered by the *Handelsgesetzbuch* and a few special cases,<sup>41</sup> and the rights of an injured party are therefore generally limited to specific performance, damages,

price. The plaintiff's reply to this was that the deficiency had caused the defendant no damage (apparently because he had been unable to sell even one hundred and twenty-five tickets to the boat), and the defendant admitted this. The Imperial Court held that the defendant was liable for but five hundred marks. If he had chosen, he could have refused the steamer altogether and relied on the *exceptio non adimpleti contractus*; but he might take the steamer, and as the plaintiff had warranted a particular quality which had a direct relation to the price fixed, the latter was not entitled to that price unless the quality existed. The defendant is no more guilty of bad faith in seeking to have the price reduced when the deficiency caused him no damage than the plaintiff would be in demanding the contract price if the defendant had been unable to use the steamer.

Another illustration is found in a decision of the *Oberamtsgericht*, Kiel, 29 Dec., 1860; *Seuff. Arch.* XIV. No. 129. The plaintiff sued for the price of twenty chests of tea sold to the defendant, and which the defendant had resold at a profit immediately. The defendant set up that the plaintiff had taken out of the chests some tea and that there was less remaining than had been agreed. The plaintiff urged that while this might justify the de-

fendant in refusing to pay until he had received additional tea, or in rescinding the bargain, it could not justify a judgment for a diminished price, the bargain having been profitable to him. But the court, in giving such a judgment, observed that the defendant was not seeking damages.

Compare *Cuckson v. Stones*, 1 E. & E. 248, where a servant who had been ill during a portion of the term of his employment was allowed to recover weekly payments during that time. The court admitted that the plaintiff might have been discharged if his illness continued for a long time, but if the contract was not terminated there could be no deduction whether the disability lasted a day, a week or a month. See also *Warren v. Whittingham*, 18 T. L. R. 508; *Mott v. Baxter*, 13 Colo. App. 63, 56 Pac. 192; *Nichols v. Coolahan*, 10 Met. 449. But see *Adlets v. Progressive Shoe Co.*, 84 Mo. App. 238; *Hughes v. Toledo Scale &c. Co.*, 112 Mo. App. 91, 86 S. W. 895; and *infra*, § 1976.

<sup>40</sup> R. G. 2 Apr., 1898, *Entsch. R. G.*, XLI. 163.

<sup>41</sup> *Hasenöhr*, *Esterreichisches Obligationenrecht*, II. 338. But by the Austrian law, unlike the Roman law and German law, damages are at least in some cases allowed as an additional remedy to the dissolution of the contract. *Ibid.* II. 474.

or the *exceptio non adimpleti contractus*.<sup>42</sup> The rules in regard to these are drawn from German authorities.

<sup>42</sup> Hasenöhrl, II. 400-416, § 89. The (actio quanti minoris). *Ibid.* II. 477, Austrian law does not recognize the note 89. remedy of diminution of the price

## BOOK V

### PARTICULAR CLASSES OF CONTRACTS

#### CHAPTER XXVIII

#### CONTRACTS FOR THE SALE OF LAND

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**§ 922. Implied as well as express promises must be considered.**

The principles considered in the preceding chapters can be applied only after the obligations of the two parties have been ascertained by construction; and not only the obligations expressed in the words of the parties must be considered but also those which are implied. A seller of goods may be under an implied warranty and the duty of the buyer in regard to the acceptance and payment of the goods can only be understood by determining the scope of the warranty. Whether a buyer of land is put in default by tender of a particular conveyance depends on whether the conveyance is such as the law requires, for the contract itself may not define the kind. Therefore some of the more important kinds of contract must now be separately considered; and first the obligations involved in a contract to buy and sell land may be taken up.

**§ 923. A vendor of land must give a marketable title.**

Sometimes parties specify the nature of the title which is bargained for. They may agree that a title shall be conveyed satisfactory to the purchaser's attorney<sup>1</sup> or, they may agree for a quit-claim of such title as the vendor has, be it good or bad, but, generally, the character of the title is either not stated, or is stated in terms equivalent in meaning to what the law would imply. In the absence of any statement the interpretation given the contract is that a marketable title must be transferred<sup>2</sup> and this means that even a title which the court believes good may be rejected if any reasonable person might doubt its validity.<sup>3</sup> But a mere possibility of a defect will not relieve the purchaser from liability to com-

<sup>1</sup> See *supra*, § 797.

<sup>2</sup> As to the indulgence given the vendor to perfect his title at any time prior to decree, see *supra*, § 834.

<sup>3</sup> *Pyrke v. Waddingham*, 10 Hare, 1; *Mullings v. Trinder*, L. R. 10 Eq. 449; *Hess v. Bowen*, 241 Fed. 659, 154 C. C. A. 417; *Smith v. Hunter*, 241 Ill. 514, 89 N. E. 686; *Gill v. Wells*, 59 Md. 492; *Foster, Hall & Adams Co. v. Sayles*,

213 Mass. 319, 100 N. E. 644; *Methodist Episcopal Church v. Robertson*, 68 N. J. Eq. 431, 58 Atl. 1056; *Empire Realty Corp. v. Sayre*, 107 N. Y. App. Div. 415, 95 N. Y. S. 371; *Ludlow v. O'Neil*, 29 Oh. St. 181; *Cummings v. Dolan*, 52 Wash. 496, 100 Pac. 989, 132 Am. St. Rep. 986; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.



plete the contract.<sup>3</sup> It is not enough that a title be good in fact, it must generally be a good record title.<sup>4</sup> Therefore, where the office containing the record of the title of the land in question is destroyed, the purchaser may refuse performance.<sup>5</sup> And if the contract calls for an abstract showing a good title, a defect in the record cannot be cured by parol.<sup>6</sup> There are possible defects of title which do not appear on the records, such as incapacity of parties, or possible dower rights. A title is not bad merely because the record does not negative all such possibilities, if it can be shown by parol proof that no defect exists and the record contains all the facts usually put upon record.<sup>7</sup> Thus the validity of a title may depend on the non-existence of persons who might claim an interest in the land. The vendor must be able to prove their non-existence.<sup>8</sup> Moreover, a seeming defect appearing on the record may be shown so clearly by parol to raise no doubt concerning the validity of the title that the purchaser must accept a conveyance.<sup>9</sup> Therefore, a title founded on adverse possession may be capable of such clear proof as to be marketable.<sup>10</sup> What objections to a title are sufficiently plausible

<sup>3</sup> *Foster, Hall & Adams Co. v. Sayles*, 213 Mass. 319, 100 N. E. 644.

<sup>4</sup> *Allen v. Globe, etc., Co.*, 156 Cal. 286, 104 Pac. 305; *Bradway v. Miller*, 200 Mich. 648, 167 N. W. 15; *Speakman v. Forepaugh*, 44 Pa. 363.

<sup>5</sup> *Calhoon v. Belden*, 3 Bush, 674; *Crim v. Umbsen*, 155 Cal. 697, 103 Pac. 178, 132 Am. St. Rep. 127; *Allen v. Globe, etc., Co.*, 156 Cal. 286, 104 Pac. 305.

<sup>6</sup> *Fagan v. Hook*, 134 Ia. 381, 105 N. W. 155; *Howe v. Coates*, 97 Minn. 385, 107 N. W. 397, 4 L. R. A. (N. S.) 1170.

<sup>7</sup> See *Day v. Kingsland*, 57 N. J. Eq. 134, 41 Atl. 99; *Barger v. Gery*, 64 N. J. Eq. 263, 53 Atl. 483; *Greenblatt v. Hermann*, 144 N. Y. 13, 38 N. E. 966; cf. *Barnett v. Higgins*, 4 Dana, 565.

<sup>8</sup> *Fuhr v. Cronin*, 82 N. Y. App. Div. 210, 81 N. Y. S. 536. In *Ferry v. Sampson*, 112 N. Y. 415, 20 N. E. 387, the court enforced the sale on the as-

sumption that a title was good which would have been invalid unless a son of the former owner, who had disappeared forty-one years previously, had died intestate, unmarried, and without issue. See also *Cambrelleng v. Purton*, 125 N. Y. 610, 26 N. E. 907. But see *contra*, *Coonrod v. Studebaker*, 53 Wash. 32, 101 Pac. 489.

<sup>9</sup> *Shanahan v. Chandler*, 218 Mass. 441, 105 N. E. 1002; *Morse v. Stober*, 233 Mass. 223, 123 N. E. 780.

<sup>10</sup> *Scott v. Nixon*, 3 Dr. & W. 388; *Games v. Bonnor*, 54 L. J. (N. S.) Ch. 517; *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355; *Stevenson v. Polk*, 71 Iowa, 278, 32 N. W. 340; *Logan v. Bull*, 78 Ky. 607; *Gump v. Sibley*, 79 Md. 165, 28 Atl. 977; *Safe Deposit & Trust Co. v. Marburg*, 110 Md. 410, 72 Atl. 839; *Conley v. Finn*, 171 Mass. 70, 73, 50 N. E. 460; *Aroian v. Fairbanks*, 216 Mass. 215, 103 N. E. 629; *Barnard v. Brown*, 112 Mich. 452, 70

to make it unmarketable is a question of real property. The question is not whether the title is good or bad, but whether there is a reasonable doubt as to its validity.<sup>11</sup>

Aside from the merits of a possible controversy with a third person in regard to property contracted to be sold, a buyer will not be compelled to accept the title if litigation with an adverse claimant seems probable. As the matter is often put—the purchaser will not be compelled to buy a law suit.<sup>12</sup> Any “distinction which once prevailed as to marketable titles between courts of law and equity no longer exists.”<sup>13</sup>

N. W. 1038, 67 Am. St. Rep. 432; Hedderly v. Johnson, 42 Minn. 443, 445, 44 N. W. 527; Scannell v. American Soda Fountain Co., 161 Mo. 606, 61 S. W. 889; Ocean City Assoc. v. Cresswell, 71 N. J. Eq. 292, 65 Atl. 454; Ottinger v. Strasburger, 33 Hun, 466, 102 N. Y. 692; Freedman v. Oppenheim, 187 N. Y. 101, 79 N. E. 841, 116 Am. St. Rep. 595; Clarke v. Wollpert, 128 N. Y. App. Div. 203, 112 N. Y. S. 547; Pratt v. Eby, 67 Pa. 396, 402; Dallmeyer v. Ferguson, 198 Pa. 288, 47 Atl. 962. See, however, *contra*—McCroskey v. Ladd (Cal.), 28 Pac. 216; Watson v. Boyle, 55 Wash. 141, 104 Pac. 147.

<sup>11</sup> See cases in this section *passim*.

<sup>12</sup> Pegler v. White, 33 Beav. 403; Hale v. Cravener, 128 Ill. 408, 21 N. E. 534; James v. Meyer, 41 La. Ann. 1100, 7 So. 618; Freetly v. Barnhart, 51 Pa. 279. See also Anderson v. Steinway, 221 N. Y. 639, 117 N. E. 575.

In Wadick v. Mace, 118 N. Y. App. Div. 777, 103 N. Y. S. 889, the court said: “Although the fact that a title tendered may impose a law suit upon the vendee to establish the boundaries is not an incumbrance in a legal sense, the tender of such deed is not a compliance with a contract of sale requiring a ‘proper deed’ assuring the grantee a fee simple free from all incumbrances. A contract to give a ‘proper deed’ calls

for a marketable title, which is defined as one free from reasonable doubt, and a title which must be defended by litigation is not free from doubt. When a vendor has agreed to convey by proper deed a title in fee simple free from all encumbrances by specific metes and bounds and it develops that by the bounds described access to other property of the vendor would be cut off, the vendee does not thereby lose his right to specific performance and is not in default by reason of a refusal to accept a deed which fails to set out the boundaries agreed upon. It seems, that under such circumstances a court of equity in the exercise of its discretion may not compel the execution of a deed which will cut off the grantor from access to other lands, but may order a reference to determine an equitable performance of the contract which will be fair to both parties.”

<sup>13</sup> Howe v. Coates, 97 Minn. 385, 107 N. W. 397, 4 L. R. A. (N. S.) 1170, 1178. To the same effect are Foster, Hall & Adams Co. v. Sayles, 213 Mass. 319, 321, 100 N. E. 644; Moore v. Williams, 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844; Brokaw v. Duffy, 165 N. Y. 391, 59 N. E. 196. But see Meyer v. Madreperla, 68 N. J. L. 258, 53 Atl. 477, 96 Am. St. Rep. 536.

### § 924. The vendor must prepare the deed.

In England owing perhaps to the absence of a recording system, it is the duty of the vendor to furnish the purchaser with an abstract of the title.<sup>14</sup> It is then the purchaser's duty to prepare a proper deed, and to tender it to the vendor for execution.<sup>15</sup> In the United States, however, the records are open to public inspection and the purchaser may examine the title without the vendor's aid. Accordingly there is no obligation on the part of the vendor to furnish an abstract,<sup>16</sup> unless, as is common in some States, the contract provides that the vendor shall furnish an abstract. And it is necessary for the vendor to prepare and execute a sufficient deed and to tender it in order to put the purchaser in default.<sup>17</sup> The purchaser is entitled to a reasonable opportunity to inspect the deed before accepting it and paying his money.<sup>18</sup>

### § 925. Form of deed necessary to fulfil the contract.

The parties may by their contract agree that conveyance shall be made by a deed with full warranties, with partial warranties, or with no warranty; and if a special stipulation of the sort is made its terms must be observed. Frequently, however, the form of the conveyance is not fixed by the contract. In the absence of a custom to the contrary, a deed

<sup>14</sup> *In re Johnson*, 30 Ch. D. 42; *In re Stamford*, [1900] 1 Ch. 287.

<sup>15</sup> *Poole v. Hill*, 6 M. & W. 835.

<sup>16</sup> *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; *Knox v. McMurray*, 159 Ia. 171, 140 N. W. 652; *Eapy v. Anderson*, 14 Pa. St. 308, 311.

<sup>17</sup> *Arlidge v. Rooks*, 22 Ark. 427; *Headley v. Shaw*, 39 Ill. 354; *Hill v. Hobart*, 16 Me. 164; *Tinney v. Ashley*, 15 Pick. 546, 26 Am. Dec. 620; *St. Paul Division v. Brown*, 9 Minn. 157; *Leaird v. Smith*, 44 N. Y. 618; *Raudabaugh v. Hart*, 61 Oh. St. 73, 87, 55 N. E. 214, 76 Am. St. Rep. 361; *Boyd v. McCullough*, 137 Pa. 7 (s. c. *sub nom.* *Johnson v. Hopwood*, 20 Atl. 630); *Walling v. Kinnard*, 10 Tex. 508,

60 Am. Dec. 216; *Seeley v. Howard*, 13 Wis. 336. The power of equity in a suit for specific performance to allow the plaintiff, at any time prior to decree or in fulfilment of the decree to perform without prior tender is elsewhere considered. See *supra*, § 834.

<sup>18</sup> *Freetly v. Barnhart*, 51 Pa. 279. In *Papin v. Goodrich*, 103 Ill. 86, it was held that the purchaser had no right to inspect the deed before payment, but this was because the court held (probably erroneously) that the purchaser was bound under the terms of the particular contract in suit to pay the instalment of the price in question before rather than concurrently with the conveyance.

warranting only against acts of the grantor is sufficient to fulfil the vendor's obligation,<sup>19</sup> but if a custom exists, a stipulation for a "conveyance" or of a "good and sufficient deed" in a contract, means such a deed as is customary in the locality.<sup>20</sup> And if (as seems generally true) the customary mode of conveyance in that place is a deed with covenants of general warranty, the vendor must give such a deed since that is the meaning of his contract.<sup>21</sup>

A different rule is applicable if the vendor is a fiduciary. If an executor or trustee contracts to sell land in which he is interested only as such, it is unreasonable to expect, and therefore the purchaser has no right to expect, that the vendor will sign a deed imposing personal liability upon him for any acts except his own, as covenants of general warranty would do if he signed the deed even as a fiduciary.<sup>22</sup> Therefore, in every jurisdiction the purchaser from an executor or trustee is entitled only to a covenant that the vendor has not himself encumbered the estate.<sup>23</sup> The rule in regard to other fiduciaries is the same.<sup>24</sup> The case must be distinguished where a fiduciary was not a party to the original contract and the executor of the vendor undertakes to enforce a contract made by his testator. In such a case the purchaser, if entitled on a proper construction of his contract, under the local custom to a deed of general warranty, cannot be required to take

<sup>19</sup> *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560; *Thayer v. Torrey*, 37 N. J. L. 339; *Espy v. Anderson*, 14 Pa. 308; *Lloyd v. Farrell*, 48 Pa. 73, 86 Am. Dec. 563.

<sup>20</sup> *Gault v. Van Zile*, 37 Mich. 22; *Wilson v. Wood*, 2 C. E. Green, 216, 88 Am. Dec. 231.

<sup>21</sup> *Witter v. Biscoe*, 13 Ark. 422; *Clark v. Lyons*, 25 Ill. 105; *Linn v. Barkey*, 7 Ind. 69; *Vanada v. Hopkins*, 1 J. J. Marsh. 293; *Allen v. Hasen*, 28 Mich. 143; *Johnston v. Piper*, 4 Minn. 195; *Herryford v. Turner*, 67 Mo. 296; *Faircloth v. Isler*, 75 N. C. 551; *Hoback v. Kilgore*, 26 Gratt. 442, 21 Am. Rep. 317; *Tavener v. Barrett*, 21 W. Va. 656. See also *Rhode v. Alley*, 27 Tex. 443, 445.

<sup>22</sup> See *supra*, §§ 310, 312.

<sup>23</sup> *Staines v. Morris*, 1 Ves. & Beames, 810; *Worley v. Frampton*, 5 Hare, 560; *Chastain v. Staley*, 23 Ga. 26; *Brackenridge v. Dawson*, 7 Ind. 383; *Dwivel v. Veasie*, 36 Me. 509; *Hodges v. Saunders*, 17 Pick. 470; *Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416; *Ennis v. Leach*, 1 Ired. Eq. 416; *Shonts v. Brown*, 27 Pa. 123, 134; *Goddin v. Vaughn's Ex'x*, 14 Gratt. 102.

<sup>24</sup> This was so held in *White v. Foljambe*, 11 Ves. 337, 345, in regard to assignees in bankruptcy, and in *Fleming v. Holt*, 12 W. Va. 143, 162, in regard to trustees for creditors under a general assignment.

anything less from the vendor's representative, and the executor must therefore give a covenant of warranty to the extent of the assets of the estate.<sup>25</sup> It is even clearer than in the case of ordinary fiduciaries that officials empowered to sell under authority given by law, such as sheriffs or other officers, cannot be expected or required to give any warranty.<sup>26</sup> And no covenant is implied from the words of grant in the deed of such an officer.<sup>27</sup>

Since the promise of A is different from the promise of B, a vendor who is bound to convey with even limited covenants of warranty cannot fulfil his obligation by tendering the deed of a third person.<sup>28</sup>

### § 926. There are no implied warranties in sales of real estate.

The doctrine of *caveat emptor* so far as the title of personal property is concerned, is very nearly abolished,<sup>29</sup> but in the law of real estate it is still in full force. One who contracts to buy real estate may indeed refuse to complete the transaction if the vendor's title is bad,<sup>30</sup> but one who accepts a deed generally has no remedy for defect of title except such as the covenants in his deed may give him.<sup>31</sup> If therefore there are no covenants, he has no redress though he gets no title. He can neither sue on an implied warranty nor can he recover because of failure of consideration, the consideration which he paid.<sup>32</sup> The defence of so severe a rule must rest on the

<sup>25</sup> See *Page v. Broom*, 3 Beav. 36; *Phillips v. Everard*, 5 Sim. 102.

<sup>26</sup> *The Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174; *Hoffeld v. United States*, 186 U. S. 273, 276, 46 L. Ed. 1160; *Corbitt v. Dawkins*, 54 Ala. 282; *Loudon v. Robertson*, 5 Blackf. 276; *Stephens v. Ella*, 65 Mo. 456; *Friedly v. Scheetz*, 9 Serg. & R. 156, 11 Am. Dec. 691; *Mitchell v. Pinckney*, 13 S. C. 203.

<sup>27</sup> *Dow v. Lewis*, 4 Gray, 468, 473.

<sup>28</sup> *Rudd v. Savelli*, 44 Ark. 145; *Crabtree v. Levings*, 53 Ill. 526; *McMurray v. Fletcher*, 24 Kan. 574; *Williams v. Gilbert*, 120 Minn. 299, 139 N. W. 502; *Farm Land Mortgage*

*Co. v. Wilde*, 41 Okl. 45, 136 Pac. 1078.

In *Thomas J. Baird Inv. Co. v. Harris*, 209 Fed. 291, 126 C. C. A. 217, the court erroneously ruled otherwise, apparently misled by the well-settled rule that one who has no title may contract to sell, into supposing that such a vendor need not acquire and transfer the title at the time for performance of the contract.

<sup>29</sup> See *infra*, §§ 975 *et seq.*

<sup>30</sup> See *supra*, § 923.

<sup>31</sup> *Gihon v. Morris*, (N. J. L. 1919), 106 Atl. 807.

<sup>32</sup> *Clare v. Lamb*, L. R. 10 C. P. 334; *United States Bank v. Bank of Georgia*,

ground that in conveyances of land the parties habitually put their full agreement in the deed and that if it is intended that the vendor shall be responsible for defective title, a warranty is inserted.<sup>33</sup> In exceptional cases where it appears that both parties entered into the transaction on the mistaken assumption, not regarded as doubtful, that the vendor had title, rescission is permitted,<sup>34</sup> but the normal inference is that the purchaser assumes the risk of title except to the extent that he exacts covenants of warranty. Still more clearly there can be no warranty of quality or condition implied in the sale of real estate and ordinarily there cannot be in the lease of it.<sup>35</sup>

It is generally true also that any express agreements in regard to land contained in a contract to sell it are merged in the deed if the purchaser accepts a conveyance. If, indeed, the vendor has made misrepresentations, even innocently, rescission is possible in most jurisdictions;<sup>36</sup> but no remedy is generally available for any breach by the vendor of any promise contained in the contract but omitted in the deed.<sup>37</sup>

10 Wheat. 333, 6 L. Ed. 423; *Union Pacific Railway Co. v. Barnes*, 64 Fed. 80, 12 C. C. A. 48; *Corbitt v. Dawkins*, 54 Ala. 282; *McLeod v. Barnum*, 131 Cal. 605, 63 Pac. 924; *Barry v. Guild*, 126 Ill. 439, 18 N. E. 759; *Horner v. Lowe*, 159 Ind. 406, 64 N. E. 218; *Wightman v. Spoffard*, 56 Iowa, 145, 8 N. W. 680; *Thorkildsen v. Carpenter*, 120 Mich. 419, 79 N. W. 636; *Dorsey v. Jackman*, 1 Serg. & R. 42, 7 Am. Dec. 611; *Goldman v. Hadley* (Tex. Civ. App.), 122 S. W. 282.

<sup>33</sup> See also *supra*, § 700 *ad fin.*

<sup>34</sup> See *infra*, § 1589.

<sup>35</sup> See *supra*, § 892.

<sup>36</sup> See *infra*, § 1500.

<sup>37</sup> It is said in 1 *Williams, Vendor & Purchaser* (2d ed.), 611, "When the contract has been fully performed, the purchaser will not be entitled to any relief in respect thereof, except (1) by virtue of an express agreement contained in the contract to make compensation for such errors, or, (2) if the

defect be really a defect of title and compensation be recoverable under the covenants for title contained in the conveyance, or (3) if the representation amounted to a warranty, collateral to the contract for sale, of the truth of the fact stated."

The only authority cited for the last proposition is *De Lassalle v. Guildford*, 1901, 2 K. B. 215. In that case the court held a lessor liable on a warranty that drains were in good condition given at the time the lease was accepted by the tenant, and as an inducement to him to accept it.

In *Franz v. Hansen*, 36 D. L. R. 349, the contract contained the words: "Said land containing two hundred and seventy-one acres." The court held that the purchaser might recover damages for the failure of the land to contain so many acres even after conveyance had been made. It may be doubted whether this decision would generally be accepted.

### § 927. Ownership of the purchaser in equity.

The doctrine has become established in English Courts of Equity that from the formation of the contract, though it is not performable until a future day, the purchaser is the owner in equity, and that the vendor holds the legal title merely as security for the payment of the price. In other words, that the relation is substantially that of mortgagor and mortgagee. Many of the effects of this doctrine do not concern the law of contracts. For instance, whether the heir or executor of a deceased vendor should receive the price for which he had during his life contracted to sell land belonging to him, is rather a question of property than of contracts. But the obligation of the buyer to perform his promise to pay the price in spite of the destruction or deterioration of the premises subsequent to the formation of the contract, involves a fundamental question of contractual liability.

### § 928. Risk generally thrown upon the purchaser.

Since the decision of *Paine v. Meller*<sup>37a</sup> it has not been doubted in England that the purchaser is not excused from fulfilling his promise to purchase by any accidental injury to the property.<sup>38</sup> It is not surprising that the English law has

<sup>37a</sup> 6 Ves. 349.

<sup>38</sup> There are dicta to this effect in *Rawlins v. Burgis*, 2 Ves. & B. 382, 387; *Harford v. Purrier*, 1 Mad. 532, 539; *Acland v. Gaisford*, 2 Mad. 28, 32; *Robertson v. Skelton*, 12 Beav. 260, 266; *Coles v. Bristowe*, L. R. 6 Eq. 149, 159, 160. See also *Lysaght v. Edwards*, 2 Ch. D. 499. In *Poole v. Adams*, 12 Weekly Rep. 683, *Kindersley* held, at suit of a *cestui que trust*, that a purchaser from the plaintiff's trustee was bound to pay the price for an estate though the house had been destroyed, and could not claim the benefit of insurance money collected by the trustee and under agreement with the purchaser allowed as part payment of the price, the trustee having misapplied the insurance money and be-

come bankrupt. In *Rayner v. Preston*, 14 Ch. D. 297, it was held that a purchaser of a house who after its destruction by fire before the time fixed for conveyance had paid the price in full, could not recover insurance money collected by the vendor. This decision was affirmed by the Court of Appeal, *Brett and Cotton, L. JJ., James, L. J.*, dissenting. Thereafter in *Castellain v. Preston*, 8 Q. B. D. 613, 11 Q. B. D. 380, the Court of Appeal, reversing the decision of *Chitty, J.*, unanimously held the insurers entitled to recover back the insurance money paid, on the ground that it was paid in ignorance of the fact that the purchaser had previously paid the price in full. In both cases all the judges recognized the doctrine of *Paine v. Meller*.

had a marked effect upon the decisions in the United States. A majority of the American courts which have dealt with the subject have, either in *dicta* or decisions,<sup>39</sup> indicated their assent to Lord Eldon's view though not always without qualification. But there is, nevertheless, a strong dissent.<sup>40</sup>

### § 929. Maxims on which the English rule is based.

The reason stated in the cases for what may be called the

<sup>39</sup> *Osborn v. Nicholson*, 13 Wall. 654, 660, 20 L. Ed. 689 (but see *The Tornado*, 108 U. S. 342, 27 L. Ed. 747, where *Wells v. Calnan*, 107 Mass. 514, was cited with approval); *Willis v. Wozencraft*, 22 Cal. 607, 618 (but see later California decisions, *infra*, § 940); *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Lombard v. Chicago Sinai Cong.*, 64 Ill. 477, 482; *Kuhn v. Freeman*, 15 Kan. 423; *Gammon v. Blaisdell*, 45 Kan. 221, 25 Pac. 580; *Johnston v. Jones*, 12 B. Mon. 326; *Calhoon v. Belden*, 3 Bush, 674; *Marks v. Tichenor*, 85 Ky. 536, 4 S. W. 225; *Martin v. Carver's Adm'r (Ky.)*, 1 S. W. 199; *Cottingham v. Fireman's Fund Co.*, 90 Ky. 439, 14 S. W. 417; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; *Skinner v. Houghton*, 92 Md. 68, 86, 48 Atl. 85, 84 Am. St. Rep. 485; *Blew v. McClelland*, 29 Mo. 304, 306; *Snyder v. Murdock*, 51 Mo. 175, 177; *Walker v. Owen*, 79 Mo. 563; *Manning v. North British, etc., Ins. Co.*, 123 Mo. App. 456, 99 S. W. 1095; *Marion v. Wolcott*, 68 N. J. Eq. 20, 59 Atl. 242; *Sewell v. Underhill*, 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) 233, 134 Am. St. Rep. 863; *Gilbert v. Port*, 28 Oh. St. 276, 292; *Dunn v. Yakish*, 10 Okl. 388, 61 Pac. 926; *Fouts v. Foudray*, 31 Okl. 221, 120 Pac. 960, 38 L. R. A. (N. S.) 251; *Richter v. Selin*, 8 S. & R. 425, 440; *Morgan v. Scott*, 26 Pa. 51; *Siter's App.* 26 Pa. 178, 180; *Reed v. Lukens*, 44 Pa. 220, 84 Am. Dec. 425; *Hill v.*

*Cumberland, etc., Co.*, 59 Pa. 474, 478; *Miller v. Zufall*, 113 Pa. 317, 325, 6 Atl. 350; *Elliott v. Ashland Mutual Fire Ins. Co.*, 117 Pa. 548, 554, 12 Atl. 676; *Huguenin v. Courtenay*, 21 S. C. 403, 405; *Brakhage v. Tracy*, 13 S. Dak. 343, 83 N. W. 363; *Baker v. Rushford*, 91 Vt. 495, 101 Atl. 769; *Christian v. Cabell*, 22 Gratt. 82, 105. A decision to the same effect in Australia is *Smith v. Hayles*, 3 Victorian L. R. Law, 237. See, however, *infra*, § 940, for qualifications of the English rule in some of the decisions cited above.

<sup>40</sup> *Cutcliff v. McAnally*, 88 Ala. 507, 512, 7 So. 331; *Conlin v. Osborn*, 161 Col. 659, 120 Pac. 755; *Davidson v. Hawkeye Co.*, 71 Ia. 532, 534, 32 N. W. 514; *Gould v. Murch*, 70 Me. 288; *Thompson v. Gould*, 20 Pick. 134; *Gould v. Thompson*, 4 Met. 224; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Hawkes v. Kehoe*, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N. S.) 125; *Bautz v. Kuhworth*, 1 Mont. 133, 25 Am. Rep. 737; *Wilson v. Clark*, 60 N. H. 352; *Powell v. Dayton, etc., R. Co.*, 12 Or. 488, 8 Pac. 544, (see S. C. 16 Or. 33, 16 Pac. 863, 8 Am. St. Rep. 251); *Elmore v. Stephens-Russell Co.*, 88 Ore. 509, 171 Pac. 763; *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698, 43 L. R. A. (N. S.) 383. See also *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 Pac. 432, 25 L. R. A. (N. S.) 609. The question is expressly left open in *Wetzler v. Duffy*, 78 Wis. 170, 47 N. W. 184, 12 L. R. A. 178.



English rule, is variously put. It is sometimes said that equity regards as done what is agreed to be done; sometimes that from the moment of the contract the vendor is trustee for the purchaser; sometimes that from that moment the purchaser is the owner in equity subject of course to a lien for the unpaid price. As many of the decisions are based simply on a repetition of a formula of this sort, it is worth while to consider the validity of the formula as such without reference to its particular applications. It can hardly be denied that present ownership is a different thing from future ownership. However certain it may be that in the future one will become the owner of property, it is a different thing from owning it now. When, therefore, it is said that equity regards one who has a contract right to property in the future as the immediate owner of it, it is in effect said that equity regards two things which are inherently different as the same. Only the hoary age and frequent repetition of the maxim prevents a general recognition of its absurdity. If the statement were made that in equity one who has contracted to buy property has *some* rights analogous to those of an owner of the property, inquiry would be natural in an individual case whether the particular right or duty of an owner then in question had been acquired by the purchaser; but when it is said broadly that he is the owner in equity, or that he is in effect a mortgagor, further consideration seems precluded, and one who accepts the maxim denies himself the effort of further thought. If our law had definitely adopted such a proposition, there would be perhaps little use in commenting upon it, but this is not the case. It will be evident from the following discussion that the position of the purchaser differs, not only in theory, but under the established law, in essential particulars from either an owner or a mortgagor, and, therefore, since the only reason that can be given for throwing the risk on the purchaser is that he is the beneficial owner, the reason failing, the rule should also fall.

### § 930. Illustrations of the purchaser's equitable ownership.

Professor Keener has marshalled the following rules of equity to show its consistent treatment of the vendee as owner

or mortgagor and therefore the inconsistency and impropriety of relieving him from the risk of loss.<sup>41</sup>

"I. The vendee can call for a conveyance of the property from a donee, or purchaser with notice.<sup>42</sup>

"II. The interest of the vendee can be assigned or devised.<sup>43</sup>

"III. In the event of the vendee's death, his heir, not his personal representative, is entitled to a conveyance.<sup>44</sup>

"IV. Under a devise by the vendee of his real estate, the interest of the vendee passes.<sup>45</sup>

"V. In jurisdictions where a wife is given dower in equitable estates, the widow of the vendee is entitled to dower.<sup>46</sup>

"VI. The vendee has a right to require husbandlike conduct of the vendor in the management of the estate.<sup>47</sup>

<sup>41</sup> 1 Col. L. Rev. 1.

<sup>42</sup> Citing *Daniels v. Davison*, 17 Ves. 433; *Lovejoy v. Potter*, 60 Mich. 95, 26 N. W. 844; *Moyer v. Hinman*, 13 N. Y. 180.

<sup>43</sup> Citing *Townsend v. Champenowne*, 9 Price, 130; *Buck v. Buck*, 11 Paige, 170. The vendee's interest was held to pass under a devise of the testator's freehold estate. *Greenhill v. Greenhill*, 2 Vern. 679, Pres. Ch. 320. See also *Langford v. Pitt*, 2 P. Wms. 629.

<sup>44</sup> Citing *Langford v. Pitt*, 2 P. Wms. 629. See also *Seton v. Slade*, 7 Ves. 265, 274; *Love v. Butler*, 129 Ala. 531, 30 So. 735; *Musham v. Musham*, 87 Ill. 80; *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 343; *Hathaway v. Payne*, 34 N. Y. 92, 103; *Thomson v. Smith*, 63 N. Y. 301, 303. But the personal representative must pay the vendor. *Milner v. Mills*, *Moseley Ch.* 123; *Garnett v. Acton*, 28 Beav. 333; *Young v. Young*, 45 N. J. Eq. 27, 34, 16 Atl. 27; *Brewer v. Vanarsdale's Heirs*, 6 Dana, 204; and see 1 Ames Cas. Eq. Jur. 191 n. On the other hand, the vendor's interest is immediately treated as personalty. *Curre v. Bowyer*, 5 Beav. 6 n. (b); *Thomas v. Howell*, 34 Ch. D. 166; *Moore v. Burrows*, 34 Barb. 173; *Smith v. Gage*, 41 Barb. 60; *Keep*

*v. Miller*, 42 N. J. Eq. 100, 6 Atl. 495; *Thomson v. Smith*, 63 N. Y. 301, 303; *Kerr v. Day*, 14 Pa. St. 112, 114, 53 Am. Dec. 526. And see a valuable note in 42 N. J. Eq. 100, and passes to his executors, his wife not having dower. *Lunsford v. Jarrett*, 11 Lea, 192, 196.

<sup>45</sup> Citing *Townsend v. Champenowne*, 9 Price, 130; *Buck v. Buck*, 11 Paige, 337. See also 1 Ames Cas. Eq. Jur. 192. Under the old English law the contract was in equity regarded as a revocation of a prior devise. *Cotter v. Laver*, 2 P. Wms. 623; *Knollys v. Alcock*, 5 Ves. 648, 654; *Bennett v. Lord Tankerville*, 19 Ves. 170, 178; *Farrar v. Earl of Winterton*, 5 Beav. 1; *Re Manchester & Southport Ry. Co.*, 19 Beav. 365, 1 Ames Eq. Jur. 195, n.

<sup>46</sup> Citing *Bailey v. Duncan's Representatives*, 4 T. B. Mon. 256. See also 1 Ames Eq. Jur. 201-204.

<sup>47</sup> Citing *Foster v. Deacon*, 3 Madd. 394; *Phillips v. Silvester*, L. R. 8 Ch. App. 173; *Clarke v. Ramus* [1891], 2 Q. B. 456. See also *Egmont v. Smith*, 6 Ch. D. 469; *Royal Society v. Bomash*, 35 Ch. D. 390; *Holmberg v. Johnson*, 45 Kan. 197, 25 Pac. 575, 1 Ames' Eq. Jur. 225 n. Compare *Hellreigel v. Manning*, 97 N. Y. 56; *Cloyd v. Steiger*, 139 Ill. 41, 28 N. E. 987.

"VII. The vendee is chargeable with the costs of improvements made by the vendor under compulsion of law.<sup>48</sup>

"VIII. The vendee is chargeable with taxes paid by the vendor beyond the value of the usufruct.<sup>49</sup>

"IX. An estate which a vendor has contracted to sell will pass under a will to a devisee to whom the vendor has devised the estates held in trust by him.<sup>50</sup>

"X. A court of equity will not allow a widow to claim, as against the vendee, dower in land which the husband had, before his marriage, contracted to sell.<sup>51</sup>

"XI. The property is no longer liable for the debts of the vendor."<sup>52</sup> To these illustrations may be added a number of decisions on insurance policies and on statutes relating to mechanics' liens and other matters. These decisions involve questions of whether the purchaser or the vendor is the "owner" or the "sole owner" or the "unconditional owner" or whether there has been by the contract a "change of title" within the meaning of a policy or of a statute;<sup>53</sup> and tend to show that at least in some cases where the purchaser has not acquired the legal title, he and not the vendor is regarded as the owner. Finally in a multitude of cases the vendor is called a trustee.<sup>54</sup>

### § 931. Rule in regard to risk is equitable.

The development of the law in regard to risk of real property

<sup>48</sup> Citing *King v. Ruckman*, 24 N. J. Eq. 556.

<sup>49</sup> Citing *King v. Ruckman*, 24 N. J. Eq. 556.

<sup>50</sup> Citing *Lysaght v. Edwards*, L. R. 2 Ch. Div. 499; the devisee or heir is compelled to convey to the purchaser, though the price is paid to personal representatives. *Watson v. Mahan*, 20 Ind. 223; *Judd v. Mosely*, 30 Ia. 423; *Newton v. Swasey*, 8 N. H. 9; *Moore v. Burrows*, 34 Barb. 173; *Newport Waterworks v. Sisson*, 18 R. I. 411, 28 Atl. 336.

<sup>51</sup> Citing *Oldham v. Sale*, 1 B. Mon. 76.

<sup>52</sup> Citing *Moyer v. Hinman*, 13 N. Y.

180. See also *Finch v. Earl of Winchelsea*, 1 P. Wms. 277; *Jackson v. Snell*, 34 Ind. 241; *Hampson v. Edelen*, 2 Har. & J. 64, 3 Am. Dec. 530; *Houston v. Nowland*, 7 G. & J. 480; *Lane v. Ludlow*, 6 Paige, 316, n.; *Blackmer v. Phillips*, 67 N. C. 340; *Siter's Appeal*, 26 Pa. 178. But generally a judgment creditor of the vendor and a purchaser under an execution sale, though not impairing the vendee's interest acquires the vendor's right. See 1 Ames Cas. Eq. Jur. 213 n.

<sup>53</sup> The decisions are collected in 1 Ames Cas. Eq. Jurisdiction, 241, 242. See also *infra*, § 936.

<sup>54</sup> See *infra*, § 936 *ad fin.*

under contract of sale has been entirely apart from the law governing sales of chattels, and has taken place chiefly in courts of equity. The matter was first touched upon by Sir Joseph Jekyll, M. R., who said, "If I should buy an house, and, before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not, in equity, be bound to pay for the house."<sup>55</sup> The leading case on the subject is *Paine v. Meller*,<sup>56</sup> a decision by Lord Eldon. This was a suit for specific performance. The contract was made on September 1 for a conveyance at Michaelmas. Owing to the seller's failure to make out a good title, the conveyance was not made then, but on December 16th or 17th the parties continued treating with each other, and there was evidence that the defect in the title was remedied to the buyer's satisfaction. On December 18th the house was burned. Lord Eldon held that if the purchaser had accepted the title he was bound to complete the purchase, but otherwise not. The case is generally cited as a decision that the purchaser is liable from the date of the contract, and it seems that such is the effect of it, though it has been cited also as deciding the contrary.<sup>57</sup> As the time for performance

<sup>55</sup> *Stent v. Bailis*, 2 P. Wms. 217, 220. The case of *Cass v. Rudele*, 2 Vernon, 280, s. c. Eq. Cas. Ab. 25, pl. 8, is not in point, because according to the reports the houses in question were destroyed after the purchaser was in default, and, according to a note in the latter report, after conveyance. There is also a whole series of cases which should be distinguished. *White v. Nutt*, 1 P. Wms. 61, may be taken as an instance. That was a suit to enforce a contract to purchase an estate for two lives. Before the time for conveyance one of the lives determined. Specific performance was decreed. This clearly follows from the nature of the contract. The contingency the happening of which lessened the value of the estate was an ordinary one necessarily in the contemplation of the parties. An agreement for the purchase of an annuity is subject to a similar risk.

*Mortimer v. Capper*, 1 Bro. C. C. 156. Cf. *Pope v. Roots*, 1 Bro. P. C. 370. On the same principle, the case of *Akhurst v. Jackson*, 1 Swanst. 85, is entirely right. There a trader agreed to take two persons in partnership for a period of eighteen years, in consideration of a sum payable in several instalments. Five months later, when only one instalment had become due, the trader became bankrupt. It was held that his assignees were entitled to recover the remaining instalments when they became due. Such cases do not differ in principle from appreciation or depreciation in the market value of property between the days of contract and conveyance, and do not fall properly within the subject of this and the following sections which relate to risks not only accidental, but extraordinary.

<sup>56</sup> 6 Ves. 349.

<sup>57</sup> A Brief Survey of Equity Juris-

had passed, owing to the vendor's default, the purchaser could clearly not be compelled to take the property unless this default was waived, and it was for this reason that Lord Eldon made the question turn on the acceptance of the title. His language makes his view clear: "As to the mere effect of the accident itself, no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be assets; and they would descend to his heir."

### § 932, Exceptions to the English rule.

Before examining the statements in the preceding sections and considering their bearing on the particular matter in issue, the limits of the English rule should be more exactly defined. If the promise of the purchaser is expressly conditional upon receiving a conveyance of the property in good condition, it can hardly be doubted that no liability will arise unless the condition is complied with. If there is no express condition to the purchaser's promise, but an express promise by the vendor to convey and deliver in good condition, it is held in Kentucky that failure to comply with the promise, though excused by impossibility, will prevent any right of action for the price.<sup>58</sup> Reasonable as this doctrine

diction, C. C. Langdell, 1 HARVARD LAW REVIEW, 375, note 1. "Lord Eldon held that the vendee must bear the loss, provided he had been put in default by the vendor before the loss happened, but not otherwise." The vendee could hardly be considered in default on any view. Though it rested with him to make the deeds, he would certainly not be in default immediately upon expressing himself as satisfied with the title. He would have a reasonable time thereafter to prepare the deeds, and in fact it was said when the title was accepted that the deeds would be ready in two or three days, a time which had not expired at the time of the fire.

<sup>58</sup> Marks v. Tichenor, 85 Ky. 536, 538, 4 S. W. 225. See also Morgan v. Hymer, 18 Ky. L. Rep. 639, 37 S. W. 576. Indeed, it has been held in Indiana that such a promise binds the promisor to pay damages. Goddard v. Bebout, 40 Ind. 114. But see Maggort v. Hansbarger, 8 Leigh, 532; Warner v. Hitchins, 5 Barb. 666; Young v. Leary, 135 N. Y. 569, 32 N. E. 607. Similarly, a promise to return leased personal property in good condition has been held to amount to an assumption of the risk. Barrere v. Soms, 113 Cal. 97, 45 Pac. 177, 572; Harvey v. Murray, 136 Mass. 377; Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301; Direct Nav. Co. v.

seems, it leads to the destruction of the whole English rule, for a promise to convey must always mean a promise to convey in substantially the same condition as at the time of the contract.

On any view, too, the vendor is not entitled to the price unless at the time of the calamity the obligation of the purchaser to take and pay for the property was absolute. If, therefore, the vendor had not at that time a good title,<sup>59</sup> or was in default,<sup>60</sup> or if either the vendor or the purchaser had any option in regard to performance of the contract,<sup>61</sup> the loss falls upon

Davidson, 32 Tex. Civ. App. 492, 74 S. W. 790. It may be doubted whether this is the true construction of the promise. The contrary decisions of *Seevers v. Gabel*, 94 Ia. 75, 62 N. W. Rep. 669, 27 L. R. A. 733, 59 Am. St. 381; *Young v. Bruce*, 5 Litt. 324; *D'Echaux v. Gibson Cypress Lumber Co.*, 114 La. 626, 38 So. 476; *McEvers v. The Sangamon*, 22 Mo. 187; *Young v. Leary*, 135 N. Y. 569, 32 N. E. 607; *Sawyer v. Nicholas*, 166 N. C. 497, 82 S. E. 840, L. R. A. 1915, B. 295; *Harris v. Nicholas*, 5 Munf. 483; *Bowler v. Ahlo*, 11 Hawaiian Rep. 357, seem better.

<sup>59</sup> *Paine v. Meller*, 6 Ves. 349; *Mackey v. Bowles*, 98 Ga. 730, 25 S. E. 834; *Phinzy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207; *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. 816; *Calhoon v. Belden*, 3 Bush, 674; *Christian v. Cabell*, 22 Gratt. 82. Under these circumstances also there is no conversion for purposes of inheritance. *Thomas v. Howell*, 34 Ch. D. 166, 1 Ames Cas. Eq. Jur. 198 n.

<sup>60</sup> *Paine v. Meller*, 6 Ves. 349; *Smith v. Cansler*, 83 Ky. 367; *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. 816; and see *infra*, § 1425, cases of refusal of specific performance because of change of value of property, where the vendor was guilty of laches.

<sup>61</sup> *Counter v. Macpherson*, 5 Moo. P. C. 83; *Lombard v. Chicago Sinai*

*Cong.*, 64 Ill. 477, S. C. 75 Ill. 271; *Smith v. Cansler*, 83 Ky. 367; *Blew v. McClelland*, 29 Mo. 304; *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. 816; *Perlee v. Jeffcott*, 89 N. J. L. 34, 97 Atl. 789; *Northern Texas Realty &c. Co. v. Lary (Tex.)*, 136 S. W. 843; *Gilbert v. Port*, 28 Ohio St. 276. See also *Smith v. Jones*, 21 Utah, 270, 60 Pac. 1104. On this principle the decision in *Goldman v. Rosenberg*, 116 N. Y. 78, 22 N. E. 259, would clearly have been the same had the court admitted the general doctrine of the English courts of equity. One partner had conveyed real estate to a firm of which he was a member, agreeing to repurchase it on the expiration of the partnership. As the property was at the risk of the business, the right of the purchaser was subject to a contingency. For the same reason, a judicial sale does not throw the risk on the vendor until the sale is confirmed, for though the purchaser is bound before that time, the vendor is not, since the court may refuse to confirm the sale. *Ex parte Minor*, 11 Ves. 559; *Twigg v. Fifield*, 13 Ves. 517.

In *Harrigan v. Golden*, 41 N. Y. App. Div. 423, 58 N. Y. S. 729, the court said: "We are of opinion that the order appealed from [refusing to compel a purchaser at judicial sale to complete a sale, a building having been burned] should be affirmed. It is clear that the weight of authority is in favor of the proposition that a purchaser at a

the vendor. So too if the loss was due to the vendor's own negligence.<sup>62</sup>

**§ 933. English doctrine originated when mutual promises were independent.**

It is interesting to observe that the doctrine in Chancery that a trust relation is created by an executory contract to buy and sell land grew up at a time when the promises in all bilateral contracts, in the absence of express conditions, were held to be independent. In 1738 when Lord Hardwicke said that "the vendor is from the time of his contract, considered as a trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor,"<sup>63</sup> the obligation of the vendor at law as well as in equity was an absolute one. He was in the same position as is now a vendor who has been paid the purchase money, since at that time it was his duty to convey whether the purchase money was paid or not.<sup>64</sup> Under these circumstances the vendor in possession if not quite in the position of a trustee for the vendee since still entitled to the beneficial use of the property came much nearer justifying that description than he does to-day when the promises in bilateral contracts are mutually dependent. Whether the English equity doctrine would ever have arisen had implied conditions been part of the early law may be very much doubted. The failure of the English courts of equity to apply the maxim *cessante ratione cessat ipsa lex*, when the promises of vendor and purchaser became by implication concurrently conditional, even in the absence of express conditions, is an illustration of an unfortunate but common habit of the law to follow precedents when the reason for them no longer exists. There is a close parallel in the development of the

judicial sale gains no title either legal or equitable, until the date fixed for the transfer of the deed. *Cheney v. Woodruff*, 45 N. Y. 98; *Robbins v. Arendt*, 4 Misc. Rep. 196, 23 N. Y. S. 1019; *Mitchell v. Bartlett*, 51 N. Y. 447."

<sup>62</sup> *Marks v. Tichenor*, 85 Ky. 536, 538, 4 S. W. 225.

<sup>63</sup> *Green v. Smith*, 1 Atk. 572. This

was said in 1738, nearly forty years before Lord Mansfield's epoch-making decision in *Kingston v. Preston*, 2 Doug. 680, S. C. Lofft, 194. The idea which Lord Hardwicke expressed is to be found also in earlier cases cited in 1 Ames Eq. Jur. 191-193.

<sup>64</sup> See *supra*, § 815; *Pordage v. Cole*, 1 Wms. Saund. 319.

same topic in the law of Rome and Continental Europe which clung to its early doctrine that the purchaser bore the risk long after the mutual dependency of promises was established.<sup>45</sup> The law of the United States if not of England may yet, as the law of the continent of Europe ultimately has done, discard a doctrine of risk fundamentally inconsistent with that of the mutual dependency of bilateral promises.

**§ 934. The result at law and in equity should be the same.**

In jurisdictions at least where equitable defences and replications are allowed at law, there should be no difference in the effect of a decision on this point by a court of law and a decision of a court of equity. If the promise of the purchaser is made expressly conditional on receiving the property in good order, a court of equity can disregard the expressed intent of the parties no more than a court of law. On the other hand, if the promise of the purchaser is in terms absolute, this promise should not be held in a court of law subject to an implied condition of performance by the vendor, if the contrary is held by a court of equity. The basis of implied conditions is that there is a failure of the consideration for a promise if the performance promised in return is not given. Whether there has been such a failure of consideration is a question which should be decided in the same way by a court of law and a court of equity. If it is proper for a court of equity to hold that a purchaser before conveyance is the owner in equity and hence liable for the price, a court of law should hold either that there are no implied conditions that the legal title to the property shall be transferred and that the property shall be in substantially the same state, or that, if there are such conditions, accidental destruction or injury of the property is an excuse for non-performance. Or, if the matter is put in another way, if equity requires the purchaser to accept a tender of a deed in spite of the destruction of a building, and to pay the full price, a refusal of such a tender should give ground for an action at law. The case is not like one where the plaintiff is entitled in equity to specific performance if he makes compensation, and a conditional decree

<sup>45</sup> See *infra*, §§ 947 *et seq.*



is necessary. Here the duty, if it exists at all, is absolute. In fact, though most of the decisions holding the purchaser not liable have been made by courts of law, and all the contrary decisions by courts of equity or by courts administering both law and equity, it is not probable that the result of the former cases at least would have been different had the proceedings been in equity. It is nearly certain that the courts of Massachusetts, Maine, and New Hampshire would give vendors no more relief in equity than in law;<sup>66</sup> and the results suggested in the California, Georgia and Iowa decisions are not dependent on procedure.

### § 935. Partial destruction.

It has not been particularly considered whether partial destruction of an estate stands on any different footing from total destruction, but no such distinction seems tenable. On any true construction of a promise to convey an estate, the promise is no more fulfilled by conveying the land without the house than by conveying nothing. And any reasoning which requires the vendee to pay when the vendor materially though excusably fails to fulfil his promise must require payment when the vendor totally and equally excusably fails to perform. In a Kansas decision<sup>67</sup> the question of total destruction seems involved. In that case the estate was taken by eminent domain so that the vendor could convey nothing at all. It was held that the vendee must pay the price, becoming thereby of course entitled to the damages payable on account of the taking.

### § 936. Comment on illustrations of vendee's equitable ownership.

Unless the cases illustrating the vendee's supposed equitable ownership stated in a preceding section<sup>68</sup> require for

<sup>66</sup> In *Poole v. Adams*, 12 W. R. 683, Kindersley, V.C., said: "Whatever the rule of this court might be as to enforcing specific performance in a case where the property was burnt down, it was clear that the contract remained good at law, and that the purchaser

might have been sued for breach in refusing to complete and pay his purchase money." This is not the usual line of argument, however.

<sup>67</sup> *Gammon v. Blaisdell*, 45 Kan. 221, 25 Pac. 580.

<sup>68</sup> *Supra*, § 930.

their decision principles different from those which would be applicable on the assumption that the purchaser's right is not that of a mortgagor but is a contract right or some right *in rem* less than that of a mortgagor these cases are obviously not pertinent to the discussion. For this reason several of them may be at once dismissed.

It is true that while a contract to sell ordinary chattels without transfer of possession gives only a personal right against the seller for damages in case of breach, a contract to sell real estate may be specifically enforced against the vendor; and not only against the vendor, but against any one who, with notice of the purchaser's rights, takes title from the vendor. In the United States, moreover, by recording his contract, the purchaser is able to charge every one with constructive notice of his rights. He thus acquires in fact a right *in rem*.<sup>69</sup> This effect of the registration laws has not generally been adverted to in connection with the question under discussion, but it seems obvious that the right of the purchaser between the time of the contract and the time for performance corresponds more nearly to full ownership where such laws prevail than where they do not. But one who has only an option to buy and who is not called an owner in equity and whom no one saddles with the risk has the same right.<sup>70</sup> The interest of one who has contracted to purchase can be assigned, but so can that of the holder of an option.<sup>71</sup> The purchaser has a right to require husbandlike conduct of the vendor in possession, but the same may be

<sup>69</sup> Another instance of the same effect of the system of registration is found in the law of equitable easements. In the United States, as every one has constructive notice of a recorded equitable easement, it is as completely a right *in rem* as a legal easement, which also only becomes a right *in rem* when recorded.

<sup>70</sup> *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47; *Forney v. Birmingham*, 173 Ala. 1, 55 So. 618; *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522; *Copple v. Aigeltinger*, 167

Cal. 706, 140 Pac. 1073; *Faraday Coal, etc., Co. v. Owens*, 26 Ky. L. Rep. 243, 80 S. W. 1171; *Whited v. Calhoun*, 122 La. 100, 47 So. 415; *Thompson v. Henry*, 85 Mo. 451; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Horgan v. Russell*, 24 N. Dak. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881; *Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539.

<sup>71</sup> See *supra*, § 415; *James on Option Contracts*, § 605.

said not only of the vendor's right against a purchaser in possession,<sup>72</sup> but also of the right of the holder of an option. Surely one who has given an option for valuable consideration, cannot thereafter be allowed to misuse the property. The creditors of the vendor it is true cannot by seizing the property destroy the purchaser's interest, as creditors of one who has contracted to sell ordinary chattel property may do, but this only shows what must certainly be fully admitted, that equity treats the purchaser (unless a purchaser for value without notice has acquired the title) as having an interest in the property. It does not show the extent of that interest. On the other hand, it is to be observed that creditors of the vendee cannot generally seize his interest except by a bill in equity; it is not subject to execution unless the price has been paid.<sup>73</sup> These rules must therefore be dropped from consideration in any argument concerning the purchaser's risk of loss. They evidently do not depend upon the existence of a situation where the purchaser must be said to have ownership in equity, as distinct from an interest less than such full beneficial ownership as should carry with it risk of loss. In regard to the assertion that the purchaser is chargeable for the cost of improvements made by the vendor under compulsion, this, if true, tends to destroy one of the arguments commonly advanced for throwing the risk on the purchaser; namely, that the chance of gain is his also. In the case supposed he is made to pay an additional price for the improvement of the property. As to taxes the general rule is well settled that the vendor must bear the burden of them until the purchaser is entitled to possession.<sup>74</sup>

In regard to the inheritance of property and dower rights therein after a contract to sell it, it should be observed that

<sup>72</sup> *Crockford v. Alexander*, 15 Ves. 138, 1 Ames Cas. Eq. Jur. 222, n.

<sup>73</sup> *Ledbetter v. Anderson, Phillips*, Eq. (N. Car.) 323, 1 Ames Cas. Eq. Jur. 214, n.

<sup>74</sup> *Sherman v. Savery*, 2 Fed. 505; *Taylor v. Robinson*, 34 Fed. 678; *National Bank v. Danforth*, 80 Ga. 55, 7 S. E. 546; *Wells v. City of Savannah*,

87 Ga. 397, 13 S. E. 442; *Carey v. Gundelfinger*, 12 Ind. App. 645, 40 N. E. 1112; *Nunngesser v. Hart*, 122 Ia. 647, 98 N. W. 505; *Carpenter v. Douglas*, 104 Miss. 74, 61 So. 161; *Farber v. Purdy*, 69 Mo. 601; *Brown v. Brown*, 124 Mo. 79, 27 S. W. 552; *Anderson v. Harwood*, 47 Mo. App. 660.

the question here is not between the vendor and purchaser, but between classes of inheritors, all of whom are in the position of volunteers. It may be entirely proper for equity to arrange the rules of inheritance in accordance with an intention of the owner to change the nature of the property at a future time. The vendor has indicated an intent to convert his real estate into personalty, and the purchaser an intent to convert personal estate into real estate, and there is no reason why the intent should not be regarded. The question is not ordinarily at what time the conversion is to be dated, but whether there is any conversion. Where the former question arises, it is noticeable that the profits of land under contract of sale belong to the vendor's heir until the day fixed for conveyance.<sup>75</sup> Whatever the basis of the rule in question, it does not violate any principle of contracts. Moreover, it seems probable on the authorities that even where the purchaser's contractual right to a conveyance is subject to a condition other than the payment of the price, that this rule of inheritance will nevertheless be applied if the condition was one which the purchaser could have performed. Yet, it seems clear that the risk of loss would not be thrown on the purchaser in such a case under the English equitable doctrine. Thus where the purchaser has a mere option when the vendor dies, on the exercise of the option the vendor's executor, not his heir, has been given the purchase money.<sup>76</sup>

The insurance cases are not all easily made consistent with one another, but so far as they can be reduced to a general principle seem rather to support the view that until he is given possession the purchaser is not the beneficial owner and that thereafter he is.<sup>77</sup> Unquestionably the purchaser has

<sup>75</sup> *Shadforth v. Temple*, 10 Sim. 184; *Lumsden v. Fraser*, 12 Sim. 263.

<sup>76</sup> *Townley v. Bedwell*, 14 Ves. 591, and see 1 Ames Eq. Jur. 200, n. *In re Marley*, [1915] 2 Ch. 264; cf. *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43.

<sup>77</sup> The question is involved in different clauses common in insurance policies. On the one hand it is said: "The interest of a vendee under an

executory contract of sale, who is not in default, and is in possession under such contract, and is the owner in equity, may be regarded as unconditional sole ownership." 2 Clement on Ins. 167, citing many cases; *McColough v. Home Ins. Co.*, 155 Cal. 659, 662, 102 Pac. 814. On the other hand, it is said: "An executory contract for the sale of the insured property is not a 'sale,' 'transfer,' 'alienation,' or

an interest in the property which equity will and should protect by enjoining if necessary any dealing with the property inconsistent with the contract. It should be equally clear that the vendor has likewise an interest in the property, and, if the purchaser is in possession, he also may be enjoined from committing waste.<sup>78</sup> However often the words may be repeated it cannot be true that the vendor is trustee for the purchaser<sup>79</sup>

'change of title' so as to avoid the policy, so long as there has been no conveyance or delivery under the contract. While the purchase money is unpaid and the property is in the possession of the insured, or the title is in him, such a contract is similar to any other incomplete transfer in its effect upon the conditions of the policy. If the vendee takes possession under the contract and makes payments, acquiring an equitable title, it has been held that there is a change of title within the meaning of the condition; but this is contrary to the general rule." 13 Amer. & Eng. Encyc. 247, 248, citing many cases.

<sup>78</sup> *Moses v. Johnson*, 88 Ala. 517, 7 So. 146; *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680.

<sup>79</sup> This is often recognized. "An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser." *Rayner v. Preston*, 18 Ch. D. 1, 6, per Cotton, L. J.

"With the greatest deference it seems wrong to say that one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the

relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide, at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose, at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due, and which have been received by the vendor between the time of the making of the contract and the time of completion: but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of a contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase, of which a court of equity will under certain circumstances decree a specific performance." *Rayner v. Pres-*

and this is occasionally recognized, yet the courts continue the use of this misleading word.<sup>80</sup>

### § 937. Rules tending to show a vendor is not a mortgagee.

There are several well-settled rules which show that one who contracted to sell property in the future is not in the position of a mortgagee.

1. It is a well-settled rule of mortgage law that no agreement of forfeiture between mortgagor and mortgagee for non-payment on time will be enforced.<sup>81</sup> It is equally well settled in the law of vendors and purchasers that an agreement that time shall be of the essence, will be enforced.<sup>82</sup> And even though the contract does not make time of the essence, either party by giving a reasonable notice to the other, may make prompt performance essential.<sup>83</sup> Important

ton, 18 Ch. D. 1, 10, per Brett, L. J. See also a criticism of this use of the word trustee in 36 Sol. Journal, 775 and 784. It has been suggested that when the purchase-money has been paid the vendor may properly be called a trustee. 2 HARVARD LAW REVIEW, 421. It is submitted that even then the vendor is not a bare trustee for the purchaser, unless by the contract the purchaser is entitled to immediate possession. And except in that case the risk should remain with the vendor. Of course, where the price is paid the purchaser is ordinarily entitled to immediate possession, but this is not necessarily the case.

<sup>80</sup> In *Royal Society v. Bomash*, 35 Ch. D. 390, 397, Kekewich, J., says: "Of course we all know that he is only a trustee in a modified sense. There are many things to be done before he becomes a mere trustee; but still Lord Selborne (in *Phillips v. Silvester*, L. R. 8 Ch. 173, 177) says he is a trustee, and I have no doubt that that is the right position, and I so decide."

It would seem that a trustee only in a modified sense would better be called by some other name,—the name of vendor, for instance.

How little weight is to be given to the loose language used in this matter is shown by the fact that it is common to find it also said that the vendee is trustee of the purchase money, or the vendor is owner of it in equity. This mode of expression is old, *Green v. Smith*, 1 Atk. 572, see *supra*, § 933, and though palpably inaccurate is still common. Two recent illustrations of it may be found in *Cross v. Bean*, 83 Me. 61, 64, 21 Atl. 752, and in *Pomeroy's Equity Jurisprudence*, § 368. And see *Fry, Spec. Perf.* (3d ed.), § 1396. In Maine, though it is said in *Cross v. Bean* that vendor and vendee are trustees for each other, it is also held in the strongest way that the risk is on the vendor. *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325.

<sup>81</sup> See *supra*, § 771.

<sup>82</sup> See *supra*, §§ 852 *et seq.*

<sup>83</sup> *Ibid.* "The idea that vendor and vendee stand in the mere relation of mortgagee and mortgagor so that in equity the same time will be given to the vendee to perform that is given to a mortgagor to redeem—is contrary to reason and the whole current of modern authorities." *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677.

qualification of this principle in the law of vendor and purchaser is found where the vendee is in possession, but only in such cases.

2. Unless the contract expressly gives the purchaser a right of possession, he is not entitled thereto;<sup>84</sup> nor is he entitled to the rents and profits until the time when he is entitled to possession.<sup>85</sup> Thereafter he is so entitled.<sup>86</sup>

3. The vendor in possession is liable for taxes.<sup>87</sup>

It is evident, therefore, that an assertion that the purchaser is in the position of a mortgagor, finds as little support in the decisions as it does in principle. In important particulars the law is everywhere settled that the relation between the parties is not to be treated as that of mortgagor and mortgagee, yet it is only on the assumption that the vendor's legal title is held merely for security that there can be any propriety in throwing the risk on the purchaser. One who admits that the relation of vendor and purchaser is not in legal effect that of mortgagee and mortgagor, though he is not precluded from asserting that one who has contracted to purchase has some incidents of ownership, cannot fairly argue that those incidents

<sup>84</sup> *Clarke v. Ramus*, [1891] L. R. 2 Q. B. 456, 463; *Gaven v. Hagen*, 15 Cal. 208; *Gates v. McLean*, 70 Cal. 42, 11 Pac. 489; *Stratton v. California Land Co.* 86 Cal. 353, 24 Pac. 1065; *Williams v. Forbes*, 47 Ill. 148; *Chappell v. McKnight*, 108 Ill. 570; *In re Boyle's Est.*, 154 Ia. 249, 134 N. W. 590, 38 L. R. A. (N. S.) 420; *Druse v. Wheeler*, 22 Mich. 439; *Cartin v. Hammond*, 10 Mont. 1, 24 Pac. 627; *Suffern v. Townsend*, 9 Johns. 35; *Erwin v. Olmsted*, 7 Cow. 229; *Spencer v. Tobey*, 22 Barb. 260, 269; *Burnett v. Caldwell*, 9 Wall. 290, 293, 19 L. Ed. 712. The law in Alabama is otherwise. *Reid v. Davis*, 4 Ala. 83; *Wimbish v. Montgomery, etc., Assoc.*, 69 Ala. 575, 578. It has been held in two cases that if the price has been paid and the land is vacant the purchaser is entitled to possession. *Miller v. Ball*, 64 N. Y. 286; *Sherman v. Savery*, 2 Fed. 505.

<sup>85</sup> *Mackrell v. Hunt*, 2 Mad. 34 n.; *Rayner v. Preston*, 18 Ch. D. 1, 11; *In re Boyle's Est.*, 154 Ia. 249, 134 N. W. 590, 38 L. R. A. (N. S.) 420; *Tucker v. McLaughlin-Farrar Co.*, 36 Okl. 321, 129 Pac. 5. See also the cases cited in note, *infra*. The same principle is also involved in the cases in the preceding note. *Cf. Ashurst v. Peck*, 101 Ala. 499, 14 So. 541; *Hundley v. Lyons*, 5 Munf. 342. After the purchaser's default, the vendor may either keep the rents or claim interest. *Barsht v. Tagg*, [1900] 1 Ch. 231. If he elects to receive interest, he is held to strict account of the rents which he received; *Plews v. Samuel*, [1904] 1 Ch. 464, or which he might have received. *Phillips v. Silvester*, L. R. 8 Ch. 173. As to the vendee's obligation to pay interest, see 1 Ames Cas. Eq. Jur. 219 n.

<sup>86</sup> See the following section.

<sup>87</sup> *Hall v. Ely* (N. J. Eq.) 108 Atl. 390, and cases cited *supra*, n. 74.

justify the transfer of risk from the vendor who retains not only the legal title, but some at least of the incidents of beneficial ownership.<sup>88</sup>

**§ 938. Inconsistency of foregoing rules with purchaser's ownership.**

On the one hand the foregoing rules preclude immediate ownership on the part of the purchaser. No argument can be convincing of the propriety of asserting that the purchaser is an owner from the making of the contract, and yet is not entitled to all the rights of an owner which he has not agreed to surrender. If an intent is manifest that the purchaser shall not have possession of rents and profits, an intent is equally manifest that he shall have no other right or consequence of ownership.

On the other hand, from the time when the purchaser is entitled by the contract to possession, he is entitled to the rights of an owner. The vendor, if still in possession, must account for the rents and profits,<sup>89</sup> and the purchaser must pay interest on the price.<sup>90</sup> This rule shows that interest on the purchase money and rents and profits are not regarded as equivalent to each other, and that therefore an exchange of them is unnecessary. Further, a purchaser in possession has every right of ownership not inconsistent with the security of the vendor,<sup>91</sup> and if the vendor intermeddle with the property

<sup>88</sup> See *infra*, § 939.

<sup>89</sup> *Acland v. Gaisford*, 2 Mad. 28; *Wilson v. Clapham*, 1 J. & W. 36; *Buck v. Duvall*, 11 Ga. App. 853, 76 S. E. 1053; *Mason v. Chambers*, 3 T. B. Mon. 318; *Baxter v. Brand*, 6 Dana, 296; *Hundley v. Lyons*, 5 Munf. 342, 1 Ames Cas. Eq. Jur. 221 n.

<sup>90</sup> *Powell v. Martyr*, 8 Ves. 146; *Fludyer v. Cocker*, 12 Ves. 25; *Roberts v. Massey*, 13 Ves. 561; *Birch v. Joy*, 3 H. L. C. 565; *Ballard v. Shutt*, 15 Ch. D. 122; *Cullum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Boyce v. Pritchett's Heirs*, 6 Dana, 231; *Bishop v. Clark*, 82 Me. 532, 20 Atl. 88; *Cleveland v. Burrill*, 25 Barb. 532; *Stevenson*

*v. Maxwell*, 2 Comst. 408; *Ramsay v. Brailsford*, 2 Desaus. 582, 592; *Hundley v. Lyons*, 5 Munf. 342; *Selden v. James*, 6 Rand. 465. A qualification is added in the English cases which would probably meet with general assent, that if the purchaser's money is lying idle ready for the vendor, and the vendor has notice of this, interest will cease.

<sup>91</sup> *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Baldwin v. Pool*, 74 Ill. 97. See also cases in the preceding section n. 85; *Dart. Vendors and Purchasers* (6th ed.), 289; *Hall v. Ely* (N. J. Eq.) 108 Atl. 370.



he is a trespasser.<sup>92</sup> Until possession or the time when possession should be transferred, therefore, under these decisions, the vendor is treated as the owner, and thereafter the purchaser is so regarded.<sup>93</sup>

**§ 939. Intent to transfer ownership should control the question.**

In the law of contracts unless the agreement of the parties is in violation of public policy, it is the duty of the court to enforce that agreement; not to substitute different rights and liabilities of its own creation. There is certainly no public policy requiring the purchaser to be the owner of property any sooner than the agreement specifies; and to hold that he is the owner now when he has agreed to be the owner next year, is an impropriety and an injustice. It is true that the parties manifest no intention in regard to the risk of loss except as such an intention may be inferred as to their agreement as to ownership. But the only ground for contending that the risk should be thrown on the vendee is because of his supposed ownership. The principle that risk attends

<sup>92</sup> *Smith v. Price*, 42 Ill. 399.

<sup>93</sup> It may be thought that the rule in regard to rents and profits of real estate is inconsistent with the rule in regard to dividends and calls upon stock after a contract for the sale of stock. It is sometimes said that after such a contract the purchaser is entitled to dividends and must pay calls. In the first place, it is to be noticed that in contracts to sell stock it is generally not specific stock which is the subject of the bargain, but any stock which answers a particular description, and it has not been suggested that it makes any difference whether the contract is to sell specific stock or not. Further, undoubtedly a purchaser of stock may as against the seller be entitled to dividends and liable for calls though the stock has not been transferred to his name, and it is probable that the presumption that an immediate trans-

fer is intended—a presumption which applies to sales of other personal property (*Williston, Sales*, § 264)—applies to sales of stock also. The purchaser is therefore presumably entitled to an immediate transfer and to all future dividends, and is immediately liable for all calls; but it has not yet been decided that after a contract to sell stock at a future day the purchaser is entitled to dividends and liable for calls and assessments in the meantime. The cases on dividends are collected in *Cook, Corporations*, § 539. As to calls, see *Coles v. Bristowe*, L. R. 6 Eq. 149, 4 Ch. 3; *Hawkins v. Maltby*, 4 Ch. 200. The case of calls is somewhat different from that of dividends. Clearly if a purchaser contracts for shares half paid up, he should not be entitled to full paid shares at the same price.

ownership might conceivably be contested, but it is not, and though if that principle is understood as necessarily throwing the risk where the technical legal title lies, it is open to criticism; it is not open to criticism when understood as requiring that the risk shall rest on that party to a contract who by the terms of the agreement has, or has agreed to have at the time, the substantial rights peculiar to present ownership, as distinguished from the rights of one who has an option or rights of a future owner. If part of the substantial rights of ownership equitably as well as legally belong to the purchaser and part still belong to the vendor, at the time in question, the risk should still be with the vendor since he should not be allowed to hold the purchaser on his promise to pay until he himself has given substantially all—not part—of what he agreed to give.<sup>24</sup>

**§ 940. Risk should pass to the purchaser on transfer of possession.**

Even if the rights which equity assures to a purchaser were much more nearly equivalent than they are to the complete ownership for which he bargained, the fundamental difficulty with the English rule remains the same; namely that, whatever rights a purchaser may acquire immediately after the contract, and even if such rights were the substantial equivalent of ownership, the contract is for the transfer of title at a future day. It is only by the transfer at that time that such a contract is fulfilled. Of course, voluntary acceptance of a proffered equivalent at an earlier day would be sufficient to bind the purchaser; but where the original intention of the parties to transfer ownership from one to another at a future day has never been changed, nothing but transfer at that day is a fulfilment of the contract. It should be obvious that a present purchase of the reversion of an estate is a different

<sup>24</sup> See *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 Pac. 432, 25 L. R. A. (N. S.) 609, which involved a contract to sell a leasehold interest in realty. Such an interest, as the court says, is regarded by the law as a chattel interest, but as a contract regarding such an

interest would be specifically enforced, the question of risk is the same as in a contract to sell a fee. The court rightly sought whether the intention of the parties was to make an immediate transfer.

thing from an executory contract to purchase an estate at a future day. It should be obvious that the intention of the parties is different in the two cases. It is, therefore, in clear disregard of the intention of the parties to hold that, since a court of equity assures to the purchaser in the latter case, to a greater or less extent, a right substantially equivalent to that secured by the purchaser of a legal future estate, the loss should be similarly adjusted. If any rule of equity other than that concerning risk now criticised is only explicable on the assumption that a vendor under an executory contract thereby acquires an immediate right to treat the purchaser as full owner, or that the purchaser acquires the rights of such an owner against the vendor, that rule also is fundamentally unsound. The intention of the parties is the factor in any proper decision. Parties do not frequently make express provisions as to risk, but they do indicate whether they intend a present transfer of the rights of ownership or a future transfer, and there should be no doubt that they expect all the incidents of ownership, to pass from the seller to the buyer at that time. That time will frequently not be, when the legal title is transferred. If, as frequently happens, a purchaser is given immediate possession under his contract, with the right to use the property as his own to the same extent as is customary with a mortgagor, the title is retained merely as security for payment of the price. It is a short way of accomplishing the same end as would be achieved by conveying to the purchaser and taking a mortgage back. When by the contract the beneficial incidents of ownership are to pass is the time which the parties must regard as the moment of transfer, and no little authority supports the conclusion that then and not before, the risk passes to the vendee.<sup>95</sup>

<sup>95</sup> In *Smith v. Phoenix Insurance Co.*, 91 Cal. 323, 333, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, the court said: "For the purpose of this decision, it is sufficient to say that no case has been cited, and we have discovered none in which the vendee has been held bound to pay the purchase price where a valuable part of the property

has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale, or has the right to such possession under the contract before the occurrence of the loss."

In *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755, 758, the court said: "Appellant's counsel cites numerous

### § 941. English rule is not based on intention.

How little the intention of the parties is regarded by the English rule may be seen by comparing a contract to sell a

authorities to the proposition that loss due to the destruction of buildings by fire in a case like this falls upon the vendee. Undoubtedly there is authority in some jurisdictions for such doctrine, most of the cases depending upon *Paine v. Meller*, 6 Ves. Jr. 349. Typical American cases upon the matter are *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, and *Snyder v. Murdock*, 51 Mo. 175. In California, however, this rule has not been followed, at least not in recent years. *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 330, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, cited by appellant, does not support his theory. While it was there stated that a vendee in possession of land may sometimes maintain an equitable title to it under his executory contract as against the vendor's legal title, the Chief Justice delivering the opinion of the court in that case said: 'There is a wide distinction between the proposition that the vendee in possession under an executory contract of sale may maintain the possession against the vendor as long as he performs his part of the agreement, and upon full compliance may enforce specific performance of the vendor's contract to convey the legal title, and the proposition here contended for, viz., that the vendor in such a contract, notwithstanding the destruction of the subject of the contract, in whole or in part, before the date stipulated for payment and conveyance, and his consequent inability to make a conveyance of that for which the vendee has bargained, may nevertheless compel the vendee to pay the whole contract price in exchange for a fraction of the property sold.' This language is followed by an analysis of the apparently conflicting decisions on

this subject, and the adoption of the rule announced in *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65, that the destruction by fire of buildings on property in the vendor's possession prior to the date fixed for the payment of the purchase price and the conveyance of the title, defeats the vendor's right to compel performance on the part of the intending purchaser under the contract. This rule has been followed ever since in this state. In *Potts Drug Co. v. Benedict*, 156 Cal. 322, 334, 104 Pac. 432, 25 L. R. A. (N. S.) 609, after a discussion of the rule that, where there has been a present, unconditional, fully consummated sale, the risk accompanies the title and any loss falls upon the purchaser, this language was used: 'Where there is a mere agreement to sell, and therefore title has not passed, the loss falls on the vendor for the same reason. In such a case the vendor is excused from the performance of his contract under the rule we have discussed by reason of the destruction of the thing, but he cannot retain money already paid on account of the proposed purchase, or recover moneys remaining unpaid.'—Citing *Wells v. Calnan*, and *Smith v. Phoenix Ins. Co.*, *supra*, and *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325."

In *Mackey v. Bowles*, 98 Ga. 730, 734, 25 S. E. 834, the court said: "The general rule seems to be that the destruction of a building after the making of a contract for the purchase of the land upon which it is situated, followed by possession on the part of the purchaser, will constitute no defence to an action for the purchase money." See also *Phinixy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207.

In *Davidson v. The Hawkeye Ins.*

carriage-horse at the end of the season and a contract to sell a race-horse at the end of the season. Equity would grant specific performance of the latter contract, and hence, while

Co., 71 Iowa, 532, 32 N. W. 514, 60 Am. Rep. 818, the court said: "We come, then, to the question as to whether, where one party binds himself unconditionally to pay a certain price for a piece of real estate, and takes possession under the contract, and the other party binds himself to convey the real estate upon the payments being made, and nothing remains to be done but for the party taking possession to make the payments, and for the other to make the deed, such contract constitutes a sale of the real estate, within the meaning of the policy. In answer to this question we have to say that we think it does. Lint was the real owner of the house that was burned. The loss was his loss."

"We can suppose a case where the owner of insured property makes a contract for the sale of it, but has not made a conveyance of the property, nor delivery of possession, but has retained control, and, while under his control and care, the property is destroyed by fire, and the seller cannot complete the contract by making such delivery as the contract contemplates; then the loss of the property would fall upon him, notwithstanding his contract, and for the reason that he is not able to carry it out; and it might well be said in such case that there was no sale within the meaning of the policy."

In *Merrill v. Beckwith*, 163 Mass. 503, 40 N. E. 855, (a case not involving risk of loss), the court said: "Where the relation between the parties is simply that of contract, namely, where one agrees to sell, and the other to buy, there is, correctly speaking, no trust created, but merely 'a contract of sale and purchase, of which a court of equity will, under certain circumstances, decree a specific performance.' But,

where the person agreeing to purchase has been allowed by the owner to enter upon the land and make improvements, there is a trust created in his favor."

In *Good v. Jarrard*, 93 S. Car. 229, 76 S. E. 698, 701, 43 L. R. A. (N. S.) 383, the court said: "In the present case the defendant was not in possession, did not have the right of possession, nor did he have the right to exercise a single right incident to ownership, but simply had the right to specific performance of the contract, upon condition that he complied with the requirements of the contract to be performed by him; while, on the other hand, the plaintiff, as between her and the defendant, had not only the actual possession, but likewise the right of possession, through her tenants, also the legal title, of which she could not be divested before the time mentioned in the contract.

"If the vendee had entered into possession, he unquestionably would have had to bear the loss, on the ground that it was his *duty* to protect the property. It would therefore be inequitable to throw the loss on him, when the property was destroyed during the time the vendor was in possession."

See also *Elmore v. Stephens Russell Co.*, 88 Oreg. 509, 171 Pa. 763. In New York until recently, it seemed probable that unless the vendee was in possession the risk would remain with the vendor. *Goldman v. Rosenberg*, 116 N. Y. 78, 22 N. E. 259; *Listman v. Hickey*, 65 Hun, 8, aff'd without opinion 143 N. Y. 630, 37 N. E. 827, and though the latest decision, *Sewell v. Underhill*, 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) 233, accepted in terms the English doctrine, the court adds (p. 172): "It will be perceived that its

the seller sends the animal over the country to race for his own benefit, he would, if the English rule were logically followed, do so at the risk of the buyer.<sup>86</sup> The carriage-horse, on the other hand, would remain at the risk of the seller till the end of the season. Surely the intention of the parties as to the time of transfer is the same in both cases. If it be suggested that in both cases the parties contemplate an immediate transfer of ownership, but that in the case of the carriage-horse equity cannot effectuate this intention, in the case of the race-horse it can, the answer is, that if the parties meant a present transfer and lease back during the season they would say so. It would be perfectly easy to express such an intention, and in the case of personalty the intention, if expressed, would be perfectly effectual without any formality. In truth, the argument for throwing the loss upon the purchaser in an executory contract of sale where possession is not given to the purchaser cannot be put more strongly than this. Equity while protecting the vendee far less than a mortgagor, and not treating him consistently as an owner subject to a charge for the price, nevertheless gives him, whatever his intention, assurance far greater than a court of law can give, that the specific subject of the sale will become his, and, if not at the

application is justified, not only by the theory upon which a court of equity proceeds, but by the facts, which establish that the contract, itself, had been performed and that the termination of the transaction, through a formal delivery of the instruments, was delayed as a matter of convenience, and not for any matter essential to the passing of the title. The title was accepted and the contract was consummated, prior to the fire, and what was deferred was the matter of placing the deed and the mortgage upon the records; a formality which it was agreed should operate as a delivery, on either side. There is the further feature of this case that the plaintiff, as vendee, went into the possession of the premises upon the execution of the contract, not as a tenant paying rent, but as their

equitable owner and entitled to their beneficial enjoyment."

<sup>86</sup> But a single case seems to have arisen in regard to risk under contracts for the sale of personal property of such a character that the contract would be specifically enforced, but no possible theory can be suggested for distinguishing such a contract in this connection from a contract to sell real estate. In *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 Pac. 432, 25 L. R. A. (N. S.) 609, the contract related to the sale of a leasehold. The court called attention to the fact that such an interest was regarded as personalty, and cited decisions regarding ordinary chattel property, not commenting on the fact that specific performance would be granted of such a contract as that under consideration.

time fixed by the contract, yet with damages sufficient to pay for the delay. In return for this assurance equity demands as a price in spite of his intention as to ownership that the vendee take the risks of accidental loss. The propriety of such a requirement depends on the answer to three questions: Is it in accordance with natural justice? Is it of practical advantage? Is it in conformity with the principles of law in analogous cases?

Views of natural justice vary so much that it is not very profitable to discuss the topic, but certainly in dealing with contracts no general rule can be more just than to aim to follow the intention of the parties, not only as to ownership but as to the incidents of ownership, and therefore to throw the loss on the purchaser if the parties intend a present transfer, on the vendor if they intend a future transfer. It is frequently suggested that, as the vendee gets the benefit of any chance improvement of the property, he should therefore suffer for a chance loss. There are several answers to this. In the first place, it proves too much, for it is as applicable to personal property as to real property. In the second place, there are practically no chance improvements analogous to chance destruction. In the third place, it is not certain that the vendee would get the benefit of an advantageous change in the property of such a character as to alter its nature, whether the subject of the sale were realty or personalty.<sup>97</sup>

<sup>97</sup> *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698, 702, 43 L. R. A. (N. S.) 383. "It is fallacious to argue that the loss should be borne by the vendee, on the ground that if the value of the land enhances he would receive the benefit thereof, and therefore he should sustain the loss when the land decreased in value. The argument is not sound, for the reason that in one case he gets the specific property for which he bargained, whereas in the other case he does not, on account of the failure of the vendor to carry out his contract, by disregarding, as we have shown, the double duty resting on him to protect the property from destruction by fire."

A few analogies suggest themselves. In the case of accession, where the nature of property has been changed by work done upon it, if there has been no wilful conversion, the owner loses his right to the property itself and has only a right to its money value in its original form. *Warren's Cases on Property*, vol. i, pp. 149-168. It is true that in such cases the increased value is due, not to chance, but to work of the defendant or some one from whom he claims. Nevertheless, the fact remains that the plaintiff had a right to a specific thing against one in possession of it, and lost that right because of the change in its nature and

**§ 942. Practical advantages of leaving risk with the vendor in possession.**

The practical advantages of leaving the risk with the vendor until transfer of possession are obvious. In the first place, it, is better in a doubtful case to let a loss lie where it falls, and to deny relief which requires litigation. As the vendor in possession will rarely have been paid in advance, to throw the risk on him makes no transfer of money or property necessary to adjust the rights of the parties. More important than this principle is the consideration that it is wiser to have the party in possession of property care for it at his peril, rather than at the peril of another. Of course, if the vendor in possession is negligent, and owing to his negligence the property is injured or destroyed, as matter of law the loss is his on any view, but there may be a great difference between not being so negligent as to be liable, and taking such care as would be induced by a great personal stake in the consequence. Then, too, negligence of a vendor in possession is a very difficult thing to prove, and the burden of proving it under the English rule is upon the vendee. A further consideration is the arrangement of the insurance. If the contract immediately throws the risk on the purchaser, it practically removes it from an

value, and it is this change which is the gist of the defence. On the other hand, it may be suggested that the young of animals which the owner had contracted to sell would presumably pass to the buyer, *partus sequitur ventrem*. *Santos v. Illidge*, 6 C. B. N. S. 841, 852; *Buckmaster v. Smith*, 22 Vt. 203; *Clark v. Hayward*, 51 Vt. 14. See further 16 Harv. L. Rev. 442. But in case of an agreement to sell a specific animal, or perhaps even a herd, at a future day, this is open to doubt. If the buyer was held entitled to the young, it would be because of a maxim in the Roman law, which, as it threw all risks on the buyer, necessarily gave him all profits. Moreover, the maxim related primarily to status rather than title. In 2 Kent's Com. 361, the learned author says: "If a person hires

for a limited period a flock of sheep or cattle of the owner, the increase of the flock during the term belongs to the usufructuary, who is regarded as temporary proprietor. This general principle of law was admitted in *Wood v. Ash*, Owen, 139, and recognized in *Putnam v. Wyley*, 8 Johns. 432, 5 Am. Dec. 346." One who agrees to sell at a future day, retaining in the meantime the *jus fruendi*, should have rights at least equal to a lessee. The case of dividends on shares of stock declared between the day of a contract to sell and the time for delivery or transfer may also be suggested. But dividends are not extraordinary accidental accessions. They are normal incidents, analogous to rents and profits of real estate. To some extent the same may be said of the increase of animals.



insurer of the property, for the vendor's insurable interest becomes only that of a mortgagee; so that, even if the insurer were forced to pay the vendor, he would be subrogated to the claim of the latter against the purchaser. This can hardly be thought a happy result, yet it is one likely to happen after any contract of sale. The vendor ordinarily has insurance at the time of the contract. The purchaser can have none, for till after that time he has no insurable interest. In fact, the purchaser relies on the vendor's insurance as a protection to the property. Even if, as is not infrequently provided, the vendor's insurance is by agreement to be assigned to the purchaser when the property is transferred, or to be held for his benefit in the meantime, either the vendor or the purchaser is not protected by the English law.<sup>98</sup>

#### § 943. English rule disregards analogies.

Finally, the doctrine of equity here criticised does not follow the analogy of cases indistinguishable on any sound principle.

In *Taylor v. Caldwell*,<sup>99</sup> the plaintiff had contracted with the defendant for the hire of a music hall for several specified days. The hall was burned before the time. The action was brought against the owner for damages. The trial court directed a verdict for the plaintiff, but a rule to enter a verdict for the defendant was made absolute. Blackburn, J., at the end of an elaborate opinion, said: "We think, therefore,

<sup>98</sup> "The common practice of inserting in conditions of sale that the purchaser shall have the benefit of any insurance effected by the vendor exposes the vendor to the danger of having to hand over the insurance money to the purchaser, and at the same time of being liable to the insurance company for an equivalent amount of his purchase money." Dart, *Vendors and Purchasers* (6th ed.), p. 197. The purchaser is not, without agreement, entitled to the insurance of the vendor. *Poole v. Adams*, 12 W. R. 683; *Rayner v. Preston*, 18 Ch. D. 1; *King v. Preston*, 11 L. Ann. 95; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, 465. So obnoxious

is this result that not a few American courts have been driven to violate a fundamental principle of insurance law, that the contract of insurance is one of personal indemnity, and have held the vendor a trustee of the insurance for the purchaser. *Skinner v. Houghton*, 92 Md. 68, 48 Atl. 85; *Manning v. North British, etc., Ins. Co.*, 123 Mo. App. 456, 99 S. W. 1095; *Gilbert v. Port*, 28 Ohio St. 276; *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425. See also *Hill v. Cumberland Valley Mutual Protection Co.*, 59 Pa. 474; *Parcell v. Grosser*, 109 Pa. 617, 1 Atl. 909.

<sup>99</sup> 3 B. & S. 826.

that the music hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and gardens and other things.”<sup>1</sup> It is true the agreement could not have been specifically enforced as a whole, because the defendant had agreed to provide certain things necessary for the proposed entertainments besides the hall; but the principle is stated as a general one, and the case has become a leading authority for similar cases. It has not been suggested that the principle does not apply to a contract that might have been specifically enforced owing to the nature of the property to which it related.

#### § 944. Risk in leased property.

It is instructive to consider in this connection the law in regard to leased property. By the early English law it seems clear that if rent was merely reserved and the lessee did not in terms covenant to pay it, even a partial destruction of leased property abated the rent or a part of it proportioned to the injury to the premises.<sup>2</sup> But where the lessee expressly

<sup>1</sup> Page 840.

<sup>2</sup> The leading case is *Richards le Taverner's case*, Dyer, 56 a: “A man makes a lease for years of land and of a stock of sheep, rendering certain rent, and all the sheep died: it was asked upon the indenture of *Richards le Taverner*, whether this rent might be apportioned? And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea gain upon part of the land leased, or part is burned with wildfire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder; otherwise is it if part be recovered or evicted by an elder title, then it is apportionable. And of this opinion were *Bromeley*, *Portman*, *Hales*, *Serjeants*, *Luke*, *Justice*, *Brooke* and several of the Temple. But

*Marvyne*, *Brown*, *Justices*, *Townshend*, *Griffith*, and *Foster* *e contra*; but all thought it was good equity and reason to apportion the rent. And afterwards this case was argued in the readings by *More* in the following Lent. And it seemed to him, and to *Brooke*, *Hadley*, *Fortescue* and *Brown*, *Justices*, that the rent should be apportioned because there is no default in the lessee.”

The statements in this case as to the effect of gain by the sea or burning by wildfire are cited in the leading case of *Paradine v. Jane*, Aleyn, 26, and frequently since, as authority, but it certainly does not appear what view the majority of the court held.

In *Rolle's Abridgment*, 236, it is said that if a man leases land and part is surrounded by fresh water, there will be no apportionment because the tenant shall have the fish and may be

covenanted to pay the rent (as is the almost universal custom) he must keep his covenant, though the leased property suffered injury by accident.<sup>3</sup> In the nineteenth century the land-

expected to regain the land. So if the land is burned over by wildfire, but if part of the land is surrounded by salt water, there will be an apportionment, because any one may fish in the water, and there is no reasonable possibility of regaining the land.

The substance of this is repeated in 6 Bacon's Abridgment (8th ed.), 49, 50, and in Chief Baron Gilbert's treatise on Rent, 186, 187 (1758). But see the case of *Paradine v. Jane*, Aleyn, 26, in the following note.

<sup>3</sup> *Paradine v. Jane*, Aleyn, 26, was an action of debt on a lease rendering rent. The defendant pleaded that Prince Rupert, an alien enemy with a hostile army, had expelled him and kept him out of possession. This was held insufficient. "And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; . . . but when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. *Dyer*, 33 a, 40 E. 3. 6. h. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations. This reservation then being a covenant in law, and whereupon

a covenant hath been maintained (as Rolle said), it is all one as if they had been an actual covenant."

After this it seems not to have been doubted in England that at least if the tenant had covenanted to pay rent he would not be excused at law. *Monk v. Cooper*, 2 Ld. Ray. 1477; s. c. 2 Strange, 763; *Shubrick v. Salmond*, 3 Burr. 1637, 1640; *Pindar v. Ainsley* (Lord Mansfield, 1763); 1 T. R. 312; *Belfour v. Weston*, 1 T. R. 310; *Baker v. Holtzaffell*, 4 Taunt. 45; *Ison v. Gorton*, 5 Bing. N. C. 501; *Arden v. Pullen*, 10 M. & W. 321. And the law in the United States is generally the same. *Osborn v. Nicholson*, 13 Wall. 654, 660, 20 L. Ed. 689; *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. Ed. 776, 7 Sup. Ct. Rep. 962; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Cook v. Anderson*, 85 Ala. 99, 4 So. 713; *Cowley v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430; *Robinson v. L'Engle*, 13 Fla. 482; *Coy v. Downie*, 14 Fla. 544; *White v. Molyneux*, 2 Ga. 124; *Lennard v. Boynton*, 11 Ga. 109; *Pope v. Garrard*, 39 Ga. 471; *Fleming v. King*, 100 Ga. 449, 28 S. E. 239; *Peck v. Ledwidge*, 25 Ill. 109; *Stubbings v. Evanston*, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839; *Smith v. McLean*, 22 Ill. App. 451, 454; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Skillen v. Waterworks Co.*, 49 Ind. 193, 198; *Harris v. Heackman*, 62 Ia. 411, 17 N. W. 592; *Redding v. Hall*, 1 Bibb, 536; *Helburn v. Moford*, 7 Bush, 169; *Lamott v. Sterett*, 1 Har. & J. 42; *Fowler v. Bott*, 6 Mass. 63; *Kramer v. Cook*, 7 Gray, 550, 553; *Roberts v. Lynn Ice Co.*, 187 Mass. 402, 73 N. E. 523; *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. 10; *Gibson v. Perry*, 29 Mo. 245; *Hallett v. Yllie*, 3 Johns. 44, 3 Am. Dec. 457; *Gates v. Green*, 4 Paige Ch. 355; *Patterson v.*

lord has been allowed to recover in an action for use and occupation, though the premises were entirely destroyed;<sup>4</sup> and now it is not likely that much weight would be given to the form of the lease, if it contained no proviso relieving the tenant. In one or two early cases it was intimated that the tenant might have relief in equity from his legal liability,<sup>5</sup> but these cases have been overruled.<sup>6</sup>

Ackerson, 1 Edw. Ch. 96; Howard v. Doolittle, 3 Duer, 464; Graves v. Berdan, 26 N. Y. 498, 500; Hilliard v. New York, etc., Gas Coal Co., 41 Oh. St. 662, 52 Am. Rep. 99; Felix v. Griffiths, 56 Ohio St. 39, 45 N. E. 1092; Harrington v. Watson, 11 Ore. 143, 3 Pac. 173, 50 Am. Rep. 465; Moline v. Portland Brewing Co., 73 Or. 532, 144 Pac. 572; French v. Richards, 6 Phila. 547; Diamond v. Harris, 33 Tex. 634; Arbenz v. Exley, 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; Cross v. Button, 4 Wis. 468. But the law is otherwise in Nebraska, Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554; and South Carolina, Ripley v. Wightman, 4 McC. 447; Coogan v. Parker, 2 S. C. 255, 16 Am. Rep. 659; and perhaps in Kansas, Whitaker v. Hawley, 25 Kan. 674, 37 Am. Rep. 277. See also Taylor v. Hart, 73 Miss. 22, 18 So. 546, 30 L. R. A. 716. It is immaterial that the lessor had insurance on the property, and has collected or can collect the money and refuses or fails to rebuild. Sheets v. Selden, 7 Wall. 416, 424, 19 Leeds v. Cheetham, 1 Sim. 146; Lofft v. Dennis, 1 E. & E. 474; L. Ed. 166, 169; Skillen v. Water Works Co., 49 Ind. 193, 198; Carlson v. Presbyterian Board, 67 Minn. 436, 70 N. W. 3; Platt v. Richmond, etc., R., 108 N. Y. 358, 15 N. E. 393; Bussman v. Ganster,

72 Pa. 285; Hoy v. Holt, 91 Pa. 88, 90, 36 Am. Rep. 659. And if the lessee builds in fulfilment of a covenant to repair he has no right to the insurance. Ely v. Ely, 80 Ill. 532. See also *infra*, § 1964.

<sup>4</sup> Izon v. Gorton, 5 Bing. N. C. 501. And see Packer v. Gibbins, 1 Q. B. 421.

<sup>5</sup> In Harrison v. Lord North, Ch. Cas. 83, the plaintiff sought to be relieved from payment of rent for a house which was taken from his possession during the civil war for use as a hospital. For the plaintiff it was argued that this was not like an ordinary case of ouster by a third person, for there was no remedy over. For the defendant it was said: "The plaintiff hath a pitiful case, but not such as this court can relieve, for the law and equity is all one in this case, . . . and cited the case of Carter and Cummins about two years since in this court, where the plaintiff being a tenant of a wharf, which by an extraordinary flood was carried all away, brought his bill to be relieved against paying of his rent, but all the relief he had was only against the penalty of the bond, which was broken for non-payment of rent; and the defendant ordered only to bring debt for his rent. . . . The Lord Chancellor (Sir Orlando Bridgeman) took time to advise; but declared if he could he would relieve the tenant."

In Brown v. Quilter, Ambler, 619,

<sup>6</sup> Hare v. Groves, 3 Anstr. 687; Holtzapffel v. Baker, 18 Ves. 115; Leeds v. Cheetham, 1 Sim. 146, 150. See to the same effect Redding v.

Hall, 1 Bibb, 536; Harrison v. Murrell, 5 T. B. Mon. 359; Lamott v. Sterett, 1 Har. & J. 42; Hicks v. Parham, 3 Hayw. (Tenn.) 224, 9 Am. Dec. 745.

### § 945. Distinction between total and partial destruction of leased property.

In England no distinction is made between partial destruction of the leased premises as where leased land remains after the calamity, and total destruction as where the lease is of a single room or story of a building without land, and the entire building is destroyed. In the latter case, as well as the former, the tenant must pay rent.<sup>7</sup> In the United States, however, the tenant is relieved in case of total destruction of the leased premises.<sup>8</sup> It is difficult to see how total destruction of the property leased should have any effect upon a covenant to pay rent if partial destruction has none. The only ground for relieving in the former case is because there has been a failure of consideration. If a lease were dealt with like an ordinary bilateral contract this would be true;<sup>9</sup> but it should equally follow that the partial failure of consideration in the latter case should serve as a partial defense.

Lord Chancellor Northington expressed surprise that it was considered so clear that the landlord could recover rent at law, and said that "when an action is brought after the house is burnt down, there is a good ground of equity for an injunction till the house is rebuilt." The bill was in fact dismissed because the landlord in his answer offered to cancel the lease, and the tenant declined to accept a cancellation. The same Chancellor is said to have proceeded upon the same theory in *Camden v. Morton*, 2 Eden, 219; and Lord Apsley adopted it in *Steele v. Wright*, cited in 1 T. R. 708. See also *Weigall v. Waters*, 6 T. R. 488, 489, per Lord Kenyon.

<sup>7</sup> *Ison v. Gorton*, 5 Bing. N. C. 501.

<sup>8</sup> *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Ainsworth v. Ritt*, 38 Cal. 89; *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 443; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125, 128; *Graves v. Berdan*, 29 Barb. 100, 26 N. Y. 498; *Hilliard v.*

*New York &c. Co.*, 41 Ohio St. 662, 666, 52 Am. Rep. 99; *Harrington v. Watson*, 11 Ore. 143, 145, 3 Pac. 173, 50 Am. Rep. 465; *Hahn v. Baker Lodge*, 21 Ore. 30, 34, 27 Pac. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723; *Conn. Mut. Life Ins. Co. v. United States*, 21 Court of Claims, 195, 201. But in Kentucky the English law was followed, *Helburn v. Mofford*, 7 Bush, 169, until changed by statute. See *Sun Ins. Office v. Varble*, 103 Ky. 758, 46 S. W. 486, 41 L. R. A. 792. See also *Humiston v. Wheeler*, 175 Ill. 514, 51 N. E. 893; *Ainsworth v. Mount Moriah Lodge*, 172 Mass. 257, 52 N. E. 81; *Uhler v. Cowen*, 199 Pa. 316, 49 Atl. 77. In *Porter v. Tull*, 6 Wash. 408, 33 Pac. 965, 36 Am. St. Rep. 172, the tenant whose rent was payable monthly in advance was allowed to recover because of failure of consideration a portion of a month's rent after the total destruction of the leased premises during the month.

<sup>9</sup> On the independency of covenants in leases, see *supra*, § 890.

In one case it was intimated that a calamity occurring before the tenant was entitled to possession under the lease, although not causing the total destruction of the property, entitled the tenant to rescind the lease,<sup>10</sup> but this distinction can hardly be supported. Though it is not clearly admitted in the cases, a contract to make a lease should stand on the same footing as a contract to convey a freehold estate.<sup>11</sup>

### § 946. Comparison of a lease with a contract to sell.

The distinction, however, between an actual lease and a contract either to make a lease or to convey a freehold, is obvious. In the first case the lessee acquires by the deed an actual legal estate. If that is what he bargained for, it is clear that immediately after the conveyance he has received the consideration for the rent. No further performance is due from the lessor. This would be abundantly clear if rent were customarily paid in a lump sum on execution of the lease, instead of in instalments at stated periods. It is, therefore, not a little odd to find it universally admitted that it is a harsh rule of strict law which requires a tenant to

<sup>10</sup> *Wood v. Hubbell*, 10 N. Y. 479, 487. Compare *Edwards v. McLean*, 122 N. Y. 302, 25 N. E. 483.

<sup>11</sup> In *Bacon v. Simpson*, 3 M. & W. 78, it was held that a plaintiff who contracted to assign a lease of a furnished house could not recover damages from one who contracted to buy it, and refused to perform on account of partial destruction because he himself was not ready to perform. It is true the action was at law, and the lease included personal as well as real property, but the decision is not rested on these grounds. In *Counter v. Macpherson*, 5 Moo. P. C. 83, the landlord agreed to put the premises in repair and put up an additional building. Before this work was completed, the premises were partially burned. The landlord was held not entitled to specific performance because the work was not completed, and this seems a sufficient reason. *Huguenin v. Courtenay*, 21

S. C. 403, 53 Am. Rep. 688, was a suit by the seller for specific performance of an agreement for the sale of a lot of land on the shore of an island, the fee of which was nominally in the State, the occupants having legally an estate from year to year and paying as rent one penny annually, but having for practical purposes the absolute ownership. Before the day appointed for transfer of title the sea washed away a portion of the lot. The court, though expressing assent to the doctrine of *Paine v. Meller*, 6 Ves. 349, gave judgment for the defendant, and distinguished the case of a sale of a leasehold estate. On appeal the decision was affirmed. The decision was clearly right on any view, because the agreement was subject to a condition which so far as appeared had not been performed, and the appellate court made this a secondary ground of decision.

pay rent when the leased premises are destroyed,—a rule from which it was decided only after some conflict that equity would not relieve,—to find that in Kentucky,<sup>12</sup> and New York,<sup>13</sup> by statute, and in South Carolina by judicial decisions,<sup>14</sup> a tenant, the actual owner of a legal estate, is relieved from liability by substantial destruction of the premises, and that almost universally in the United States total destruction of the leased premises terminates the tenant's liability, and yet to find frequently, in these same jurisdictions, that one who has agreed to buy real estate in the future, though perhaps discharged at law by accidental injury to the property, is regarded by a court of equity as already having such an ownership in the property that he must pay for it. The facts and opinion of the court in *Huguenin v. Courtenay*<sup>15</sup> are suggestive in this connection. The court says, in substance, if a tenant is relieved by destruction of the leased premises, he surely cannot be liable if the premises are destroyed after an agreement to lease in the future; and a lease is a lease though it be for 999 years and whatever the rent; but if, instead of a lease substantially equivalent to a fee, the subject-matter of the agreement were in fact a fee, the seller would be entitled to the price.

Doubtless the reason why a tenant is relieved to the extent that he is in case of accidental injury or destruction to the leased premises, is because the parties to a lease are apt to

<sup>12</sup> Ky. Stat., Sec. 2297; *Sun Ins. Office v. Varble*, 103 Ky. 758, 46 S. W. 486, 41 L. R. A. 792.

<sup>13</sup> Chap. 345 of Laws of 1860 provides "the lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed or be so injured by the elements or any other cause as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessee or occupants may thereupon quit and surrender possession of the leasehold

premises and of the land so leased or occupied." For the construction of this statute, see *Suydam v. Jackson*, 54 N. Y. 450; *Butler v. Kidder*, 87 N. Y. 98; *Edwards v. McLean*, 122 N. Y. 302, 25 N. E. 483; *New York, etc., Co. v. Motley*, 143 N. Y. 156, 38 N. E. 103. But where rent was payable on the 1st of each month in advance, and the premises were destroyed by fire on January 2, 1914, the tenant was liable for the January rent. *Pikeway Realty Corp. v. Cohen*, 150 N. Y. S. 23.

<sup>14</sup> *Ripley v. Wightman*, 4 McC. 447; *Coogan v. Parker*, 2 S. C. 255, 16 Am. Rep. 659.

<sup>15</sup> 21 S. C. 403, 53 Am. Rep. 688.

regard it rather as a contract than as a conveyance. "A lease is in one sense a running rather than a completed contract. It is an agreement for a continuous interchange of values between landlord and tenant, rather than a completed contract."<sup>16</sup> If this were granted it would only make a lease analogous to a contract for the sale of real estate, as distinguished from an actual conveyance, and if the tenant is relieved in the former case, the purchaser should be in the latter. Yet the same court which exhibited such tenderness for the lessee as thus to construe a lease has twice decided that a purchaser is liable to pay to the vendor the contract price for land taken by eminent domain before transfer of the property, becoming entitled thereby to damages for the taking.<sup>17</sup> In the later of these two decisions the assessed damages were exactly one-third of the contract price.<sup>18</sup>

<sup>16</sup> *Whitaker v. Hawley*, 25 Kan. 674, 687, 37 Am. Rep. 277, per Brewer, J.

<sup>17</sup> *Kuhn v. Freeman*, 15 Kan. 423; *Gammon v. Blaisdell*, 45 Kan. 221, 25 Pac. 580. When *Kuhn v. Freeman* was decided, the eminent judge who wrote the opinion of the court in *Whitaker v. Hawley*, *supra*, was a member of the court. A contrary decision is *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271.

<sup>18</sup> A lease of personal property might be thought to approach more closely to a continuing contract, but such leases are rare. In the Southern States leases of slaves were formerly not unusual, and opinion was divided as to whether the loss in case of death fell upon the lessor or lessee. It was held that the lessee was excused from paying the stipulated hire in *Collins v. Woodruff*, 9 Ark. 463; *Dudgeon v. Teass*, 9 Mo. 857; *Bacot v. Parnell*, 2 Bailey, 424; *Muldrow v. Wilmington &c. R. R.*, 13 Rich. 69; *Townsend v. Hill*, 18 Tex. 422; *George v. Elliott*, 2 Hen. & Mun. 5. So emancipation by law was held to relieve the hirer from any obligation to pay rent thereafter. *Wilkes v. Hughes*, 37 Ga. 361; *Mundy v. Robin-*

*son*, 4 Bush, 342. On the other hand, by other courts it was held that the hirer was not relieved in case of the slave's death: *Ricks's Adm. v. Dillahunty*, 8 Port. 134; *Lennard v. Boynton*, 11 Ga. 109; *Harrison v. Murrell*, 5 T. B. Mon. 359 [see also *Redding v. Hall*, 1 Bibb, 536; *Griswold v. Taylor's Adm.*, 1 Met. (Ky.) 228; *Hughes v. Todd*, 2 Duv. 188]; *Harmon v. Fleming*, 25 Miss. 135; *Hicks v. Parham*, 3 Hayw. (Tenn.) 224, 9 Am. Dec. 745; *Wharton v. Thompson*, 9 Yerg. 45; *Dickinson v. Cruise*, 1 Head, 258; or emancipation, *Coward v. Thompson*, 4 Coldw. 442. In all these cases it is to be noticed there was not simply deterioration, but absolute destruction of the leased property. But slaves were an unusual kind of chattel, and it was held that the lease of a slave gave the lessee a property right, an estate in the slave so to speak, for the term of the lease: *Smoot v. Fitzhugh*, 9 Port. 72; *Harmon v. Fleming*, 25 Miss. 135; *McGee v. Currie*, 4 Tex. 217, 222. Specific performance was also granted of contracts relating to them. *Murphy v. Clark*, 9 Miss. 221; *Williams v. Howard*, 3 Murph. 74; *Horry v. Glover*, 2 Hill's



### § 947. Risk of loss in the Roman Law was on the buyer.

In the Institutes of Justinian it is laid down:<sup>19</sup> "As soon as the contract of purchase and sale is made, which is, if the transaction is without writing, when the price is agreed, the risk of the thing sold immediately falls upon the buyer, although it has not yet been delivered to him. Thus, if the slave dies or is injured in any part of his body, or the whole or any part of the house is burned, or the whole or any part of the land is carried away by flood or is diminished or injured by an inundation or by a tempest which overthrows the trees, it is the loss of the buyer, who must pay the price though he does not receive the thing," and though, it may be added, delivery was necessary according to the Roman law for the transfer of title, as it is generally in the modern Civil law.

This view seems to have been little questioned by the Roman writers, though Africanus says that if the treasury seizes upon an estate which the owner has agreed to sell but has not delivered, the owner, though not liable for damages,

Ch. 515; *Henderson v. Vaulx*, 10 Yerg. 30, 37. Compare *Randolph v. Randolph*, 6 Rand. 194.

A lease of a furnished house includes personal as well as real property. In *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, it was held that the absolute destruction of the personal property relieved the tenant from the payment of the rent reserved as a lump sum for both personalty and realty, but it was held otherwise in *Bussman v. Ganster*, 72 Pa. 285. See also *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454. A contract to assign the residue of a term in a furnished house was held excused by the destruction of the premises. *Bacon v. Simpson*, 3 M. & W. 78.

In the Civil Law a hiring gives the hirer merely a contractual right, and wherever that system of law prevails, the hirer is excused not simply by the destruction, but also by the injury of the leased property, to an extent pro-

portional to the injury. *Hunter's Roman Law* (2d ed.), 506, 508; Pothier, *Contrat de Louage*, sections 133-143; Code Civil Art. 1722, 1 Bell, Comm. (9th ed.), § 1208; Windscheid, *Lehrb. des Pandekt.*, § 400; Code of Louisiana, Art. 2867. The law in Newfoundland seems to be the same, by custom. *Broom v. Preston*, Sel. Cas. S. C. Newf. 491 (referred to in *Gates v. Green*, 4 Paige, Ch. 355). A lease in the Civil Law is, therefore, analogous to a contract of sale. The civilians who support the doctrine of the Roman law as to risk in contracts of sale, have always been troubled to reconcile the law as to leases. Hofmann seems clearly right in saying that reconciliation is impossible. *Periculum beim Kaufe*, 18-21.

<sup>19</sup> Lib. iii. Tit. xiii. 3. The rule seems to be of great antiquity, and Dr. Franz Hofmann endeavors to show that it is of Greek origin. *Periculum beim Kauf* (Vienna, 1870), pp. 169-188.

must restore the price.<sup>20</sup> This text led Cujacius to maintain that by the Roman Law the risk remained with the seller until delivery, but the text was reconciled by other writers as depending upon the particular facts of the case. Thus Voet says:<sup>21</sup>

"There the question was as to a farm, which, though captured from the enemy, for the time had been left to its former owner, but afterwards had been confiscated owing to urgent necessity or public utility, as it appears may be done. Since, therefore, the seller could not prevent this confiscation, it would have been unjust for the buyer to be bound, because the seller ought to have warned an ignorant buyer that the land was in a position where it might be confiscated at the will of the Prince; and if he did not do this, he is held to restitution of the price, as if on account of some latent defect of the thing."

**§ 948. Until there was *emptio perfecta* the risk was on the seller.**

In order to transfer the risk to the buyer, it was necessary that there should be *emptio perfecta*. The obligation of the parties to go forward might be complete, yet the sale might not be perfect. To make a perfect sale it was necessary for the bargain to be unconditional, to relate to specific goods, and for the price to be certain.<sup>22</sup> If a sale was subject to a suspensive (or precedent) condition, and the subject-matter was destroyed before fulfilment of the condition, the loss fell on the seller, since the obligation could never become complete; but if the injury to the subject-matter did not destroy it or change its identity, the loss fell on the buyer, if the condition was fulfilled, for the fulfilment was held to relate back to the time when the agreement was concluded. If a resolatory (subsequent) condition was attached to a bargain, the risk of destruction nevertheless passed immediately, but the

<sup>20</sup> Dig. Lib. 19 (locati conducti), 2, 33, quoted by Pothier, *Contrat de Vente*, § 308.

<sup>21</sup> *Compendium Juris*, Lib. 18 *Pandectarum*, Tit. vi. *De Periculo*, 1.

<sup>22</sup> "Si id quod venierit appareat quid

quale quantum sit, sit et pretium, et pure venit, perfecta est emptio." Dig. 18, 6, 8. Pothier, *Contrat de Vente*, § 309; Moyle, *Contract of Sale in the Civil Law*, 77.

risk of injury not amounting to destruction did not necessarily pass, for such injury would not prevent the rescission of the contract by the happening of the condition; and if the condition were dependent on the will of the buyer, he would naturally exercise his right.<sup>23</sup> A sale was also imperfect if the amount of the price was not exactly determined, or if the goods were not exactly defined. Thus, in sales by count, weight, or measure, the risk did not pass to the buyer till the goods were counted, weighed, or measured. This was so where a definite quantity or proportion of a specified mass was sold at a price to be determined by calculation when the goods should be counted, weighed, or measured;<sup>24</sup> and it has even been held that though the whole of such a mass were purchased, the transaction should be regarded in the same way,<sup>25</sup> but the contrary view certainly seems more sensible.<sup>26</sup> So if a fixed proportion of a specified mass were purchased, that should also be regarded as a sale *per aversionem*,—that is, a sale of a specified thing for a lump sum.<sup>27</sup>

#### § 949. Effect of negligence or default.

After the risk had passed to the buyer, the seller before delivery was liable for wilful default (*dolus*), and also negligence (*culpa*), whether gross or slight, unless the buyer were

<sup>23</sup> Moyle, Contract of Sale, 78-82; Pothier, Contrat de Vente, §§ 311-313; Voet, Compendium Juris, Lib. 18 Pandectarum, Tit. vi. 4. Compare Code Civil, § 1182.

<sup>24</sup> Moyle, Contract of Sale, 84, 85; Pothier, Contrat de Vente, § 309; Code Civil, § 1585.

<sup>25</sup> Moyle, Contract of Sale, 84, citing Demante, Cours Analytique de Code Civil, vii. p. 10; Pothier, Contrat de Vente, § 309. So in *Peterkin v. Martin*, 30 La. An. 894, 896, it is laid down: "There can be no sale in lump except for a lumping price." This is because by the civil law to make a perfect sale it is necessary that the price as well as the goods should be ascertained.

<sup>26</sup> Aubry & Rau, Cours de Droit Civil Français, 4th ed., iv., § 349, p.

341, citing Duvergier, i. 90, Dijon, 13 décembre, 1867, Sir., 68, 2, 311. As delivery is no longer necessary in France for the transfer of title, the title in the case supposed would in that country pass to the buyer; and if the risk remains with the seller, the curious case is presented of a seller retaining the risk after he has parted with title and perhaps possession. But such, it seems, is the law of Louisiana. It was so held in *Shuff v. Morgan*, 9 Martin, 592. In *Larue v. Rugely*, 10 La. An. 242, however, the court expressly leave open the question whether transfer of possession as well as title transfers the risk. See also *Goodwyn v. Pritchard*, 10 La. An. 249; *Peterkin v. Martin*, 30 La. An. 894.

<sup>27</sup> Moyle, Contract of Sale, 86.

in default (*mora*) in receiving delivery, in which case the seller was thereafter only responsible for wilful default.<sup>28</sup> If the seller were in default in making delivery, the property was thereafter at his risk.<sup>29</sup>

**§ 950. Reasoning of the older writers inconsistent with dependency in bilateral contracts.**

The reason uniformly given by the older writers in support of the doctrine of the Roman law, that the risk passes as soon as there is *emptio perfecta*, though the title has not passed, is thus expressed by Noodt:<sup>30</sup> "The buyer, as soon as the bargain is made, is a creditor of the thing sold. The seller, on the other hand, is a debtor. By the natural destruction of it, the debtor of a specific thing is freed from his debt."<sup>31</sup> This argument is, of course, sufficiently conclusive to prove that the seller is freed from liability, but it does not prove that the buyer is liable. That it is assumed to have this effect would naturally induce the belief that the Roman law did not have the principle of the English law, that if one party to a contract of mutual obligation is excused from performing by the impossibility of performance, the other party is likewise excused; or, as it may be put more tersely, impossibility excuses breach of a promise, but not breach of a condition, whether express or implied. Certainly writers on the civil law prior to the nineteenth century did not recognize the doctrine of implied dependency of mutual promises<sup>32</sup> or the insufficiency of their arguments as to risk would have been

<sup>28</sup> Voet, *Compendium Juris*, Lib. 18 *Pandectarum*, Tit. vi. 2.

<sup>29</sup> *Ibid.* Tit. vi. 3. See also Moyle, p. 87.

<sup>30</sup> Lib. xviii. Tit. vi.

<sup>31</sup> See also Voet, Lib. xviii. Tit. vi.; Sanders' *Justinian*, Hammond's ed., p. 446; Pothier, *Contrat de Vente*, § 308; C. G. Wächter, *Archiv. f. civil Pr.*, xv. 97 (1832). See also Moyle, p. 90.

<sup>32</sup> Thus Pothier, *Contrat de Vente*, § 308, states that though Barbeyrac and Puffendorf object "that the buyer's

obligation to pay the price is dependent upon the condition that the thing sold shall be delivered to him, I deny the proposition. The buyer is under an obligation to pay the price, not upon condition that the seller shall give him the thing, but rather upon the condition that the seller is on his part obliged to cause him to have the thing; it is sufficient, therefore, if the seller is legally subject to such obligation, and does not fail in its performance, in order that the obligation of the buyer may have a cause and subsist."

apparent. Nevertheless, there is a text in the Digest which covers the case.<sup>33</sup> At the present day the general rule in the civil law is almost universally recognized to be the same as in the English law.<sup>34</sup>

### § 951. Reasons advanced by modern writers.

It only remained, therefore, for the civilians to find another and better reason, or to change their rule. The subject has been a popular one with legal writers on the Continent of Europe, especially in Germany; and many and various have been the reasons, theoretical and practical, suggested. It is not necessary to examine all of them,<sup>35</sup> but three lines of reasoning seem entitled to consideration,—

I. The buyer is entitled to the *commodum rei*, and the *periculum rei* should always go to the same party. But there is no *commodum rei* that can be classed with the risk of destruction. Changes in the pecuniary value of the subject-matter of a bargain have of course no effect upon it. But if a case can be supposed of an accidental change in the subject-matter of a contract of sale, so that it is no longer substan-

<sup>33</sup> Dig. 19, 1, 50. "Bona fides non patitur, ut, cum emptor alicujus legis beneficio pecuniam rei venditæ debere desisset antequam res ei tradatur, venditor tradere compelletur et re sua careret."

<sup>34</sup> Windscheid, Lehrbuch des Pandektenrechts, § 321, 3; Hofmann, Periculum beim Kauf, pp. 8, 9. Both writers cite a number of other authorities. Some authorities, however, still maintain that in order to make out the *exceptio non adimpleti contractus* it is necessary that the plaintiff shall be in default in the performance of his obligation,—not simply have failed to perform it under circumstances making his failure excusable. A few writers hold that a bilateral contract consists of two wholly independent promises. See citations above.

<sup>35</sup> As an illustration of the fertility of the Teutonic intellect when in

search of a reason, the suggestion of a writer, not inaptly named Goose, may be mentioned. He says, "even if the buyer were not required to pay the price, he would be injured by the calamity, for the thing purchased was of more value to him than the money; the seller also would not be freed from loss, for the money was worth more to him than the thing. If the buyer is required to pay the price, he only suffers loss. A contrary view would be very like the justice of St. Crispin, only worse. It injures both, and indemnifies neither." Jahrb. f. Dogm., ix., § 203. So able a writer as Ihering puts forward as the reason of the rule the theory that failure to make an immediate delivery and transfer of title is generally due to the wrongful delay of the buyer, and that to prevent controversy, the law assumes this to be always the case. Jahrb. f. Dogm. iii. 463-465.

tially the same thing, it is not certain that the seller would be bound to perform.<sup>26</sup> As this argument rests on an assumption which, though it cannot be disproved, cannot be proved, it does not advance the discussion.

2. Immediately after the contract, the seller can no longer deal with the subject-matter of it freely for his own benefit. His hands are tied. If an accident befalls the thing, and the loss is thrown upon the seller, he has incurred a loss because of holding the thing for the seller's benefit instead of disposing of it otherwise. But it must be observed that every bilateral contract, if the parties respect their promises, involves the consequence that neither party is as free as he was before; and in a contract of sale the loss of freedom on the part of the buyer is just as real, and just as much for the benefit of the other party, as is the seller's sacrifice. True, the seller's obligation relates to a specific thing; but, generally speaking, the only result of a failure by the seller to have the thing ready for delivery is liability in damages to the buyer, and the latter suffers the same consequence if he has not the price ready at the appointed time.

3. Windscheid's explanation<sup>27</sup> is that the contract of sale itself is from its very nature in effect an alienation of the thing sold. A contract of sale, he says, is an immediate declaration of surrender of the owner's rights in a thing (*Entäußerungserklärung*). "It has for its content that the thing sold is given; it is not that an obligation is undertaken to give it. An obligation on the part of the seller first arises when the actual state of affairs does not correspond to the declaration." It is another and somewhat less carefully analyzed way of saying the same thing, to say that when a contract of sale is entered into, an immediate completion is ordinarily expected and a delay is accidental. This line of argument in a sense includes also the reason given in the preceding paragraph. It may be doubted whether the parties to a contract to sell at a future day, look at the matter in this way; and it is not

<sup>26</sup> "It is said, 'the buyer is not unfairly treated, the *commodum* also belongs to him.' This is only saying that the *commodum rei* and the *periculum rei* must always fall to the same

party, but to which one?" Hofmann, p. 33.

<sup>27</sup> Lehrbuch, § 321, 3. A similar theory is expressed in Austin on Jurisprudence, 4th ed., p. 1001.

unlikely that Windscheid was led to adopt his view in order to furnish an explanation of the rule of the Roman law as to risk.

### § 952. Subsidiary questions.

If the risk remain with the seller until delivery or transfer of title, few subsidiary questions can arise; but if the general doctrine of the Roman law is followed, endless arguments are still open as to the correctness of the conclusions of that law in the case of conditional contracts.<sup>38</sup> A favorite matter of dispute also is the case of successive agreements by a seller with two persons to sell each the same thing. Every possible view has its champions, that the seller can recover the price from the first buyer only, from the second buyer only, from neither buyer because the seller can prove against neither that the thing was being held for him, that the decision depends on whether the second sale was made in good faith,<sup>39</sup> and finally Ihering maintains that whether the seller has acted in good faith or not, he may recover the price from either buyer he wishes.<sup>40</sup> This seems almost a *reductio ad absurdum* of the Roman theory.

No difference was made by the Roman law, or seems generally to be made by the modern Civil Law, on this subject, between movable and immovable property.

### § 953. The modern continental law leaves the risk with the seller until transfer of title or possession.

The reasons brought forward in support of the doctrine of the Roman law seem generally to have been thought inadequate by European legislators. In France the risk of loss now remains with the seller until the title passes;<sup>41</sup> in

<sup>38</sup> See *supra*, § 949.

<sup>39</sup> This case is not so improbable as appears at first sight. Thus an owner of property might contract to sell it after an authorized agent had made a similar contract.

<sup>40</sup> For the learning on this subject see Hofmann, pp. 137-153; Oesterlen, *Mehrfacher Verkauf* (Stuttgart, 1883),

Martinius, *Der Mehrfache Kauf* (Halle, 1873); Windscheid, *Lehrbuch*, § 390, clause 3; Ihering, *Jahrb. f. Dogm.* iii. 474.

<sup>41</sup> This change in the French law has been effected by putting back the time of the transfer of title to the time of the contract. Code Civ., art. 711, "La propriété des biens s'acquiert . . . par

Germany<sup>42</sup> and Austria<sup>43</sup> until delivery, which is also generally the moment when the title passes.<sup>44</sup> In the new Swiss code of obligations, though it is provided<sup>45</sup> that profits and risk generally pass to the buyer from the conclusion of the contract, it is also provided<sup>46</sup> that when a time has been fixed by contract for the transfer of possession of immovable property, the profits and risk are not presumed to pass to the buyer until that time has arrived.

### § 954. The buyer's right is purely personal.

By the Roman law a contract of sale before actual transfer of title, gave the purchaser a purely personal right against the seller; and if the contract was not performed, the buyer could only be compelled to pay damages. He could not get the thing itself.<sup>47</sup> If the seller, in violation of his contract, sold and delivered the thing to a third person, the latter

*l'effet des obligations.*" Art. 1138. "L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite." The French law is, therefore, now quite similar to the English law governing chattels; and the rule of French law that *en fait de meubles la possession vaut titre* bears some analogy to the rule generally prevailing in this country, that as regards an innocent third person, delivery is necessary, though unnecessary so far as the buyer and seller are concerned.

<sup>42</sup> The Civil Code provides, Art. 446. With the transfer of the thing sold the risk of accidental destruction and of accidental depreciation passes to the buyer. From the time of the transfer, the profits belong to the buyer, who also bears the burdens of the thing. If the buyer of a piece of land, before the delivery, is entered as owner in the Land Register, these results take effect upon the entry. Prior to the enactment of the Code the rule was the same

in Prussia, Gesetsbuch, § 100, I Teil, XI. Titel; Hofmann, p. 46. In commenting on the provision of the Civil Code, Titze, *Unmöglichkeit der Leistung* (Leipzig, 1900) says (p. 262): "In the sale of immovables the buyer must bear the risk from the time when the seller has transferred to him either possession or title to the thing sold."

<sup>43</sup> Gesetsbuch, §§ 1048-1050, 1064; Hofmann, p. 52. If a time for delivery is fixed by the contract. After that time the risk is transferred to the buyer.

<sup>44</sup> The case may arise, certainly in the case of real estate, where delivery is made but title has not passed, because a necessary formality has not been complied with. In such a case it is held, in Prussia at least, that the risk is upon the buyer. *Entscheidungen des Reichsgericht's, Civilsachen*, vol. 7, p. 241.

<sup>45</sup> Art. 185.

<sup>46</sup> Art. 220.

<sup>47</sup> This is expressed by the maxim *Nemo potest præcise cogi ad faciendum*. Pothier, *Obligations*, Part i. ch. ii. art. 2, § 2; Fry, *Spec. Perf.*, § 6; Holand, *Jurisprudence*, 6th ed. pp. 283, 284.



acquired title, and even though he knew of the prior contract, was apparently under no liability, and this is still the continental law to a large degree.<sup>48</sup> In the modern Civil law

\* It is true that Pothier says of the original purchaser in such a case (*Contrat de Vente*, § 320), "He cannot reclaim the thing against the second buyer, who purchases it in good faith, *in scius prioris venditionis*." Pothier, however, does not make the positive statement that the thing might be reclaimed from one who purchased the thing in bad faith. On the other hand, in Aubry & Rau, *Cours de Droit Civil Français*, 4th ed., ii. p. 55, in discussing the doctrine of modern French law, that a second purchaser, in good faith, to whom the thing is delivered, acquires a superior right to the first purchaser, to whom no delivery was made, though the latter has title, the authors say: "D'ailleurs il ne faut pas perdre de vue que la préférence n'est accordée au second acquéreur qu'autant qu'il est de bonne foi; et cette condition ne se comprendrait pas en principe, si la propriété des meubles corporels ne vait se transférer à l'égard des tiers que par la tradition." That is, the fact that the original purchaser has a remedy against a second purchaser with notice necessarily implies that the original purchaser had title as distinguished from a contractual right. See also *Knox v. Payne*, 13 La. An. 361.

In Germany, according to the old common law, the purchaser of real estate was protected more fully than by the English law. Stobbe (*Handbuch des Deutschen Privatrecht*, § 175) says: "If the owner of an estate engages to transfer it to another, and afterwards conveys it to a third person, according to the law of the middle ages, the first appears to have been preferred to the second purchaser, and to have had an action against him for surrender of the estate, in case he had not acquired through lapse of time lawful seisin.

To a certain extent this principle belongs to later law also, but with this limitation that the second purchaser is only liable in case of bad faith." Under the Civil Code a contract is not recognized as having any binding effect on the property, either real or personal, even as against the purchaser with notice except as a result of land registration. A contract, however, is not recognized as an instrument to be recorded.

In Oesterlen, *Mehrfacher Verkauf* (Stuttgart, 1883), § 2, p. 29, it is said: "The first buyer has no remedy against the second who gets delivery, even though the latter acted fraudulently, *i. e.*, with notice. Nevertheless in the time of the Glossators the doctrine was set up that the first buyer could recover the object of sale from the fraudulent second buyer. At common law this view is now universally abandoned, *Comp. Seuff. Arch.* XI. n. 116. But the doctrine is established as local law in places, *e. g.*, in Prussia, and not as a peculiar proposition of law, but as a particular application of the so-called 'Rechts Zur Sache' (relativ dingliches Recht) which gives to a naked personal claim a real right as against a fraudulent third person." The matter is treated more fully in Hartman, *Obligation*, p. 126, *seq.*; Dernburg, *Preuss. Privatrecht*, § 184; Ziebarth, *Real Execution*, p. 192, *seq.* and 275 (1866).

Further, creditors of a seller by the Roman law might seize the thing sold at any time before delivery, even though the price had been paid. Pothier, *Contrat de Vente*, § 321. This was the law of Scotland until 19 & 20 Vict. c. 60, §§ 1 & 2. See Moyle, *Contract of Sale*, 135; Bell, *Principles of the Law of Scotland*, § 86.

the remedy of specific performance seems to be generally adopted;<sup>49</sup> and, since the adoption of a system of registering deeds and contracts relating to land, one who has entered into a contract for the purchase of real estate may, in some jurisdictions, by recording his contract, acquire a right against any one who thereafter takes title.<sup>50</sup> These changes in the law do not seem, however, to have been considered by writers as making any difference in the risk after a contract of sale. Registration laws and specific performance are not referred to in that connection.

It is obvious that the extent of the right to the thing itself which a buyer acquires immediately on the completion of a contract might well be a consideration of great importance. If the buyer acquires by a recorded contract for the purchase of an estate an absolute right against the world to have that property upon paying the price, there is given to the argument of Windscheid quoted above, that a sale is itself an alienation of the property, a force which it does not otherwise possess. It has been in part at least because of the control which the

<sup>49</sup> A learned reviewer of the third edition of Fry on Specific Performance, questioning an opinion expressed in that work, that specific enforcement of contracts probably has a more extensive application in England than on the Continent of Europe, says (8 Law Quarterly Review, 251): "If we had to express the difference between English and Continental law in this respect in a few words, we should say that in England specific performance is granted where damages are not an adequate remedy, whilst on the Continent damages are awarded when specific performance is impossible, and also that the means of enforcement are more varied on the Continent than in England." This statement seems borne out by quotations from French and German authorities. Demolombe, *Traité des Contrats*, 2d ed. vol. I. p. 486; Dernburg, *Preussisches Privatrecht*, 3d ed. vol. i. p. 276; Forster-Eccius, *Preussisches Privatrecht*, 4th

ed. vol. i. pp. 551, 899; German Code of Civil Procedure, §§ 769-779.

<sup>50</sup> In France, in 1855, a law was passed having the same general effect as the registration laws generally in force in this country. See Aubry & Rau, *Cours de Droit Civil*, 4th ed. ii. pp. 56 *et seq.*, 286 *et seq.* Under this law contracts to sell real estate as well as conveyances may be recorded; and consequently, if recorded, insure the purchaser a right against any one who in fraud of the contract thereafter obtains a conveyance. In Germany registration laws are now generally in force. In some States registration is a necessary element in the transfer of title; in other States it has no more importance than in this country. In Prussia title passes by registration, even though the buyer knows of a previous contract; and so in some other States. Stobbe, *Handbuch des Deutschen Privatrecht*, § 95.

buyer of real estate acquires immediately upon the formation of a contract of sale that the English court of chancery and the courts of some of the United States have held that the contract makes the buyer at once the owner in equity, and the loser by the injury or destruction of the property. But this reasoning seems peculiar to English and American law.

## CHAPTER XXIX

### CONTRACTS FOR THE SALE OF PERSONAL PROPERTY

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### § 955. Duty of delivery and payment.

The following sections of the Uniform Sales Act<sup>1</sup> state the fundamental duties of buyer and seller of goods. "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale."<sup>2</sup>

"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods."<sup>3</sup>

### § 956. Place, time, and manner of delivery.

The Sales Act continues:<sup>4</sup>

"(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question

<sup>1</sup> See *supra*, § 506, n. 2, for a statement of the jurisdiction, where the statute has been enacted.

<sup>2</sup> Sec. 41.

<sup>3</sup> Sec. 42. This section was cited and applied in: *Bridgeport Hardware Mfg. Corp. v. Bouniol*, 89 Conn. 254, 93 Atl. 674; *Gruen v. Ohl*, 81 N. J. L. 626, 80

Atl. 547; *Bernzweig v. Hyman Levin Co.*, (App. Term, Supr. Ct.) 172 N. Y. S. 437; but held inapplicable in *Kelly Const. Co. v. Hackensack Brick Co.*, 91 N. J. L. 585, 103 Atl. 417, 2 A. L. R. 685. See further, *supra*, §§ 40, 835.

<sup>4</sup> Sec. 43.

depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business,<sup>5</sup> if he have one, and if not, his residence,<sup>6</sup> but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.<sup>7</sup>

"(2) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.<sup>8</sup>

"(3) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale.<sup>9</sup> Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.<sup>10</sup>

"(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.<sup>11</sup>

"(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller."<sup>12</sup>

<sup>5</sup> *Bridgeport Hardware Mfg. Co. v. Bouniol*, 89 Conn. 254, 93 Atl. 674; *Leuders v. Fahlberg Works* (N. Y. Misc.), 150 N. Y. S. 635; *Schiff v. Winton Motor Car Co.*, 90 N. Y. Misc. 590, 153 N. Y. S. 961, 964; *Dressler Beard Mfg. Co. v. Winter Garden Co.* (N. Y. Misc.), 158 N. Y. S. 875.

<sup>6</sup> *Dordoni v. Hughes*, 83 N. J. L. 355, 85 Atl. 353.

<sup>7</sup> See *supra*, § 836.

<sup>8</sup> *Rochester Distilling Co. v. Geloso*, 92 Conn. 43, 101 Atl. 500; *Gruen v. Ohl*, 81 N. J. L. 626, 80 Atl. 547;

*Stephens-Adamsan Mfg. Co. v. Bigelow*, 86 N. J. L. 707, 92 Atl. 398. See also *supra*, § 38.

<sup>9</sup> See *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433; *Greenfield v. Herrman*, 130 N. Y. S. 132, 72 N. Y. Misc. 408, *Williston, Sales*, § 454.

<sup>10</sup> See *Williston, Sales*, §§ 366, 371, 374.

<sup>11</sup> See *supra*, § 856.

<sup>12</sup> This necessarily follows from the duty of the seller to deliver the goods. *Williston, Sales*, § 456.

**§ 957. Delivery to a carrier on behalf of the buyer.**

The Sales Act provides <sup>13</sup> in regard to delivery by the seller to a carrier:

“(1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer,<sup>14</sup> except in the cases provided for in section 19, Rule 5 <sup>15</sup> or unless a contrary intent appears.<sup>16</sup>

“(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.<sup>16</sup>

“(3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.” <sup>17</sup>

<sup>13</sup> Sec. 46.

<sup>14</sup> *Alderman Bros. Co. v. Westinghouse &c. Co.*, 92 Conn. 419, 103 Atl. 267; *Schans v. Bramwell* (N. Y. Misc.), 143 N. Y. S. 1057; *Hauptman v. Miller*, 94 N. Y. Misc. 266, 157 N. Y. S. 1104; *Woodland Lumber & Mfg. Co. v. Barnett*, 185 N. Y. App. D. 572, 173 N. Y. S. 4; *State v. Bayer*, 93 Ohio, 72, 112 N. E. 197.

<sup>15</sup> Rule 5. “If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the

buyer or reached the place agreed upon.”

<sup>16</sup> Delivery to a carrier with directions to deliver on the seller's order is not a delivery to the buyer. *Lyman v. Woldert Grocery Co.*, 133 Ill. App. 362.

<sup>16</sup> *Miller v. Harvey*, 221 N. Y. 54, 116 N. E. 781; *Southern Nursery Co. v. Winfield Nursery Co.*, 89 Kan. 522, 132 Pac. 149.

<sup>17</sup> See *Williston, Sales*, § 469; *Wimble v. Rosenberg*, [1913] 1 K. B. 279, 3 K. B. 743; *Law & Bonar Ltd., v. British Am. Tobacco Co.*, [1916] 2 K. B. 605.

### § 958. Delivery of wrong quantity.

The Sales Act provides <sup>18</sup> as to error in quantity:

"(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them,<sup>19</sup> but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate.<sup>20</sup> If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full,<sup>21</sup> the buyer shall not be liable for more than the fair value to him of the goods so received.

"(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

"(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

"(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties."<sup>22</sup>

### § 959. Right to examine the goods.

The Sales Act provides <sup>23</sup> as to the buyer's right of examination:

"(1) Where goods are delivered to the buyer, which he

<sup>18</sup> Sec. 44.

<sup>19</sup> *Boyd v. Second Hand Supply Co.*, 14 Ariz. 36, 123 Pac. 619.

<sup>20</sup> *Doxey v. Coates*, 181 N. Y. App. D. 207, 168 N. Y. S. 76; *Bloom v. Arthur Walker & Co., Inc.*, (App. Term, Supr. Ct.) 175 N. Y. S. 150.

<sup>21</sup> *Kirshman v. Crawford-Plummer Co.*, 165 N. Y. App. D. 259, 150 N. Y. S. 886.

<sup>22</sup> As to the right of the buyer to reject an offer of a wrong quantity, see

*Cunliff v. Harrison*, 6 Ex. 903; *Reuter v. Sala*, 4 C. P. D. 239; *Norrington v. Wright*, 115 U. S. 188, 205, 6 Sup. Ct. 12, 29 L. Ed. 366; *Rock Glen Salt Co. v. Segal*, 229 Mass. 115, 118 N. E. 239; *Downer v. Thompson*, 6 Hill, 208; *List v. Chase*, 80 Ohio, 42, 88 N. E. 120; *Williston, Sales*, §§ 460-463. Cf. *Shipton v. Weil*, [1912] 1 K. B. 574; *Cox v. Early*, (Tex. Civ. App.) 143 S. W. 345. See also *supra*, § 703.

<sup>23</sup> Sec. 47.



has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.<sup>24</sup>

"(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.<sup>25</sup>

"(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words 'collect on delivery,' or otherwise<sup>26</sup> the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination." The buyer's right may be excluded by the terms of the contract or may be lost subsequently by agreement or waiver.<sup>27</sup> And a contract to sell C. O. D.<sup>28</sup> or for cash against documents of title;<sup>29</sup> or in any other terms which indicate that payment is to precede delivery,<sup>30</sup> excludes the right to inspect before

<sup>24</sup> Bridgeport Hardware Mfg. Corp. v. Bouniol, 89 Conn. 254, 93 Atl. 674; Agri Mfg. Co. v. Atlantic Fertilizer Co., 129 Md. 42, 78 Atl. 365, Ann. Cas. 1918 D. 396; Gerli v. Mistletoe Silk Mills, 80 N. J. 128, 76 Atl. 335; Greeff &c. Mfg. Co. v. Scourene Mfg. Co., 182 N. Y. App. D. 311, 169 N. Y. S. 550; Fort Wayne Printing Co. v. Hurley Reilly Co., 163 Wis. 179, 157 N. W. 773.

<sup>25</sup> This is the rule of the common law. The right operates both as an obligation of the seller and a condition qualifying either the seller's obligation to take title, or his obligation to pay, or both. Lorymer v. Smith, 1 B. & C. 1; Deutsch v. Dunham, 72 Ark. 141, 78 S. W. 767; Charles v. Carter, 96 Tenn. 607, 36 S. W. 396; Garvan v. New York Central R. Co., 210 Mass.

275, 96 N. E. 717; Unadilla Silo Co. v. Hull, 90 Vt. 134, 96 Atl. 535. See Williston, Sales, §§ 471-480.

<sup>26</sup> As where goods are shipped under a bill of lading with draft attached. Imperial Products Co. v. Capitol Chemical Co., 103 N. Y. Misc. 493, 170 N. Y. S. 397.

<sup>27</sup> See Urbansky v. Kutinsky, 86 Conn. 22, 84 Atl. 317.

<sup>28</sup> Wiltse v. Barnes, 46 Ia. 210.

<sup>29</sup> E. Clemens Horst Co. v. Biddell, [1912] A. C. 18; Roach v. Lane, 226 Mass. 598, 116 N. E. 470; Plumb v. J. W. Hallauer & Sons Co., 145 N. Y. App. Div. 20, 130 N. Y. S. 147; Dudley v. Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. Rep. 1027.

<sup>30</sup> Lawder & Sons Co. v. Mackie Grocery Co., 97 Md. 1, 54 Atl. 634.

payment, but if after payment the goods are found inferior, the buyer may refuse them and reclaim the price.<sup>31</sup> Unless authorized expressly by the contract or impliedly by custom a seller is not justified in shipping goods to the buyer in such a way as to exclude the right of inspection, and if he does so, the buyer may refuse to proceed with the contract.<sup>32</sup>

### § 960. Buyer is not bound to return goods wrongly delivered.

The Sales Act provides<sup>33</sup> "that unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them."<sup>34</sup> If the seller refuses or neglects to remove the goods the buyer may resell them.<sup>35</sup> The contract may, however, impose upon the seller the duty of returning them.<sup>36</sup>

### § 961. Risk of loss under the Sales Act.

The Sales Act<sup>37</sup> provides: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer<sup>38</sup> but when the property therein

*Cf. Murphy v. Sagola Lumber Co.*, 125 Wis. 363, 103 N. W. 1113.

<sup>31</sup> *Delaware, etc., R. Co. v. United States*, 231 U. S. 363, 58 L. Ed. 269, 34 Sup. Ct. Rep. 65; *Hudson v. Germain Fruit Co.*, 95 Ala. 621, 10 So. 920; *Corey's Wholesale Fruit Co. v. Fuller*, 62 Fla. 146, 56 So. 800, 801; *Pittsburgh, etc., R. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295, 298.

<sup>32</sup> *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513; *Imperial Products Co. v. Capitol Chemical Co.*, 187 N. Y. App. D. 599, 176 N. . S. 49.

<sup>33</sup> Sec. 50.

<sup>34</sup> *Putnam v. Bolster*, 216 Mass. 367, 373, 103 N. E. 942. Such is the rule at common law. *Grimoldby v. Wells*, L. R. 10 C. P. 391 *Mulcahy v. Dieudonne*, 103 Minn. 352, 116 N. W. 636. See also *J. I. Case Threshing Mach. Co. v. Huber*, 160 Mich. 92, 125 N. W. 66,

32 L. R. A. (N. S.) 212; *Ash v. International Harvester Co.*, 101 Miss. 542, 58 So. 529; *Strauss v. Furniture Co.*, 76 Miss. 343, 24 So. 703; *Rheinstrom v. Steiner*, 69 Ohio St. 452, 69 N. E. 745, 100 Am. St. Rep. 699; *Unadilla Silo Co. v. Hull*, 90 Vt. 134, 96 Atl. 535.

<sup>35</sup> *Rubin v. Sturtevant*, 80 Fed. 930, 51 U. S. App. 286, 26 C. C. A. 259; *Jones v. Bloomgarden*, 143 Mich. 326, 106 N. W. 891; *Descalsi Fruit Co. v. Sweet*, 30 R. I. 320, 75 Atl. 308, 27 L. R. A. (N. S.) 932, 136 Am. St. Rep. 961. *Cf. White v. Schweitzer*, 221 N. Y. 461, 117 N. E. 941.

<sup>36</sup> *Berlin Machine Works v. Midland Coal Co.*, 45 Mont. 390, 123 Pac. 396.

<sup>37</sup> Sec. 22.

<sup>38</sup> *Agri Mfg. Co. v. Atlantic Mfg. Co.*, 129 Md. 42, 98 Atl. 365, Am. Cas. 1918 D. 396.

is transferred to the buyer the goods are at the buyer's risk,<sup>39</sup> whether delivery has been made or not, except that—

“(a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.<sup>40</sup>

“(b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.”<sup>41</sup>

### § 962. Risk generally attends title.

In the English and American law of sales of goods there is singularly little discussion in regard to the risk before transfer of the property. It was early assumed without discussion that the maxim *res perit domino* was of universal application,<sup>42</sup> and this assumption has sufficed to fix the law.<sup>43</sup> In the

<sup>39</sup> *Schans v. Bramwell*, 143 N. Y. S. 1057.

<sup>40</sup> Applied to conditional sales in *Collard v. Tully*, 78 N. J. Eq. 557, 80 Atl. 491; *O'Neil-Adams Co. v. Eklund*, 89 Conn. 232, 93 Atl. 524; *Dinsmore v. Maag-Wahmann Co.*, 122 Md. 177, 89 Atl. 399. Applied to goods shipped in accordance with contract where the seller named himself as consignee in the bill of lading in order to retain security, in *Alderman Bros. Co. v. Westinghouse Air Brake Co.*, 92 Conn. 419, 103 Atl. 267; *Kinney v. Horwitz*, (Conn. 1919), 105 Atl. 438.

<sup>41</sup> Subsection (b) was held applicable only to cases of temporary default in *Rylance v. Walker*, 129 Md. 475, 99 Atl. 597. In such a case the subsection was applied in *Baltimore & Ohio R. Co. v. Carter*, 133 Md. 551, 105 Atl. 760. Section 22 of the Sales Act was copied from section 20 of the English Sale of Goods Act. Subsection (a), however, is not in the English act. The reasons

for its insertion will appear from the discussion in the following sections. The English act has an additional paragraph not copied in the American act because deemed unnecessary: “Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.”

<sup>42</sup> It is curious that this maxim of the Roman Law should be quoted in our law chiefly in a class of cases to which it did not apply in the Roman Law.

<sup>43</sup> In Noy's Maxims, c. XLII, it is said: “If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; . . . and if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer.” It will be ob-

absence of agreement to the contrary, the risk is with the seller, though the goods are identified, till the moment when the property is transferred. If the goods are destroyed or injured before that time, the buyer cannot be compelled to pay the price,<sup>44</sup> and if he has paid the price in advance, it may be recovered.<sup>45</sup>

### § 963. Risk may by agreement be separated from title.

Risk of loss or deterioration is a natural incident of ownership, but there is no rule of law which prevents one who is not the owner from agreeing to bear the risk. He thereby virtually becomes an insurer of goods which he does not own.<sup>46</sup> It may be a proper construction of a bargain that risk is to be assumed by one party or the other, even though it is not so expressed in terms. For instance, if it is agreed that one party or the other shall insure the goods, it seems a necessary inference that the parties intended the risk to be borne by this party.<sup>47</sup> It is perhaps more common for the buyer to

served that the case here supposed is a sale with a lien for the price. As the dependency of mutual promises in any executory bilateral contract was little understood before the present century, and the question whether impossibility is so far an excuse for non-performance of a dependent promise, that the counter-promise must nevertheless be performed, has been settled still more recently, it is obvious that only modern decisions have much value in this discussion. In *Rugg v. Minett*, 11 East, 210, it was taken for granted that risk attends title, and the only discussion related to the question whether title had in fact passed. So clear is the law that it is hardly formally stated by so acute a writer as Benjamin. The only statement he makes is a casual one, without citation of authorities, in § 308.

<sup>44</sup> Cases are collected, *supra*, § 885.

<sup>45</sup> Cases are collected, *supra*, § 885.

<sup>46</sup> This question was much considered in *Castle v. Playford*, L. R. 5 Ex. 165,

L. R. 7 Ex. 98, and *Martineau v. Kitching*, L. R. 7 Q. B. 436. Other decisions illustrating the right of the parties to agree expressly for the incidents of risk, irrespective of title, are: *Inglis v. Stock*, 10 A. C. 263; *Fragano v. Long*, 4 B. & C. 219; *The Elgee Cotton Cases*, 22 Wall. 180, 22 L. Ed. 863.

<sup>47</sup> *Fragano v. Long*, 4 B. & C. 219. In this case the price was made payable after the goods, which were the subject of the bargain, should arrive, and the defendant asserted that this provision showed that until the goods arrived the buyer had no right in them, but Bayley, J., said: "If the goods were not to be paid for unless they arrived, why should the plaintiff insure them?" See also *Anderson v. Morice*, L. R. 10 C. P. 58, 609, 1 A. C. 713, and *Colonial Ins. Co. v. Adelaide Ins. Co.*, 12 A. C. 128. In both these cases the buyer in fact insured the goods, but the contract did not provide expressly that he should do so.

assume risk, although the property may not have passed to him, than it is for the seller to retain the risk though the property has passed from him, but it is obvious that the latter arrangement is possible.<sup>48</sup> Opposite views have been expressed in regard to the inference to be drawn as to the transfer of the property in the goods when the contract is silent on the point, but makes express provision in regard to the risk. Blackburn, J., said:<sup>49</sup> "If you . . . show that the risk attached to one person or the other it is a very strong argument for showing that the property was meant to be in him." On the other hand, exactly the opposite inference was suggested in the Supreme Court of the United States:<sup>50</sup> "It needs no agreement that the buyer shall take the risk if it is intended the ownership shall pass to him. Hence the stipulation that the cotton should be at the risk of Lobdell (the buyer) after the date of the contract, instead of showing an intention of the parties that the right of property should pass to him seems rather to indicate a purpose that the ownership should remain unchanged. Else why introduce a provision totally unnecessary?" The inference suggested by the English judge seems the sounder.<sup>51</sup> Mercantile contracts are drawn briefly, and

\* *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. (N. S.) 322, 33 L. J. Q. B. (N. S.) 214. This was a contract for 1,000 tons of coal, "payment of one-half of each invoice value in cash on handing you bills of lading and policy of insurance to cover the amount." The balance of the price was to be paid on delivery. The coal was shipped and half of the price paid but the vessel never reached port. The seller brought action for the balance of the price and the buyer brought a cross-action to recover the portion of the price which he had already paid. The judges in the Court of Queens Bench were equally divided in their opinion, but the majority in the Court of the Exchequer Chamber, following the opinion of Blackburn, J., in the court below, held that under the contract the property in the goods vested in the

buyer on shipment, but as to the half of the price still unpaid, there could be no recovery unless the coal was delivered.

<sup>49</sup> *Martineau v. Kitching*, L. R. 7 Q. B. 436, 453, 454.

<sup>50</sup> *Elgee Cotton Cases*, 22 Wall. 180, 194, 22 L. Ed. 863. In *Stewart v. Henningsen Produce Co.*, 88 Kans. 521, 129 Pac. 181, 50 L. R. A. (N. S.) 111, Ann. Cas. 1914 B. 701, a provision in a contract that the seller should pay "storage, interest and insurance charges" to a certain day, was held not to prevent property and risk from passing to the buyer as soon as the seller had put the goods in a deliverable condition.

<sup>51</sup> The English line of reasoning was adopted (without citation of authority) in *Sanitary Carpet Cleaning Co. v. Reed Mfg. Co.*, 145 N. Y. S. 218, 159 N. Y. App. Div. 587.

provision is frequently made only for the matters which strike the parties as important. Where goods are shipped from a distance the question of risk naturally occurs to prudent business men as desirable to settle in the agreement. The more abstract question when the property in the goods passes is much less likely to occur to them. An agreement that risk shall pass to the buyer is, therefore, not justly construed as an agreement that the property shall remain in the seller, but rather as evidence that the property was intended to pass. It must be admitted that the question is one of fact in each case, and that the argument here suggested is more appropriate to a brief mercantile contract prepared by the parties than to an elaborate agreement based on legal advice.

**§ 964. Risk is on the buyer where the seller retains a security title only.**

That the risk should be thrown upon the buyer if the seller retains title merely to enforce performance by the buyer of his obligations under the contract, as enacted in the Sales Act,<sup>52</sup> is a consequence of the theory that such a bargain is, in effect, though not in form, a sale to the buyer and a mortgage back by him of the property to secure the price. Two classes of cases especially, commonly present the question—first, conditional sales; and, second, shipments under bills of lading. These two cases will now be separately considered.

**§ 965. Risk is on the buyer in a conditional sale.**

Where goods are delivered to the buyer but title is retained by the seller until the price is paid, the buyer immediately acquires the right to use the goods as his own, and has indeed exactly the same power over them, and right in regard to them, that he would have if he had bought them, and mortgaged them back to secure the price.<sup>53</sup> The time for payment in such sales frequently extends over months and sometimes over years. It is necessarily to be expected by the parties

<sup>52</sup> Sec. 22 (a), see *supra*, § 961.

<sup>53</sup> See *supra*, §§ 734 *et seq.* The risk of loss is borne by a chattel mortgator. American Soda Fountain Co. v. Blue,

146 Ala. 682, 40 So. 218; *Blue v. American Soda Fountain Co.*, 150 Ala. 165, 43 So. 709.

that the goods will deteriorate during this period, and, nevertheless, that the buyer will be bound to pay the price. It seems properly to follow that if the goods are accidentally destroyed or injured, the buyer must stand the loss; that is, he must pay the price in full at the time agreed. The decisions upon the point are in conflict, but the weight of authority sustains the view here expressed.<sup>54</sup> There are, however, a number of decisions to the contrary.<sup>55</sup>

Wherever the Uniform Sales Act is in force,<sup>56</sup> the seller's right of recovery should be clear.<sup>57</sup> By special terms in the

<sup>54</sup> *Chicago Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 283, 34 L. Ed. 349; *Kentucky Wagon Mfg. Co. v. Blanton-Curtis Co.*, 8 Ala. App. 669, 62 So. 368; *Phillips v. Hollenberg Music Co.*, 82 Ark. 9, 99 S. W. 1105; *Roach v. Whitfield*, 94 Ark. 448, 127 S. W. 722, 140 Am. St. Rep. 131; *Hollenberg Music Co. v. Barron*, 100 Ark. 403, 140 S. W. 582, 36 L. R. A. (N. S.) 594; *O'Neil-Adams Co. v. Eklund*, 89 Conn. 232, 93 Atl. 524, Ann. Cas. 1918 D. 379 (applying Sales Act); *Avery v. Middlebrooks*, 142 Ga. 830, 83 S. E. 944; *Jessup v. Fairbanks*, 38 Ind. App. 673, 78 N. E. 1050; *Burnley v. Tufts*, 66 Miss. 48, 5 So. 627, 14 Am. St. Rep. 540; *Tufts v. Wynne*, 45 Mo. App. 42; *American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54; *Collerd v. Tully*, 78 N. J. Eq. 557, 80 Atl. 491 (applying Sales Act); *National Cash Register Co. v. South Bay Assoc.*, 64 N. Y. Misc. 125, 118 N. Y. S. 1044; *Whitlock v. Auburn Lumber Co.*, 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214; *Harley v. Stanley*, 25 Okl. 89, 105 Pac. 188; *Topp v. White*, 12 Heisk. 165; *Marion Mfg. Co. v. Buchanan*, 118 Tenn. 238, 99 S. W. 984, 8 L. R. A. (N. S.) 590; *Carolina, etc., R. Co. v. Unaka Springs Lumber Co.*, 130 Tenn. 354, 170 S. W. 591; *LaValley v. Ravenna*, 78 Vt. 152, 62 Atl. 47, 2 L. R. A. (N. S.) 97, 112 Am. St. Rep. 898; *Exposition Arcade Corp. v. Lit*, 113 Va. 574, 75 S. E. 117, Am.

Cas. 1913 D. 335. See also *Cooper v. Chicago Organ Co.*, 58 Ill. App. 248; *Osborn v. South Shore L. Co.*, 91 Wis. 526, 65 N. W. 184; *Hesselbacher v. Ballantyne*, 28 Ont. 182; *Goldie v. Harper*, 31 Ont. 284. In *Whitlock v. Auburn Lumber Co.*, 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214, the property had not been delivered, but was held in the seller's possession subject to the buyer's order. The risk of loss was nevertheless held to be on the buyer.

<sup>55</sup> *Arthur v. Blackman*, 63 Fed. 536; *Bishop v. Minderhout*, 128 Ala. 162, 29 So. 11, 52 L. R. A. 395, 86 Am. St. Rep. 134; *American Soda Fountain Co. v. Blue*, 146 Ala. 682, 40 So. 218; *Blue v. American Soda Fountain Co.*, 150 Ala. 165, 43 So. 709; *Randle v. Stone*, 77 Ga. 501; *Glisson v. Heggie*, 105 Ga. 30, 32, 31 S. E. 118; *Mountain City Mill Co. v. Butler*, 109 Ga. 469, 34 S. E. 565; *Whigham v. Hall*, 8 Ga. App. 509, 70 S. E. 23; *McKinney v. Battle*, 13 Ga. App. 255, 79 S. E. 92; *Swallow v. Emery*, 111 Mass. 355; *Sloan v. McCarty*, 134 Mass. 245; *Edward Thompson Co. v. Vacheron*, 125 N. Y. S. 939, 69 N. Y. Misc. Rep. 83; *Cobb v. Tufts* (Tex. Civ. App.), 2 Willson's Civ. Cas. 141; *Molsons Bank v. Howard*, 21 Ont. Wk. Rep. 278.

<sup>56</sup> See *supra*, § 506, n. 2.

<sup>57</sup> See *supra*, § 961.

contract the question of risk may be settled by the parties in any way they please,<sup>58</sup> and some of the apparently conflicting decisions may be reconciled on this basis.<sup>59</sup> But the parties frequently do not express a direct intention in regard to the matter and a rule based on general principles is, therefore, required. In a case on the point in Mississippi,<sup>60</sup> where the plaintiff sued for the price of a soda fountain which had been delivered to the defendant under a conditional sale, the court held the plaintiff entitled to recover though the property had been destroyed and said: "Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all he was to do, except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether, by the contract, he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do." This language was quoted with approval by the North Carolina Supreme Court in a case involving similar facts.<sup>61</sup> Analogous to the risk of loss

<sup>58</sup> *Hoobler v. International Harvester Co.*, 185 Ala. 533, 64 So. 567; *Ryan v. Agricultural Ins. Co.*, 188 Mass. 11, 73 N. E. 849.

<sup>59</sup> See a discussion based on the presumed intent of the parties in

*American Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, 55 Atl. 54.

<sup>60</sup> *Burnley v. Tufts*, 66 Miss. 48, 5 So. 627, 14 Am. St. Rep. 540.

<sup>61</sup> *Tufts v. Griffin*, 107 N. C. 47, 12



is the chance of benefit. But one class of goods seems to illustrate this: Where an animal is sold conditionally and during the period when the animal sold is in the buyer's possession, but before the price has been paid and the property passed, the animal has young, it is held that the young are subject to the same condition as the mother. That is, the property is in the seller, but passes to the buyer on the payment of the price originally stipulated for. Thus the buyer secures the benefit of the increase without paying anything additional for it.<sup>62</sup>

**§ 966. Risk where goods are shipped under a bill of lading.**

It is evident there can be no possibility of throwing risk of loss or deterioration upon the buyer where goods are shipped to him unless the goods are sent in conformity with an order or contract and by a proper method of shipment.<sup>63</sup> The property will not otherwise pass to him, and no reason can be suggested for imposing the risk upon him of goods which he did not order or which for any reason were improperly sent. On the other hand, if goods are properly shipped to the buyer, in accordance with an order or contract, the buyer being named as consignee in the bill of lading, there can be equally little doubt that the risk of loss and deterioration is upon the buyer, for the property has passed to him. This is very evident if the bill of lading is a straight bill—that is, one which names the buyer as consignee without making use of the word “order,” for here the bill of lading does not in any way qualify the inferences to be drawn from the shipment.<sup>64</sup> The same principle is applicable, moreover, even though the bill is an “order” bill and negotiable, provided that the buyer is named as consignee. It is true that the seller by retaining the possession of the bill may prevent the buyer from obtaining the delivery of the goods. This, however, is because the seller is enabled to control the possession

S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863.

<sup>62</sup> *Anderson v. Leverette*, 116 Ga. 732, 42 S. E. 1026; *Allen v. Delano*, 55 Me. 113, 92 Am. Dec. 573; *Bunker v.*

*McKenney*, 63 Me. 529; *Buckmaster v. Smith*, 22 Vt. 203; *Kent v. Buck*, 45 Vt. 18; *Clark v. Hayward*, 51 Vt. 14.

<sup>63</sup> *Williston, Sales*, § 278.

<sup>64</sup> *Williston, Sales*, §§ 281, 282, 286.

of the goods by means of the bill of lading. The goods are the buyer's, but the carrier will not surrender them until the bill of lading is surrendered. The situation is similar where an order bill is taken by the shipper in his own name and indorsed and delivered to the buyer.<sup>65</sup> In the cases thus far considered in this section, the general principle that risk attends title is, therefore, applicable. But it may be supposed that the seller instead of consigning the goods directly to the buyer, either by a negotiable or a nonnegotiable bill, consigns them to himself or to a third person, with a view to retain title until the buyer pays the price, and has not indorsed and delivered the bill prior to the loss. The situation on principle seems analogous to that where a conditional sale is made. The seller either retains the property himself or transfers it to a third person for the purpose of securing payment of the price, but the beneficial interest in the goods vests in the buyer on shipment, assuming always that the goods were properly shipped in conformity with the buyer's order. Where the bill of lading names a third person as consignee, who advances the price on the security of the bill of lading, it is evident that the risk must be with the buyer and not with the holder of the legal title. The consignee has the legal title of the goods,<sup>66</sup> but he has no interest in the shipment other than to secure repayment of the money which he has advanced. He is usually a banker and the transaction is merely one form of making a loan on security.<sup>67</sup> It is evident then that the holder of the legal title in such a case does not bear the risk, nor can the risk remain with the seller, for it may be that the price has already been paid or a bill of exchange accepted for the price. It, therefore, rests on the buyer. In

<sup>65</sup> *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. 886, 54 Am. Rep. 30; *Washburn-Crosby Co. v. Boston & Albany R. Co.*, 180 Mass. 252, 257, 62 N. E. 590.

<sup>66</sup> Williston, *Sales*, § 272.

<sup>67</sup> "This 'security title' of the bankers cannot have the force of an unqualified ownership of the goods, with complete right of disposition irrespective of the importer's interest. The ex-

porters having 'relinquished the whole of their interest' on transmission of the bills of lading to the bankers, the title acquired by the bankers for security must have a 'residue of ownership' of some character in the importer under a contract of purchase and consignment of the goods." *In re Richheimer*, 221 Fed. 16, 22, 136 C. C. A. 542, per Seaman, J.

substance the transaction is the same where the seller retains the security title himself instead of introducing a banker into the matter. That the risk should fall on the buyer follows not simply from the foregoing process of elimination of the other parties, but also from a direct consideration of the buyer's position. The shipment has been made in accordance with his order and is solely for his benefit. The English law sustains the view here suggested.<sup>88</sup> The same doctrine has been expressed in a New York decision,<sup>89</sup> and so it has been

<sup>88</sup> The question was one much considered in the case of *Browne v. Hare*, 3 H. & N. 484, 4 H. & N. 822. The defendants, merchants at Bristol, contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of refined oil to be shipped "free on board" at Rotterdam at £45 15s. per ton to be paid for on delivery of the bills of lading by bill of exchange, payable in three months and dated on the day of shipment of the oil. The plaintiffs, accordingly, shipped on a general ship, trading between Rotterdam and Bristol, five tons of the oil, and the master signed a bill of lading making the oil deliverable to "shippers' order." The plaintiffs indorsed the bill of lading specially to the defendants and forwarded it with a bill of exchange drawn on the defendants to the broker through whom the original contract had been made. On the following night the ship was wrecked and the oil lost. The plaintiffs' letter reached its destination shortly afterward and the broker presented the bill of lading with the bill of exchange to the defendants, requesting acceptance of the latter. The defendants refused. It was held that the plaintiffs were entitled to recover upon the defendants' promise to pay the price of the oil. This decision was affirmed by the Exchequer Chamber. The court rested the decision on the ground that the property in the oil passed to the buyer on ship-

ment of the goods but as the court also admitted that the seller had control of the oil, and as it is evident from other decisions that the seller had complete power of disposition of the oil by virtue of the form of the bill of lading (see *Williston, Sales*, § 283), it follows that the court's decision must be taken as holding that the beneficial interest as distinguished from a mere title for security was in the buyer. See also *Shepherd v. Harrison*, L. R. 4 Q. B. 196, per Cockburn, C. J.; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164; *Inglis v. Stock*, 10 A. C. 263.

<sup>89</sup> *Farmers' & Mechanics' Bank v. Logan*, 74 N. Y. 568. In this case *Sears & Daw*, commission merchants, who had bought wheat for one Brown with their own money, shipped the goods under a bill of lading in which they were named as consignees, but which contained a direction to notify Brown. The court, in its opinion, asserts both that the title remained in *Sears & Daw* and that the risk was upon Brown, saying: "We are asked, would not the profit have been Brown's, had the wheat advanced in value, and the loss his, had it declined, or if it had been destroyed by fire? To which the ready answer is, whatever had chanced to it, it would not have been his, as between him and *Sears & Daw* and the plaintiff, until he complied with the conditions on which it was bought for him, that is

held under the Sales Act.<sup>70</sup> In some cases, however, courts have somewhat hastily assumed that the risk necessarily accompanied legal title, and on being satisfied that the legal title was by virtue of the bill of lading or mode of shipment in one party or the other, have assumed that the risk necessarily was there also.<sup>71</sup> Under what is known as a c. i. f.

to say, had accepted and paid the draft. As soon as he paid the draft, it would have been his, with whatever enhancement of value. Had it lessened in value, or been burned up, he would still have been liable to Sears & Daw, for the price of their services and for their expenses, and to the plaintiff, first, on his promise to accept the draft, and after acceptance, on that obligation to pay it." See also *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. 1012; *Glanzer v. J. K. Armsby Co.*, 100 N. Y. Misc. 476, 165 N. Y. S. 1006.

<sup>70</sup> *Alderman Bros. Co. v. Westinghouse Air Brake Co.*, 92 Conn. 419, 103 Atl. 267; *Kinney v. Horwitz*, (Conn. 1919), 105 Atl. 438.

<sup>71</sup> In *Willman Mercantile Co. v. Fussy*, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698, the plaintiff received an order for a carload of apples from the defendant. The apples were to be f. o. b. cars at the seller's residence, "sight draft with bill of lading attached." The apples were shipped in good order but froze on their way. The plaintiff took a bill of lading for the consignment in his own name, and forwarded this, with sight draft attached, through a bank to the defendant who refused to honor the draft. The court said, no doubt with truth: "The plaintiff, the vendor in this case, dealt with the bill of lading with the manifest purpose of securing the payment for the apples," but the court seems wrong in holding that it necessarily follows that the risk is on the seller because the control remains with him. In *Vaughn v. New York, etc., R. R. Co.*, 27 R. I. 235, 61 Atl. 695, it ap-

peared that a carload of corn was shipped by one Shultis of Boston, to the plaintiff, to Davisville, R. I. The corn was duly shipped and a bill of lading, with draft attached, was sent through a bank to the plaintiff. While the corn was standing on a spur track of the defendant, adjacent to the plaintiff's warehouse, a fire broke out which consumed both the warehouse and the car of corn. The court held that the plaintiff could not recover from the railroad for the loss of the corn, saying: "As to the carload of corn, we are of the opinion, upon all the testimony, that title to the same had not passed to the plaintiff at the time of the fire. He could only obtain title to the same by paying the draft and obtaining the bill of lading, which he had not done prior to the destruction. The sale was conditional upon the payment of the draft, and title still remained in Shultis at the time of the fire; and the carload of corn had not been delivered to the plaintiff at that time; it was still locked and sealed with the lock and seal of the defendant." See also *Cragun v. Todd*, 131 Iowa, 250, 108 N. W. 450 (where the loss caused by injury to peaches damaged in transit was thrown upon the seller); *Graham v. Laird Co.*, 20 Ont. Law Rep. 11 (where the facts were almost identical with those in the *Montana Case*); *Henderson v. Lauer*, (Cal. App. 1919), 181 Pac. 811; *St. Louis & San Fr. R. Co. v. Allen*, 31 Okl. 248, 120 Pac. 1090, 39 L. R. A. (N. S.) 309. On the other hand, courts sometimes go too far in the other direction and assert the buyer has the legal title and that

contract, where the shipper takes out an insurance policy for the benefit of the buyer and the price is payable on tender of the bill of lading and insurance policy it is obvious the risk is on the buyer, and the seller on tendering the documents is entitled to the price, even though prior to the tender the goods have been lost and the seller is aware of the fact.<sup>72</sup>

### § 967. Effect of default upon risk.

There has not been much discussion in our law upon the effect of default by buyer or seller upon the risk of loss or deterioration. The principles which must govern the question are, however, reasonably clear. If the buyer repudiates or commits a total breach of the contract it is obviously impossible for the seller to retain the goods as his own, or deal with them as such, and yet claim that the risk of their continued existence rests with the buyer, even if the property in the goods had already passed to the buyer. The seller must choose what attitude he will take. As repudiation or breach by the buyer where the property has passed relates merely to taking delivery of the goods, the risk has clearly passed to the buyer under the principles stated in the preceding sections, and his default cannot enable him to get rid of the burden. The seller, however, in such case may by rescission or resale of the goods deprive the buyer of his title,<sup>73</sup> and if the seller elects to do this, the risk thereupon is removed from the buyer. Until manifestation of an election by the seller to rescind, or until a resale, as the property remains in the buyer, so the risk will remain with him. If the buyer's repudiation or default relates not simply to taking delivery, but to taking title to the goods, the situation is different. Here, as the seller has the property he normally would bear the risk, and as the buyer's conduct will generally amount to a total breach of the contract, whatever rights the seller has will arise immediately. In England, and many of the United States, the seller's right is limited to a right of action for the difference between the contract price and the market price of the goods

the seller's interest is merely a lien.  
*Robinson v. Houston, etc., Ry. Co.*,  
105 Tex. 185, 146 S. W. 537.

<sup>72</sup> *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198.

<sup>73</sup> *Williston, Sales*, §§ 501 *et seq.*

at the time the contract should have been carried out. In many jurisdictions in the United States, however, the seller may elect to store the goods for the buyer, or to notify the buyer that he holds them as bailee for the buyer and recover the full price as if the property in the goods had passed.<sup>74</sup> Under the Sales Act this remedy is allowed the seller if the goods are of a kind that cannot readily be resold for a reasonable price.<sup>75</sup> If the law allows a seller thus to treat goods as if they were the buyer's, and the seller makes an election so to do, it would seem that the buyer must thereafter bear the risk. If the seller has not indicated which course he intended to pursue, the loss would fall on him. Since the property is in him, until he manifests an election to transfer it to the buyer, it could not be assumed, in the absence of some overt act manifesting an election, that the seller held the property for the buyer's benefit and as his bailee.<sup>76</sup> If the repudiation or breach is committed by the seller the same principles are applicable. The risk will be upon the seller if the property in the goods has not been transferred, and even if it has been, an election to rescind the transfer, manifested by the buyer, will throw back the risk and the property upon the seller.<sup>77</sup> It has hitherto been assumed that one party or the other has totally repudiated his obligation or committed a final and complete breach of it. The situation for which section 22 (b) provides is rather for a delay or temporary fault, which is not, and perhaps cannot be, treated as sufficient breach to terminate the bargain.<sup>78</sup> Speaking of such a situation, Blackburn, J., said:<sup>79</sup> "The delay in weighing is quite as much the fault of the purchaser as of the sellers. When the prompt day [*i. e.*, the day appointed by agreement or usage of trade for payment] comes the sellers have a right to require that the goods should be weighed at once, so as to ascertain

<sup>74</sup> See *infra*, §§ 1365 *et seq.*

<sup>75</sup> Section 63 (3).

<sup>76</sup> See *Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848, where the loss was thrown on the sellers because they "did not place themselves in the position of bailees" for the purchasers; and to similar effect *Rylance*

*v. James Walker Co.*, 129 Md. 475, 99 Atl. 597.

<sup>77</sup> See *Doane v. Dunham*, 79 Ill. 131.

<sup>78</sup> *Rylance v. Walker*, 129 Md. 475, 99 Atl. 597; *Baltimore & Ohio R. Co. v. Carter*, 133 Md. 551, 105 Atl. 700.

<sup>79</sup> *Martineau v. Kitching*, L. R. 7 Q. B. 436, 456.

the price, and have it paid to the last farthing. . . . Now by the civil law it always was considered that, if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being *in mora* and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shown that the party was *in mora*, he shall have the risk just as if the *emptio* was *perfecta*. That is perfectly good sense, and justice, though it is not necessary to the decision of the present case, that . . . because the noncompletion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed." A New York decision also presents facts involving the point,<sup>80</sup> but the court held that the risk remained with the seller in spite of the buyer's default, since this default was not the cause of the loss. A decision in the Supreme Court of the United States follows the same line of argument.<sup>81</sup> It seems probable

<sup>80</sup> *McConihe v. New York & Lake Erie R. R. Co.*, 20 N. Y. 495, 75 Am. Dec. 420. The defendants had agreed to buy fifteen cars of the plaintiff, fitted with boxes which the defendants were to supply. The cars were to be finished by a certain time, but, owing to the failure of the defendants to furnish the boxes, the cars were never finished. Seven of them were finished as far as was possible without the boxes, and these cars were destroyed by fire while still in the plaintiff's possession, but without any negligence, more than two months after the time when all the cars were to have been finished. The court held that property had not passed to the defendants, and as the loss was not a necessary consequence of the defendants' delay in furnishing the boxes, the risk also had not passed.

<sup>81</sup> *Grant v. United States*, 7 Wall. 331, 19 L. Ed. 194. The United States government had agreed to buy supplies which were to be furnished by the plaintiff. By the terms of the

contract the government was to inspect the supplies at the place of shipment. The government unreasonably delayed the appointment of an inspector. The goods were finally inspected and shipped but were delayed on the road and were finally captured by the troops of Texas, then in a state of rebellion against the United States. It is to be noticed, however, that the delay in shipment was not caused by the government's delay, for the plaintiffs were unable to deliver at the point of shipment all the supplies which were to go forward until after the government was ready to proceed with the inspection, and the inspection was delayed after the appointment of an inspector at the request of the plaintiff. The action was to recover for the goods lost. It was held that no recovery could be had. The court said: "If, however, it be admitted that the government was in default in not inspecting sooner, that default had no connection with

from the authorities cited, that the provision of the English Sale of Goods Act, copied in the American Sales Act, goes further in throwing the risk upon the party in default than the common law has hitherto gone. The original draft of the English act provided that the risk should be upon the party in default "as regards any loss which would not have occurred but for such fault."<sup>82</sup> The expression "might not have occurred" was substituted at the instance of Lord Watson. The effect of this substitution seems to be to shift the burden to the wrongdoer to show that his default was not a cause of the loss. It seems reasonable, in case of doubt as to the proximate causation of the loss by the delay, that the party in default who is confessedly a wrongdoer should suffer rather than the innocent party. This view also has the support of the Civil law.<sup>83</sup>

#### § 968. Requirements of warranty under the English Law.

It is commonly said by the English authorities, and by the American authorities which follow the English law, that a warranty in the law of sales of chattels is collateral.<sup>84</sup> It is not made wholly clear whether by this is meant collateral in form or in legal effect. There is no doubt that under the English law a warranty is collateral in legal effect, but the important question remains, How is a warranty to be identified as such? How is it to be distinguished from other promises? This is something which the English law and English lawyer have never been willing or perhaps able to define entirely.<sup>85</sup>

the subsequent injury suffered by the claimant, and was not the proximate cause of it. In such a case the rule of law applies, that where property is destroyed by accident, the party in whom the title is vested must bear the loss."

<sup>82</sup> Section 20.

<sup>83</sup> Moyle, *Contract of Sale*, 86; Pothier, *Vente* No. 58. See also *infra*, § 307.

<sup>84</sup> As to other uses of the word warranty, see *supra*, § 673.

<sup>85</sup> In the English Sale of Goods Act, § 11 (1 B.), it is said that whether a

stipulation in a contract is a condition or a warranty "depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract." The authority for this provision in the Sale of Goods Act is *Graves v. Legg*, 9 Ex. 709, and other cases where it is laid down that whether the performance of the duty of one party to the contract is a condition precedent to the liability of the other depends on the intention of the parties in each case. But in the law of contracts, in the determination of each



Three tests may be supposed, each one of which has doubtless had some weight in determining decisions but none of which can be said to have been established as conclusive. These three tests are: (1) Was the promise collateral in form? (2) Was the transaction in which it was made an executed sale or an executory contract to sell? (3) Did the transaction relate to specific goods? These tests may be considered in order.

### § 969. Suggested tests of a collateral warranty.

A warranty is not necessarily collateral in form, though frequently so. When a horse is sold and the seller, as a separate statement inducing the sale, says that he warrants him sound, the warranty is collateral. In the early English law probably all warranties were collateral in form.<sup>86</sup> At the present day it is clear that a warranty need not be collateral in form. An accepted order describing goods, or a contract to sell goods by description, involves a warranty that the goods are of that description.<sup>87</sup> This test is therefore inadequate. Nor is the distinction based on whether the agreement is executed or executory satisfactory. In an executory contract to sell, it is apparently true that there may be in England a collateral warranty, the truth of which will not be a condition of the buyer's obligations,<sup>88</sup> though such a case must be unusual. In the United States, however, the buyer certainly may reject goods offered under an **executory contract** if they fail to conform to a warranty of quality,<sup>89</sup> or of title.<sup>90</sup> Nor does the distinction between goods

case the court has the further aid of considering the materiality of the stipulation in question. The Sale of Goods Act affords no such clue.

<sup>86</sup> *Chandelor v. Lopus*, Dyer, 75, a, note; s. c. Cro. Jac. 4.

<sup>87</sup> *Edgar v. Breck*, 172 Mass. 581, 52 N. E. 1083; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, 38 N. J. L. 496, 20 Am. Rep. 425; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, 78 N. Y. 393, 34 Am. Rep. 544; *Morse v. Union Stock Yards*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157; Hoff-

man *v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916.

<sup>88</sup> See English Sale of Goods Act, § 11 (1), (b). Cf. Benjamin, *Sale* (5th Eng. Ed.), 1003.

<sup>89</sup> *Rubin v. Sturtevant*, 80 Fed. 930, 51 U. S. App. 286, 26 C. C. A. 259; *Owens v. Sturges*, 67 Ill. 366; *Boothby v. Plaisted*, 51 N. H. 436, 437, 12 Am. Rep. 140.

<sup>90</sup> *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550, 56 S. W. 969, 49 L. R. A. 416, 94 Am. St. Rep. 388.

specified and those unspecified at the time of the bargain afford more help.

A warranty collateral in form ordinarily applies to specific goods. Indeed a collateral warranty of unspecified goods is only conceivable in an executory contract to sell. But if a collateral warranty is possible in any case of an executory contract to sell, it seems that such a possibility is not precluded though the goods are unspecified at the time of the bargain. The difficulty of determining when a warranty is collateral, and the slight importance attached by parties to the form of their transaction makes it undesirable for the law to make a substantial difference in the rights of the parties depend on whether a warranty is collateral in form. If the buyer on breach of any material promise or warranty by the seller, may reject the goods if title has not passed and may rescind it by acting promptly if title has passed,<sup>91</sup> there will be little occasion to distinguish between collateral obligations and those which form part of the main promise. The principles governing substantial performance and material breach of contract will suffice.

#### § 970. Definition of express warranty.

The American Uniform Sales Act thus defines express warranty:<sup>92</sup>

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."<sup>93</sup> It should be observed that under this definition a warranty is not necessarily a promise or contract. The law of warranty is older by a century than special assumpsit, and the action on the

<sup>91</sup> See *infra*, § 1461.

<sup>92</sup> Sec. 12.

<sup>93</sup> See *Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646, 141 C. C. A. 402; *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361;

*Mastin v. Boland*, 178 N. Y. App. D. 421, 165 N. Y. S. 468; *Dabany v. Rosenthal* (N. Y. Misc.), 152 N. Y. S. 1043; *Kirkpatrick v. Kepler*, 164 Wis. 558, 160 N. W. 1047.

case on a warranty was in part the foundation of the action of *assumpsit*. An action on a warranty was regarded for centuries as an action of deceit, and it was not until 1778 that the first reported decision occurs of an action in *assumpsit* on a warranty.<sup>94</sup> And it is still possible where a distinction of procedure is observed between actions of tort and of contract to frame the declaration for breach of warranty in tort.<sup>95</sup> It is probable that to-day most persons instinctively think of a warranty as necessarily a contract or promise, but though frequently warranties are true promises and contracts, in other cases they are merely representations which induce a sale, and if it is said that a promise or contract is implied from such representation, the implication is one of law and not of fact.<sup>96</sup> It may be added that the whole law of implied warranty both of title and of quality is based on implied representations rather than on promises.

### § 971. Intent to warrant.

It is often said that an intent on the part of the seller to warrant is an essential element of the obligation. Undoubtedly in order to make out a true contract of warranty, it is essential that the apparent intention of the seller shall have been to promise in consideration of the buyer's purchase; but if the contention in the previous section is sound that warranty may be based on representation as well as on true contract, it follows that not even apparent intent to contract is essential, and much authority supports this conclusion.<sup>97</sup> It is of vital importance, however, that the seller should affirm as matter of fact, and not as matter of opinion, his statement

<sup>94</sup> *Stuart v. Wilkins*, 1 Doug. 18.

<sup>95</sup> *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172; *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 15 L. R. A. (N. S.) 884, 84 N. E. 481, *Williston, Sales*, § 197.

<sup>96</sup> *Williston, Sales*, § 197. See *infra*, §§ 1503, 1504. See, however, *Heilbut v. Buckleton*, [1913] A. C. 30. A criticism of this decision may be found in 27 Harv. L. Rev. 1. It is followed

in *Harrison v. Knowles*, [1918] 2 K. B. 608.

<sup>97</sup> *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615; *Stroud v. Pierce*, 6 Allen, 413, 416; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Ingraham v. Union R. Co.*, 19 R. I. 356, 33 Atl. 875; *Hobart v. Young*, 63 Vt. 363, 369, 21 Atl. 612, 12 L. R. A. 693. See further, *Williston on Sales*, §§ 198, 199.

in order to render him liable as a warrantor.<sup>98</sup> The tendency of modern cases is towards holding positive statements of quality affirmations of fact.<sup>99</sup> The question has been somewhat confused by inexact terminology. The words *warranty* and *representation* recur in the discussions, and differences of opinion have been increased by the manifold meanings attached to the word warranty.<sup>1</sup> That a representation is the antithesis of warranty, as that word is used in the language of insurance and of charter-parties, is certain. It is natural that it should be hastily assumed that the same antithesis is used when warranty is spoken of in the law of sales; and this assumption is made in some of the decisions, but generally it is made clear if a representation is spoken of as distinguished from a warranty, that what is meant by representation is an expression of opinion as distinguished from an assertion of fact.

### § 972. Reliance of the buyer—obvious defects.

It is essential that the buyer should rely on the seller's statement, whether in the particular case the warranty sounds in contract or in tort. If in contract, the offer must be accepted; if in tort, the deceitful statement must be acted on. The difficulties which arise in regard to questions of reliance relate to several special cases which may be classified under four headings, as follows: 1, Obvious or known defects; 2, inspection; 3, statements made previously to the bargain; 4, statements made subsequently to the bargain. In regard to obvious defects, two conceptions exist which are not always kept separate. In the first place, a warranty in general terms is held not to cover defects which the buyer must have observed.<sup>2</sup> This is a rule of a construction, and is based on an

<sup>98</sup> See the analogous question regarding fraudulent statements, *infra*, §§ 1491. *et seq.*

<sup>99</sup> See Williston, Sales, §§ 203, 204.

<sup>1</sup> See *supra*, § 673.

<sup>2</sup> Thompson v. Harvey, 86 Ala. 519, 5 So. 825; Huston v. Plato, 3 Colo. 402; Marshall v. Drawhorn, 27 Ga. 275; Ragsdale v. Shipp, 108 Ga. 817, 34 S. E. 167; O. H. Jewell Filter Co.

v. Kirk, 102 Ill. App. 246, *affd.*, 200 Ill. 382, 65 N. E. 698; Connersville v. Wadleigh, 7 Blackf. 102, 41 Am. Dec. 214; Dean v. Morey, 33 Iowa, 120; Storrs v. Emerson, 72 Iowa, 390, 34 N. W. 176; Scott v. Geiser Mfg. Co., 70 Kans. 500, 80 Pac. 955; Richardson v. Johnson, 1 La. Ann. 389; Brown v. Bigelow, 10 Allen, 242; McCormick v. Kelly, 28 Minn. 135, 9 N. W. 675;

endeavor by the court to give effect to the intention of the parties.

In the second place, there are statements, especially in the earlier authorities, which seem to go so far as to say that it is impossible to warrant against an obvious defect, however clearly a seller may have expressed an intention to do so. As to this, there seems no reason if the seller contracts in regard to an obvious defect or if he makes representations upon which the buyer in fact relies, why he should escape liability. It can hardly lie in his mouth to say that though he was making false representations or promises to induce the buyer to make the bargain, and the buyer was thereby induced, he should not have been. Certainly there is a growing tendency in the law not to allow that sort of argument.<sup>3</sup>

### § 973. Inspection.

Inspection may conceivably have a threefold importance in connection with the buyer's reliance on the seller's state-

*Hansen v. Gaar, Scott & Co.*, 63 Minn. 94, 65 N. W. 254; *Branson v. Turner*, 77 Mo. 489; *Doyle v. Parish*, 110 Mo. App. 470, 85 S. W. 646; *Hanson v. Edgerly*, 29 N. H. 343; *Leavitt v. Fletcher*, 60 N. H. 182; *Schuyler v. Russ*, 2 Caines, 202; *Jennings v. Chetango County Ins. Co.*, 2 Denio, 78; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Bennett v. Buchan*, 76 N. Y. 386; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; *Mulvany v. Rosenberger*, 18 Pa. St. 203; *Fisher v. Pollard*, 2 Head, 314, 75 Am. Dec. 740; *Long v. Hicks*, 2 Humph. 305; *Williams v. Ingram*, 21 Tex. 300; *McAfee v. Meadows*, 32 Tex. Civ. App. 105, 75 S. W. 813; *Hill v. North*, 34 Vt. 604.

<sup>3</sup> In *Norris v. Parker*, 15 Tex. Civ. App. 117, 38 S. W. 259, the court said: "There seems to be no good reason why a warranty may not cover obvious defects as well as others, if the vendor is willing to give it, and

the buyer is willing to buy defective property on the assurance of the warranty. If he relies on his own judgment alone, he does not rely on his warranty." "A special warranty on the sale of a horse may be made to cover blemishes or defects which are open and visible, if the intention to do so is clearly manifested," is the language of the Supreme Court of Minnesota in the case of *Fitzgerald v. Evans*, 49 Minn. 541, 52 N. W. 143. In *Watson v. Roode*, 30 Neb. 264, 271, 46 N. W. 491, it is said: "The seller may bind himself against patent defects, if the warranty is so worded." To similar effect are *Turner v. Manley*, 14 Ga. App. 215, 80 S. E. 680; *Steele v. Andrews*, 144 Ia. 360, 121 N. W. 17; *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652; *Williams v. Ingram*, 21 Tex. 300; *Henderson v. Railroad Co.*, 17 Tex. 560, 67 Am. Dec. 675; *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693. See also *Branson v. Turner*, 77 Mo. 489; *June v. Falkinburg*, 89 Mo. App. 563.

ments. In the first place, if the defect was one which could be discovered by inspection and the buyer inspected the goods, it may be urged that the parties did not intend that the language used should cover this defect. This reasoning is analogous to that adopted in regard to obvious defects. An obvious defect, however, means a defect that is apparent upon casual inspection and does not need careful or expert examination for its discovery.<sup>4</sup> If the defect required examination of the latter sort, it is still more plain than in the cases of obvious defects that a seller who clearly promises or affirms that the goods are free from the defect which in fact vitiates them will be liable. A second aspect in which inspection or rather the right to inspect may have a bearing on the seller's liability, exists where the buyer has full power and opportunity to inspect, and inspection, if made, would have disclosed the defective character of the goods, but the buyer fails to make the inspection. These facts it may be urged should preclude liability on the seller's part, but whatever may be the law in regard to implied warranty<sup>5</sup> in the case of express warranty, either by contract or representation, it is no defense that the buyer, had he inspected, might have found out the falsity of the seller's statements. The buyer is justified in taking the seller at his word, and in relying upon the seller's statements rather than upon his own examination.<sup>6</sup> A third pos-

<sup>4</sup> *W. T. Adams Mach. Co. v. Turner*, 162 Ala. 351, 50 So. 308, 136 Am. St. Rep. 28.

<sup>5</sup> See *infra*, § 988. Courts sometimes do not observe the distinction between express and implied warranty in this respect. See, *e. g.*, *Egbert v. Hanford Produce Co.*, 92 N. Y. App. Div. 252, 86 N. Y. S. 1118.

<sup>6</sup> *Thompson v. Bertrand*, 23 Ark. 730. The seller of a slave gave a warranty of soundness. The buyer might have discovered the unsoundness of the slave's feet and knee by examination. The seller was held liable upon the warranty. *Leitch v. Gillette-Herzog Mfg. Co.*, 64 Minn. 434, 67 N. W. 352. The seller of 500 iron bedsteads stated that if the parts

of one of the beds went together properly the parts of all would do so. The buyer having found that one could be put together properly made no further inspection. It was held that the plaintiff was entitled to recover, though had he set up more of the bedsteads he would have discovered that the parts would not go together properly. See also *Jones v. Just*, L. R. 3 Q. B. 197, 204; *First Bank v. Grindstaff*, 45 Ind. 158; *Vaupel v. Lamply*, 181 Ind. 8, 103 N. E. 796; *Meickley v. Parsons*, 66 Iowa, 63, 23 N. W. 265, 55 Am. Rep. 261; *Cook v. Gray*, 2 Bush, 121; *Gould v. Stein*, 149 Mass. 570, 577, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Woods v. Thompson*, 114 Mo. App.

sible importance of inspection by the buyer is in excluding reliance by the buyer on any statement of the seller in regard to the goods. It was held in a New York decision that such was the effect of inspection.<sup>6a</sup> But this decision misinterprets the requirement of reliance. There is no reason in the nature of things why a buyer should not rely both on the seller's statements and on his own judgment. Observation shows that buyers constantly do this, and accordingly it is generally and rightly held that inspection by the buyer does not excuse the seller from liability for words which amount to an express warranty,<sup>6b</sup> if the difference between the goods and the description was not detected.<sup>6c</sup>

#### § 974. Statements before or after the bargain.

If a warranty be conceived of exclusively as an express contract, it is obvious that an offer of the warrantor accepted by the buyer is essential. If a statement made by the seller precedes the sale by a long period and especially if the statement was not made as part of the negotiations culminating in the sale, it will be difficult to find such an offer and accept-

38; *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122; *Barnum Wire Works v. Seley*, 34 Tex. Civ. App. 47, 77 S. W. 827; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

<sup>6a</sup> *Crocker-Wheeler Electric Co. v. Johns-Pratt Co.*, 29 N. Y. App. Div. 300, *affd.*, without opinion, 164 N. Y. 593, 58 N. E. 1086. The seller of material called "vulcabeston" represented that it was made of the best, para rubber and selected asbestos, and that it was practically a perfect insulating material. Specimens were furnished the buyer who experimented with them. The court said, as to the seller's statements: "They were not relied upon by the plaintiff or its predecessor; for, before making any contract, the officers of the plaintiff or its predecessor satisfied themselves, by their own investigation or experiment, that the representations made

respecting the material and its sufficiency for their purposes were true. It is elementary that, in order to entitle the plaintiff to maintain an action for breach of an express warranty, it must be established that the warranty was relied on. Such was not the case here." See also *Redfield v. Engel*, 171 Mich. 207, 137 N. W. 60.

<sup>6b</sup> *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Hitz v. Warner*, 47 Ind. App. 612, 93 N. E. 1005; *South Bend Co. v. Caldwell*, 21 Ky. L. Rep. 1084, 1363, 55 S. W. 208; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; *Keely v. Turbeville*, 11 Lea, 339; *Woods v. Thompson*, 114 Mo. App. 38.

<sup>6c</sup> *Procter v. Atlantic Fish Co.*, 208 Mass. 351, 94 N. E. 281.

ance. On the other hand, it is apparent that the buyer may be as completely deceived by statements prior to the ultimate negotiations as by statements made at the time of the bargain. If the view is sound that has been previously expressed, that the law imposes upon the seller the obligation of a warrantor, not simply when he agrees to assume it, but also when he induces the buyer to enter into the bargain by positive statements in regard to the goods, the buyer may well be protected. The original basis of warranty, as has been seen, a basis which still cannot be safely lost sight of, is the deception of the buyer because of his natural and, therefore, justifiable reliance on the seller's statements. This should furnish the test by which the seller's liability for past statements should be governed. There seems no reason to distinguish a case where the seller makes a statement in regard to goods at the time of the sale, a little while before that time, or a long time before, if the statement was originally made with reference to a possible sale, or was expressly or impliedly adopted as the basis for subsequent negotiations. Affirmation may induce the sale as fully when the buyer buys after considerable further negotiation, as when he buys immediately.<sup>7</sup> Statements subsequent to the bargain cannot amount to a warranty unless there is new consideration.<sup>8</sup>

### § 975. Implied warranties of title under Sales Act.

The obligations of one who sells or contracts to sell goods, to transfer a good title are thus expressed in the Sales Act.<sup>9</sup> "In a contract to sell or a sale, unless a contrary intention appears, there is—

"(1) An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.<sup>10</sup>

<sup>7</sup> See *Percival v. Oldacre*, 18 C. B. (N. S.) 398; *Cowdy v. Thomas*, 36 L. T. (N. S.) 22; *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N. S.) 855; *Powers v. Briggs*, 139 Mich. 664, 103 N. W. 194; *Empire State Bag Co. v. McDermott*, 89 N. Y.

App. Div. 234, 85 N. Y. S. 787; *Williston, Sales*, §§ 209, 210. Cf. *Texas Star Flour Mills Co. v. Moore*, 177 Fed. 744, 753.

<sup>8</sup> See *supra*, § 142.

<sup>9</sup> Sec. 13.

<sup>10</sup> *Carbolineum Wood Preserving Co.*



"(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

"(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer,<sup>11</sup> before or at the time when the contract or sale is made.<sup>12</sup>

"(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest."<sup>13</sup>

### § 976. No implied warranty of title in early law.

The English law started with the assumption that the seller did not warrant the title of the goods which he sold. This is clearly expressed in an often-quoted passage from Noy's *Maxims*,<sup>14</sup> "If I take the horse of another man, and sell him, and the owner takes him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse; and *caveat emptor*." If, however, the seller knew that he had no title and concealed the fact, he was early held responsible to the buyer for the fraud.<sup>15</sup> It was, of course, true as soon as warranty was recognized at all that a seller might warrant the title of the goods which he sold, and Lord Holt made it clear that a bare affirmation of title by the seller amounted to a warranty.<sup>16</sup> Lord Holt confined his ruling to the case where the seller was in possession, but

*v. Carter* (N. Y. Munic. Ct.), 50 N. Y. L. J. 361, 27 Harv. L. Rev. 287; *Kirkpatrick v. Kepler*, 164 Wis. 558, 160 N. W. 1047.

<sup>11</sup> If an incumbrance is known to the buyer no warranty is implied. *Dreibach v. Eckelkamp*, 82 N. J. L. 726, 83 Atl. 175.

<sup>12</sup> *Kirkpatrick v. Kepler*, 164 Wis. 558, 160 N. W. 1047.

<sup>13</sup> This section closely follows section 12 of the English Sale of Goods Act, except subsection (4) which is an addition. There are some changes of wording in the other subsections

of which the essential ones are: In the first line of (1) "warranty" is substituted for "condition;" in (2) the final words "as against any lawful claims existing at the time of the sale" have been added; in (3) the words "at the time of the sale" have been inserted.

<sup>14</sup> Chapter 42.

<sup>15</sup> *Sprigwell v. Allen*, Aleyn, 91, 2 East, 448, note; *Furnis v. Leicester*, Cro. Jac. 474.

<sup>16</sup> *Medina v. Stoughton*, 1 Salk. 210, 1 Ld. Raym. 593. See also *Anon.*, 1 Rolle Abr. 90, 91, pl. 5-8.

in *Pasley v. Freeman*,<sup>17</sup> Buller, J., held an affirmation effective whether the seller was in possession or not. The progress of the law from this point is typical of its tendency in the entire subject of contracts. In early times intentions not expressed by words were disregarded; to-day they are frequently given effect by the recognition of implied meanings. Blackstone says:<sup>18</sup> "By the Civil law (Ff. 21, 2, 1) an implied warranty was annexed to every sale, in respect to the title of the vendor; and so too, in our law, a purchaser of good and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." (Cro. Jac. 474, 1 Rolle Abr. 90.) Perhaps this statement so far as it implies that the seller by the mere act of selling warrants his title was somewhat ahead of Blackstone's time, for it was not until 1864 that the general doctrine was established that the sale of a chattel is a representation of title in the seller and, therefore, a warranty.<sup>19</sup>

### § 977. Warranty of title in America.

Where the seller is in possession of goods it has uniformly been held in the United States that there is a warranty of title.<sup>20</sup>

<sup>17</sup> 3 T. R. 51.

<sup>18</sup> 2 Comm. 451.

<sup>19</sup> *Eichholz v. Bannister*, 17 C. B. (N. S.) 708. In *Raphael v. Burt*, Cab. & Ellis, 325, it was held broadly by Stephen, J., that a sale of personal property (bonds) implies an affirmation of title. See also *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127, 144; *Baguley v. Hawley*, L. R. 2 C. P. 625.

<sup>20</sup> *Deatz v. United States*, 38 Ct. Cl. 355; *Houser's Case*, 39 Ct. Cl. 508; *Williamson v. Sammons*, 34 Ala. 691; *Gray v. Haynes*, 164 Ala. 294, 51 So. 416; *Hafer v. Cole*, 176 Ala. 242, 57 So. 757; *Lindsay v. Lamb*, 24 Ark. 222; *Mason v. Bohannon*, 79 Ark. 435, 96 S. W. 181; *Miller v. Van Tassel*, 24 Cal. 458; *Gross v. Kierski*, 41 Cal. 111; *Starr v. Anderson*, 19 Conn. 338; *Lines v. Smith*, 4 Fla. 47; *Morris v. Thompson*, 85 Ill. 16; *Marshall*

*v. Duke*, 51 Ind. 62; *Paulsen v. Hall*, 39 Kans. 365, 18 Pac. 225; *Thurston v. Spratt*, 52 Me. 202; *Maxfield v. Jones*, 76 Me. 135, 137; *Rice v. Forsyth*, 41 Md. 389; *Shattuck v. Green*, 104 Mass. 42; *Boston & Albany R. R. Co. v. Richardson*, 135 Mass. 473; *Hunt v. Sackett*, 31 Mich. 18; *Fulwell v. Brown*, 156 Mich. 551, 121 N. W. 265; *Davis v. Smith*, 7 Minn. 414; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Jordan v. Van Dusee*, 139 Minn. 103, 165 N. W. 877, L. R. A. 1918, B. 1136; *Storm v. Smith*, 43 Miss. 497; *Schell v. Stephens*, 50 Mo. 375; *Matheny v. Mason*, 73 Mo. 677, 39 Am. Rep. 541; *Shultis v. Rice*, 114 Mo. App. 274, 89 S. W. 357; *Dierling v. Pettit*, 140 Mo. App. 88, 119 S. W. 524; *Budd v. Power*, 8 Mont. 380, 20 Pac. 820; *Hall v. Aitkin*, 25 Neb. 360, 41 N. W. 192; *Sargent v. Currier*, 49

The doctrine suggested by Lord Holt that no warranty existed if the seller was not in possession has been recognized by number of *dicta* and a few decisions;<sup>21</sup> but this denial of warranty been disapproved in recent cases, and it may be questioned whether it is likely to be permanently followed even aside from statute.<sup>22</sup> The doctrine of implied warranty of title applies not simply to chattels but also to choses in action, both to those having tangible form, such as bonds,<sup>23</sup> stock,<sup>24</sup> negotiable paper,<sup>25</sup> and also to those having no tangi-

N. H. 310, 6 Am. Rep. 524; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523; *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. 64; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *Cohn v. Ammidown*, 120 N. Y. 398, 24 N. E. 944; *Inge v. Bond*, 3 Hawks, 101; *St. Anthony &c. Elevator Co. v. Dawson*, 20 N. Dak. 18, 126 N. W. 1013, Ann. Cas. 1912, B. 1337; *Balte v. Bedemiller*, 37 Or. 27, 60 Pac. 601, 82 Am. St. Rep. 737; *Whitaker v. Eastwick*, 75 Pa. St. 229; *Krumbhaar v. Birch*, 83 Pa. St. 426; *Colcock v. Goode*, 3 McCord, 513; *Word v. Cavin*, 1 Head, 506; *Gookin v. Graham*, 5 Humph. 480; *Gilchrist v. Hilliard*, 53 Vt. 592, 38 Am. Rep. 706; *North American Commercial Co. v. North American Transportation Co.*, 52 Wash. 502, 100 Pac. 985; *Byrnside v. Burdett*, 15 W. Va. 702; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; *Edgerton v. Michels*, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408.

<sup>21</sup> *Lowman v. Excelsior Pattern Co.*, 104 Ala. 367, 16 So. 17; *Huntingdon v. Hall*, 36 Me. 501, 58 Am. Dec. 765; *Long v. Hickingbottom*, 28 Miss. 772, 64 Am. Dec. 118; *Storm v. Smith*, 43 Miss. 497; *Edick v. Crim*, 10 Barb. 445; *Hopkins v. Grinnell*, 28 Barb. 533, 537; *Scranton v. Clark*, 39 N. Y. 220, 100 Am. Dec. 430; *Andres v. Lee*, 1 Dev. & Bat. Eq. 318; *Scott v. Hix*, 2 Sneed, 192, 62 Am. Dec. 458; *Byrnside v. Burdett*, 15 W. Va. 702.

<sup>22</sup> In *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. 64, Depue, J., delivering the opinion of the court said: "In this country the distinction between sales where the vendor is in possession and where he is out of possession, with respect to implied warranty of title, has been generally recognized, but the tendency of later decisions is against the recognition of such a distinction and favorable to the modern English rule." In *Whitney v. Heywood*, 6 Cush. 82, 86, Dewey, J., says "possession here must be taken in its broadest sense," and "the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied;" and this language is quoted with approval in *Shattuck v. Green*, 104 Mass. 42, 45. In *St. Anthony &c. Elevator Co. v. Dawson*, 20 N. Dak. 18, 126 N. W. 1013, Ann. Cas. 1912, B. 1337, a warranty was held properly implied when goods were constructively in the seller's possession—that is, in the possession of his bailee.

<sup>23</sup> *Raphael v. Burt*, Cab. & Ellis, 325; *Utley v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54; *Richardson v. Marshall County*, 100 Tenn. 346, 45 S. W. 440.

<sup>24</sup> *State v. R. R. Co.*, 34 La. Ann. 947; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523.

<sup>25</sup> *Bank of St. Albans v. Farmers'*

ble form, such as accounts,<sup>28</sup> rights in a partnership,<sup>27</sup> and rights in inventions whether patented or not.<sup>28</sup> In short, the doctrine is applicable to all personal property.<sup>29</sup> Under the Sales Act,<sup>30</sup> an exchange is properly designated a sale, but apart from statute there is the same warranty of title in a contract of barter as in a sale for money.<sup>31</sup> A seller who has no title to the goods which he purports to sell but who afterwards acquires title is estopped to deny the validity of the transfer because of the implied representation and warranty of title.<sup>32</sup> The Sales Act further expressly provides in subsection (3) of section 13, that there is an implied warranty against incumbrances. This merely enacts the rule of the common law; for the implied warranty that the seller has title means that he has a perfect title free from incumbrances.<sup>33</sup>

Bank, 10 Vt. 141, 33 Am. Dec. 188; Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682. See also Meyer v. Richards, 163 U. S. 385, 41 L. Ed. 199, 16 Sup. Ct. Rep. 1148, and *infra*, § 1162.

<sup>28</sup> Gilchrist v. Hilliard, 53 Vt. 592, 38 Am. Rep. 706.

<sup>27</sup> Jamison v. Harbert, 87 Iowa, 186, 54 N. W. 75.

<sup>28</sup> Krumbhaar v. Birch, 83 Pa. St. 426; Costigan v. Hawkins, 22 Wis. 74, 94 Am. Dec. 583.

<sup>29</sup> A sale of the reports of a Commercial Agency (applying Sales Act, § 94 of c. 571, Acts, 1911). Carbolinum Wood Preserving Co. v. Carter, 50 N. Y. L. J. 361, commented on in 27 Harv. L. Rev. 287 (N. Y. Munic. Ct. 1913).

<sup>30</sup> Section 9 (2).

<sup>31</sup> Hunt v. Sackett, 31 Mich. 18; Close v. Crossland, 47 Minn. 500, 50 N. W. 694; Patee v. Pelton, 48 Vt. 182; Byrnside v. Burdett, 15 W. Va. 702.

<sup>32</sup> Williston, Sales, § 131.

<sup>33</sup> Burpee v. Holmes, 132 Ga. 464, 64 S. E. 486; Close v. Crossland, 47

Minn. 500, 50 N. W. 694; Hickman v. Dill, 39 Mo. App. 246; Hall v. Aitkin, 25 Neb. 360, 41 N. W. 192; Dresser v. Ainsworth, 9 Barb. 619; Hodges v. Wilkinson, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545; Clevenger v. Lewis, 20 Okla. 837, 95 Pac. 230; Baker v. Shaw, 68 Wash. 99, 122 Pac. 611, 613. The decisions cited above related to property incumbered by a mortgage. The following decisions relate to patents depriving the purchaser of the right to use the property purchased: Electro Dynamic Co. v. The Electron, 74 Fed. 689, 45 U. S. App. 16, 21 C. C. A. 12; Siegel v. Brooke, 25 Ill. App. 207; National Box Co. v. Gotham, 111 N. Y. S. 1132, 126 N. Y. App. Div. 926. Compare American Electrical Co. v. Consumers' Gas Co., 47 Fed. 43; Lowman v. Excelsior Pattern Co., 104 Ala. 367, 16 So. 17. In Benjamin, Sale (5th Eng. Ed.), 674, however, it is said that there was no authority in the English common law for the provisions in the Sale of Goods Act, either as to warranty of quiet enjoyment or against incumbrances.

### § 978. Limitations on implied warranty of title.

Whether the seller is in or out of possession there can be no doubt that by appropriate words he may sell simply such interest as he may have in the property.<sup>34</sup> The intent to limit the seller's undertaking to a mere quitclaim may be expressed not only by an agreement in terms to sell such interest as the seller has, but otherwise, as by a refusal to warrant title.<sup>35</sup> The nature of the seller's right may also be known to the buyer and may be of such doubtful character that it must be assumed the parties intended to buy and sell only such title as the seller had.<sup>36</sup>

<sup>34</sup> *First National Bank v. Mass. Trust Co.*, 123 Mass. 330; *Croly v. Pollard*, 71 Mich. 612, 39 N. W. 853; *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. 64; *Krumbhaar v. Birch*, 83 Pa. St. 426; *Peuchen v. Imperial Bank*, 20 Ont. 325.

<sup>35</sup> *Miller v. Van Tassel*, 24 Cal. 458; *Dreisbach v. Eckelkamp*, 82 N. J. L. 726, 83 Atl. 175; *Porter v. Bright*, 82 Pa. St. 441.

<sup>36</sup> In *Morley v. Attenborough*, 3 Ex. 500, a sale of pledged property by a pawnbroker was held not to be accompanied by a warranty of title, though the property was sold by auction and it was not stated in the auctioneer's catalogue to be a forfeited pledge. Parke, B., threw out the suggestion that though there was no implied warranty of title, perhaps the purchaser might recover back the purchase money as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to, if the purchaser should not have a good title. This of course would be very difficult to show unless there was an express agreement to that effect. In *Chapman v. Speller*, 14 Q. B. 621, the defendant at a sheriff's sale bought the goods from the sheriff for £18. The plaintiff was also at the sale and bought the defendant's bargain of

him for £5 and paid him this together with the £18, the price of the goods. The defendant paid the sheriff the £18 and the latter began to deliver the goods to the plaintiff when they were claimed by the true owner as not the property of the execution debtor. It was held that there was no implied warranty by the plaintiff that he had title nor was there any failure of consideration, the plaintiff having paid the £23 to the defendant, not for the goods but for such right as the defendant had acquired by his purchase. In *Bagueley v. Hawley*, L. R. 2 C. P. 625, a boiler had been seized and sold under a distress for a poor rate due from the occupier of the premises, on which the boiler was set. It was bought at public auction by the defendant and before removal resold by him to the plaintiffs with notice of the circumstances under which the defendant had bought it, the plaintiffs by the bargain being required to move the boiler at their own expense from the premises where it was still standing. The mortgagees of the premises prevented the plaintiffs from carrying it away and they brought this action on an alleged implied warranty. The court held, Willes, J., dissenting, that there was no evidence to justify a jury in finding a warranty. In *Hopkins v. Grinnell*, 28 Barb. 533, the defendants had levied on property

**§ 979. Sales by one not professing to be owner.**

The commonest illustration of the principle referred to in the preceding section is found in sales by those who purport to sell by virtue of authority in fact or law. Such persons unless they expressly warrant title are not liable for the lack of title of the person who is supposed to own the goods.<sup>37</sup> This principle is expressed in subsection (4) of the section of the Sales Act under consideration, which states a well-settled doctrine. So in cases of sales by a sheriff, or other judicial officer,<sup>38</sup> or auctioneer,<sup>39</sup> or mortgagee,<sup>40</sup> or assignee in bankruptcy,<sup>41</sup> or executor or administrator,<sup>42</sup> or guardian,<sup>43</sup> or simply an agent.<sup>44</sup> If the seller either has authority in fact from the principal to make the sale, or if the principal is bound for any other reason by the agent's act in making the sale, there will be on well-known principles of agency the same obligation imposed upon the principal as if he had made the sale directly himself. The agent is not wholly free from implied obligation, but all that he warrants is his authority to act for the principal, and if he has not the authority which he assumes to have he will be liable.<sup>45</sup> If the seller's authority is conferred upon him by law, as in the case of a sheriff, there can, of course, be no implied warranty by the owner of the goods any more than by the officer who

in the factory of their debtor. The plaintiff knowing these facts entered into a contract with the debtor for the purchase of the property covered by the levy. Thereupon the defendants gave him an order addressed to the sheriff who had levied upon the property directing him to deliver the plaintiff the goods which he had purchased. The sheriff refused to deliver the goods on account of the lien of junior executions in his hands. It was held there was no warranty of title. In this case, however, the plaintiff had only given a note for the price of the goods he purchased and this note was produced for cancellation at the trial.

<sup>37</sup> *Bassett v. Lockard*, 60 Ill. 164;

*Neal v. Gillaspay*, 56 Ind. 451, 26 Am. Rep. 37.

<sup>38</sup> *The Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174; *Robinson v. Cooper*, 1 Hill (S. C.), 286.

<sup>39</sup> *Mercer v. Leihy*, 139 Mich. 447, 102 N. W. 972.

<sup>40</sup> *Harris v. Lynn*, 25 Kans. 281, 37 Am. Rep. 253; *Cohn v. Ammidown*, 120 N. Y. 398, 24 N. E. 944.

<sup>41</sup> *Johnson v. Laybourn*, 56 Minn. 332, 57 N. W. 933.

<sup>42</sup> *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Brandon v. Brown*, 106 Ill. 519; *Sparks v. Messick*, 65 N. C. 440.

<sup>43</sup> *Storm v. Smith*, 43 Miss. 497.

<sup>44</sup> *Irwin v. Thompson*, 27 Kan. 643.

<sup>45</sup> See *supra*, § 282, *infra*, § 1507.

makes the sale. Moreover, such officers, unlike agents whose power is derived from authority in fact, do not warrant the validity of the authority which they purport to exercise. They are, however, liable for actual representations, fraud, or negligence in the exercise of their duties.<sup>46</sup>

§ 980. When the cause of action arises.

There is much difference of opinion upon the question when the right of action of a purchaser arises for breach of a warranty of title. On principle it would seem that if the seller did not have a good title when he sold the goods, there was then an immediate breach of his obligation. This view, though, supported by the English law as well as by some cases in the United States,<sup>47</sup> is nevertheless open to some practical objections. If the cause of action arises before eviction or claim made by the superior title, it may be that the Statute of Limitations will bar the buyer's right to recover on the warranty before he is aware that it has been broken. Moreover, if the buyer can sue at once it is very difficult to say what damages he ought to be given. If he is allowed the value of the property he may get not only its full value in this way but continue in undisturbed possession of the property itself. On the other hand, if he is restricted to nominal damages his remedy will be of no practical value to him and will indeed work him this possible injury, that the judgment he recovers may prevent him from bringing a later suit when he has suffered substantial damage. Logically his recovery, if his action is tried before he has been evicted, should be based on the chance of his being subsequently deprived of the benefit of what he had bought.<sup>48</sup> Such a measure of damage is, however, so speculative as to be difficult of practical application. For these reasons many of the

<sup>46</sup> *Mechem, Public Officers*, 809, 812; *Sexton v. Nevers*, 20 Pick. 451, 32 Am. Dec. 225. See also *supra*, § 305.

<sup>47</sup> *Furnis v. Leicester*, Cro. Jac. 474; *Turner v. Moon*, 2 Ch. App. 825 (real estate); *Chancellor v. Wiggins*, 4 B. Mon. 201, 39 Am. Dec. 499; *Grose v. Hennessey*, 13 Allen, 389; *Perkins v.*

*Whelan*, 116 Mass. 542; *Matheny v. Mason*, 73 Mo. 677, 680, 39 Am. Rep. 541. See also *Harper v. Dotson*, 43 Iowa, 232; *Pusey's Trustee v. Wathen*, 90 Ky. 473, 14 S. W. 418; *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Word v. Cavin*, 1 Head, 506.

<sup>48</sup> See *infra*, §§ 1395, 1396.

United States deny the buyer a right of action until his possession has been interfered with.<sup>49</sup> "The vendee is not bound to await legal action against him. If satisfied of the insufficiency of his vendor's title, and that the true owner would recover the property in an action, he may surrender it, and recover its value in an action against his vendor, by affirmatively establishing that the vendor was without title; or the vendee may await the prosecution of an action. If the vendor be notified of the action and required to defend, a judgment, if obtained, would be conclusive as to his want of title; but if not notified, and judgment is obtained, the *onus* of showing want of title would rest upon the vendee, the same as if surrendered without action."<sup>50</sup> "If the property be surrendered to the true owner, then the vendee's loss and damage is established; but if a judgment be had against him, either with or without notice, the vendee's loss or damage is not established without proofs of satisfaction or payment of the judgment."<sup>51</sup> The burden is, of course, upon the buyer to establish that the seller had no title to the goods, and if the goods have been surrendered unreasonably to an adverse claimant against the buyer, this is no proof of the original seller's defect of title in an action between him and the buyer unless the seller was requested to defend the action against the adverse claimant or at least had notice of that action.<sup>52</sup>

<sup>49</sup> *Johnson v. Oehmig*, 95 Ala. 189, 10 So. 430, 36 Am. Rep. 204; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec. 39; *Sullivan v. Wooldridge*, 107 Ark. 256, 154 S. W. 508; *Gross v. Kierski*, 41 Cal. 111; *Barnum v. Cochrane*, 143 Cal. 642, 77 Pac. 656; *Terrell v. Stevenson*, 97 Ga. 570, 25 S. E. 352; *Linton v. Porter*, 31 Ill. 107; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Wanser v. Messler*, 29 N. J. L. 256; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482 (compare *McGiffin v. Baird*, 62 N. Y. 329; *Cahill v. Smith*, 101 N. Y. 355, 4 N. E. 739); *Krumbhaar v. Birch*, 83 Pa. St. 426; *Hull v. Caldwell*, 3 S. Dak. 451, 54 N. W. 100. See also *Randon v. Toby*, 11 How. 493, 13 L. Ed. 784; *Joslin v. Caughlin*, 27 Miss. 852.

<sup>50</sup> *Burt v. Dewey*, 40 N. Y. 283, 286, 100 Am. Dec. 482, citing *Sweetman v. Prince*, 26 N. Y. 224, 232. See also *Hafer v. Cole*, 176 Ala. 242, 57 So. 757; *Bordwell v. Collie*, 45 N. Y. 494; *O'Brien v. Jones*, 91 N. Y. 193; *Cahill v. Smith*, 101 N. Y. 355, 4 N. E. 739; *Johnson v. Oehmig*, 95 Ala. 189, 10 So. 430, 36 Am. St. Rep. 204; *Jordan v. Van Dusee*, 139 Minn. 103, 165 N. W. 877; *Matheny v. Mason*, 73 Mo. 682, 39 Am. Rep. 541; *Read v. Staton*, 3 Hayw. 159; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545.

<sup>51</sup> *Burt v. Dewey*, 40 N. Y. 283, 286, 100 Am. Dec. 482. And see cases cited in the preceding note.

<sup>52</sup> *Salle v. Light's Exrs.*, 4 Ala. 700,



The decisions allowing an immediate right of action hold, in effect, that the seller is subject to a warranty of title, strictly so called. The other decisions limit the obligation of the seller in effect to a covenant of quiet enjoyment. The Uniform Sales Act, following the provisions of the English statute, provides that the seller impliedly warrants both title and quiet enjoyment. The effect of this provision would seem to be to give the buyer the right to proceed immediately though his possession was not disturbed, and if later his position was interfered with he could bring another action on the implied covenant of quiet enjoyment and recover the damages which he failed to recover in the first action. The same question arises in regard to covenants of warranty and quiet enjoyment in deeds of real estate.<sup>53</sup>

### § 981. Rule of the Civil law.

By the classical Roman law the seller was not bound to transfer a good title to the buyer. He was, however, bound to guarantee the purchaser undisturbed possession. This rule produces in effect the result reached by the American authorities referred to in the preceding section, which require some disturbances of the buyer's possession as a condition precedent to any right of action by him.<sup>54</sup> The modern French law preserves the rule of the Roman law, and goes beyond it so far as to compel the seller to restore the price even though the parties have agreed that there shall be no warranty unless the sale expressly related to a disputed right or claim.<sup>55</sup> The

39 Am. Dec. 317; *Thurston v. Spratt*, 52 Me. 202; *Ryerson v. Chapman*, 66 Me. 557; *Fallon v. Murray*, 16 Mo. 168; *Barney v. Dewey*, 13 Johns. 224, 7 Am. Dec. 372; *Buchanan v. Kauffman*, 65 Tex. 235.

<sup>53</sup> See *infra*, § 1401.

<sup>54</sup> Moyle, *Contract of Sale in the Civil Law*, 110, 111.

<sup>55</sup> The provisions of the French Code are as follows: "1625. The warranty due from the seller to the buyer has two objects: first, the peaceful possession of the thing sold; secondly, the concealed defects of this

thing, or its redhibitory vices. 1626. Although at the time of sale there has been no stipulation as to warranty, the seller is legally bound to warrant the buyer against suffering total or partial eviction from the thing sold, or from liens asserted on the thing (*charges prétendues sur cet objet*), and not mentioned at the time of the sale. 1627. The parties may, by special conventions, add to this legal obligation, or diminish its effect, and may even stipulate that the seller shall not be liable to any warranty. 1628. Although it be stipulated that the seller

rule in Germany prior to the enactment of the Civil Code has also been that the seller warranted quiet enjoyment by the buyer and, therefore, that no cause of action arose until the vendor's possession has been interfered with.<sup>56</sup> By the Civil Code, however, the seller is bound to make the buyer owner.<sup>57</sup> Possibly this may affect the German law in this particular.

### § 982. Implied warranty of quality in the Sales Act.

The Uniform Sales Act provides as follows: Sec. 15. "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.<sup>58</sup>

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.<sup>59</sup>

shall be liable to no warranty, he remains bound to a warranty against his own act; any contrary agreement is void. 1629. In the same case of a stipulation of no warranty, the seller, in the event of eviction, remains bound to return the price, unless the buyer knew, when he bought, the danger of eviction, or unless he bought at his own risk and peril."

<sup>56</sup> Endemann, Einführung, 700.

<sup>57</sup> Bürgerliches Gesetzbuch, § 433.

<sup>58</sup> *Kansas City Bolt Co. v. Rodd*, 220 Fed. 750, 136 C. C. A. 356 (Ohio); *Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646, 141 C. C. A. 402; *Job v. Heidritter Lumber Co.*, 255 Fed. 311, (C. C. A.) (N. Y.); *Gearing v.*

*Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916, D. 1006; *Pentland v. Jacobson*, 189 Mich. 339, 155 N. W. 468. *G. B. Shearer Co. v. Kakoulis*, 144 N. Y. S. 1077; *Marx v. Locomobile Co.*, 82 N. Y. Misc. 468, 144 N. Y. S. 937; *Wasserstrom v. Cohen*, 165 N. Y. App. D. 171, 150 N. Y. S. 638. There was held to be no implied warranty of food in a sale to a dealer. *Baker v. Kamantowsky*, 188 Mich. 569, 155 N. W. 430; *Zielinski v. Potter*, 195 Mich. 90, 161 N. W. 851.

<sup>59</sup> *Thornett v. Beers*, [1919], 1 K. B. 486; *Flacomio v. Eysink*, 129 Md. 367, 100 Atl. 510, 516; *Maggiore v. Edson* (N. Y. Misc.), 164 N. Y. S. 377.

"(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."<sup>60</sup>

"(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."<sup>61</sup>

"(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade."<sup>62</sup>

"(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."<sup>63</sup>

This section follows substantially section 14 of the English act, though the American act uses the word "warranty."<sup>64</sup> The English statute was intended to be an exact codification of the previously existing common law, and the American act should be construed with this in mind.<sup>65</sup>

### § 983. No implied warranty of quality in the early law.

A development in the law of implied warranty of quality is to be observed similar to that already noticed in regard to implied warranty of title. There are early cases making it clear that in the absence of knowledge by the seller that the article which he sold was of bad quality he was not liable.<sup>66</sup>

<sup>60</sup> *Pentland v. Jacobson*, 189 Mich. 339, 155 N. W. 468.

<sup>61</sup> *Quemahoning Coal Co. v. Sanitary &c. Co.*, 88 N. J. L. 174, 95 Atl. 986; *Empire Cream Separator Co. v. Quinn*, 184 N. Y. App. D. 302, 171 N. Y. S. 413; *Sure Seal Co. v. Loeber*, 171 N. Y. App. D. 225, 157 N. Y. S. 327; *Matteson v. Lagace*, 36 R. I. 223, 89 Atl. 713; *Ohio Elec. Co. v. Wisconsin &c. Co.*, 161 Wis. 632, 155 N. W. 112; *Northwestern Blaugas Co. v. Guild (Wis.)*, 171 N. W. 662.

<sup>62</sup> *Procter v. Atlantic Fish Co.*, 208 Mass. 351, 94 N. E. 281.

<sup>63</sup> *Pentland v. Jacobson*, 189 Mich. 339, 155 N. W. 468.

<sup>64</sup> In subsections (1-3), however, the

English act uses "condition." The American subsection (3) is a proviso of subsection (2) of the English act and the American subsection (4) a proviso of subsection (1). In subsection (1) after the word "judgment" the English act has the following words: "and the goods are of a description, which it is in the course of the seller's business to supply." The omission of these words seems to make the buyer's reliance the sole test. This doubtless means justifiable reliance, and whether the seller were a dealer would be important evidence.

<sup>65</sup> See *Kansas City Bolt Co. v. Rodd*, 220 Fed. 750, 754, 136 C. C. A. 356.

<sup>66</sup> *Rolle*, Abr. 90, pl. 4.

If, however, the seller knew that the goods he was selling were not merchantable, at least if he were a dealer, he was liable.<sup>67</sup> These cases certainly express the limits of the law until the beginning of the nineteenth century.<sup>68</sup> The earliest case where a broader rule is suggested is a *Nisi Prius* decision of Lord Ellenborough in 1815.<sup>69</sup> Since then it has not been doubted that in some cases at least the seller of goods is under an obligation to furnish goods which are at least merchantable though no such agreement or representation was made. The question has resolved itself into this: In what cases is such a warranty implied and in what cases does the old maxim of *caveat emptor* still apply?

### § 984. Executory and executed agreements.

It is obvious that the question whether a seller is bound

<sup>67</sup> Rolle, Abr. 90, pl. 1, 2, 3. See also 3 Bl. Comm. 165.

<sup>68</sup> In *Stuart v. Wilkins*, 1 Doug. 18, 20, Lord Mansfield said: "Selling for a sound price without warranty may be a ground for an *assumpsit*, but in such a case it ought to be laid that the defendant knew of the unsoundness." In *Parkinson v. Lee*, 2 East, 314, in a sale of hops by sample with a warranty that the bulk corresponded to the sample, it was held that the law did not raise an implied warranty that the commodity should be merchantable though the price was a fair one for merchantable goods. Therefore, there being a latent defect unknown to the seller arising from the fraud of the grower from whom the seller purchased, the seller was not responsible though the goods turned out to be unmerchantable.

<sup>69</sup> *Gardiner v. Gray*, 4 Campb. 144. In this case there was a bargain for the sale of twelve bags of waste silk, apparently specific bales not yet landed from the vessel in which they were imported. The bargain took place in London, but the silk was sent to the defendant at Manchester.

On examination he found it unmerchantable. Lord Ellenborough ruled as follows: "I am of opinion, however, that under such circumstances, the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be, that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as waste silk?" A similar decision was made in the same year in the case of *Laing v. Fidgeon*, 4 Campb. 169, 6 Taunt. 108.

by an implied obligation that goods shall be of merchantable quality or fit for a particular purpose is somewhat different in the case of a contract to sell goods by description and in the case of an executed sale of specified goods. If the seller contracts to sell goods by description it may well be argued that as matter of construction the contract means not any goods of that description but goods of fair or merchantable quality of that description.<sup>70</sup> That is probably the actual meaning of the parties. On the other hand, if the seller agrees to sell a specified article which the parties have before them, it is clear that if an obligation is imposed upon the seller it cannot be derived from the terms of the bargain but is super-added by the law. The obligation is quasi-contractual, rather than contractual. Because of the difference just alluded to, some courts have been willing to infer an obligation to furnish merchantable goods if the bargain was executory, but not if it was executed. It is to be observed, however, that an executory contract to sell may relate to a specified defined article and on the other hand an executed sale may relate to goods identified only by description. The distinction which such courts have in mind, therefore, is not properly described as between executory contracts to sell and executed sales, but rather between bargains relating to specified property and bargains relating to property specified only by description.<sup>71</sup> It is almost always true, however, that an executory

<sup>70</sup> *Dominion Coal Co., Ltd., v. Dominion Iron & Steel Co., Ltd.*, 25 T. L. R. 309; *Baer v. Mobile & Co. Mfg. Co.*, 159 Ala. 491, 49 So. 92; *Weaver-Dowdy Co. v. Frits*, 110 Ark. 90, 160 S. W. 1085.

<sup>71</sup> This is apparent from the language in some of the cases. Thus in *Deming v. Foster*, 42 N. H. 165, the court said: "In the case of executory contracts for the making or furnishing of goods or articles for a special use, the law implies a contract that the articles to be made or furnished shall be reasonably fit and proper for the use for which they are ordered. And when articles thus

agreed to be made or furnished are delivered, the law implies a warranty that the articles are reasonably fit and proper for that use. But there is no implied warranty as to the quality of an article sold, nor of its fitness for any particular use, where there is a present sale of a particular existing article, then open to the examination and inspection of the purchaser, and where he requires no express warranty." It will be noticed that the cases put by the court where there will and where there will not be a warranty do not cover all cases. An executed sale of an article not open to inspection is not touched upon. See also *Kinaley v.*

contract to sell relates to unspecified goods, and an actual sale still more generally relates to goods specified in some other way than by a description of their character. It is for this reason that courts have referred to the distinction as one between executory contracts and sales rather than between bargains in regard to unspecified goods known only by description and goods otherwise identified. In whatever way the distinction be worded it is an important one. If the contract is for the sale of goods specified only by description, and there are various grades and qualities of goods fulfilling that description, it is a reasonable construction of the bargain that goods of merchantable quality are intended. Accordingly this construction is adopted unless something in the contract indicates a contrary intention. Nor is it material whether the seller is a manufacturer or a dealer or neither.<sup>72</sup>

How far the buyer may lose his right to object or to claim damages by accepting inferior goods is elsewhere considered.<sup>73</sup> Moreover, even in an executory contract the terms of the bargain may be so specific that the contract itself marks out the extent of the seller's liability leaving nothing to implication.<sup>74</sup>

Gruppe, 241 Fed. 466, 154 C. C. A. 298; *Timken Carriage Co. v. Smith*, 123 Iowa, 554, 99 N. W. 183. But see *Loxtercamp v. Lininger Implement Co.*, 147 Iowa, 29, 125 N. W. 830.

<sup>72</sup> *Laing v. Fidgeon*, 6 Taunt. 108; *Bunch v. Weil*, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80; *McClung v. Kelley*, 21 Iowa, 508; *Russell v. Critchfield*, 75 Iowa, 69, 39 N. W. 186; *Atkins Bros. Co. v. Southern Grain Co.*, 119 Mo. App. 119, 95 S. W. 949; *Deming v. Foster*, 42 N. H. 165; *Hart v. Wright*, 17 Wend. 267; *Howard v. Hoey*, 23 Wend. 350, 35 Am. Dec. 572; *Hargous v. Stone*, 5 N. Y. 73; *Dounce v. Dow*, 64 N. Y. 411; *Hadley v. Clinton County Co.*, 13 Ohio St. 502; *Wilson v. Belles*, 22 Pa. Super. Ct. 477; *Fogel v. Brubaker*, 122 Pa. St. 7, 14, 15 Atl. 692; *Best v. Flint*, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910. "This is a

general rule, applicable alike to all whether they be manufacturers or dealers or merely sellers." *Interstate Grocer Co. v. George Wm. Bentley Co.*, 214 Mass. 227, 101 N. E. 147. Cf. *Coleman v. Hendee*, 158 N. Y. App. Div. 461, 143 N. Y. S. 587. See also *Meraux v. Kenilworth Sugar Co.*, 135 La. 99, 64 So. 974; *Bigman v. Lorio*, 135 La. 285, 65 So. 266.

<sup>73</sup> See *supra*, §§ 700 *et seq.*

<sup>74</sup> In *Rollins Engine Co. v. Eastern Forge Co.*, 73 N. H. 92, 59 Atl. 332, 68 L. R. A. 441, the defendant, pursuant to an order, agreed to procure the necessary steel and forge it into a specified shape with the required finish, to be used by the plaintiff for a piston rod for an engine to be sold by the latter. It was held that the measure of the defendant's liability was ordinary care in selecting the material and forging it according to

§ 985. Specified goods and unspecified goods.

As has been shown in the preceding section, it is more than a liberal rule of construction, it is an imposition of liability irrespective of (though not contradicting) the positive contract of the parties, to hold that there is a warranty of quality in case of a sale or contract to sell specific goods. That such a warranty is imposed in some cases is now well settled.<sup>75</sup> The reason for imposing such a liability upon the seller is the justifiable reliance of the buyer upon the seller in the purchase of the goods.<sup>76</sup> This reliance does not exist in every case. The circumstances which must be considered in determining its existence may be thus summarized. Was the seller a manufacturer of the goods, and thus familiar with their construction? Or, if not a manufacturer, was he a dealer

the specifications and it was not liable for either defects in the steel or in its manufacture which were not discoverable by such care. If this case is to be supported it must be on the ground that the full specifications excluded the ordinary rule. *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587. See further, *infra*, § 990.

<sup>75</sup> The first decision to this effect, other than those cited *supra*, § 983, note, seems to be *Shepherd v. Pybus*, 3 M. & G. 868. This was a contract for the sale of a barge by the builder. It was lying at the seller's wharf and was not quite finished. It was held that a warranty was implied that the barge was reasonably fit for use as such. In many cases subsequently it has been held that a warranty may be implied though the goods to which the bargain related were specified. *Jones v. Just*, L. R. 3 Q. B. 197; *Prest v. Last*, [1903] 2 K. B. 148; *Bristol Tramways &c. Co. v. Fiat Motors*, [1910] 2 K. B. 831; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 S. Ct. 537, 28 L. Ed. 86; *Campion v. Marston*, 99 Me. 410, 59 Atl. 548; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31

Am. St. Rep. 526; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Prentice v. Fargo*, 53 N. Y. App. Div. 608, 65 N. Y. S. 1114; *Landreth v. Wyckoff*, 73 N. Y. S. 388 (compare *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 636, where the court lays stress on the fact that the contract in question was executory); *Hood v. Bloch*, 29 W. Va. 244, 255. In Pennsylvania it has been the fixed rule that there are no implied warranties in executed sales. *Fogel v. Brubaker*, 122 Pa. St. 7, 14, 15 Atl. 692; *Pyott v. Balts*, 38 Pa. Super. 608. And perhaps in Illinois. *Telluride Power Co. v. Crane Co.*, 103 Ill. App. 647, 208 Ill. 218. See also *Lambert v. Armentrout*, 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556. The enactment of the Sales Act in both Illinois and Pennsylvania should bring the law of those States into harmony with that generally prevailing.

<sup>76</sup> *Benjamin, Sale* (5th Eng. Ed.), 625; *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 So. 12; *Skinner v. Kerwin Glass Co.*, 103 Mo. App. 650, 77 S. W. 1011; *Omaha Coal Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Hood v. Bloch*, 29 W. Va. 244.

in goods of that kind and so a competent judge of their quality? Did the buyer inspect or have an opportunity to inspect the goods, and was the defect latent so that it could not be discovered by such inspection? Apart from opportunity to inspect, were there circumstances showing that the seller selected the goods relying on his own judgment or showing an intention that the buyer should take the risk of the quality? Varying weight is given in different jurisdictions to these circumstances, as will appear from the following sections.

**§ 986. The seller a manufacturer.**

Where the seller manufactured the goods which he sold, a warranty that the goods are merchantable is implied both in England and in America, unless something in the terms of the bargain indicates a contrary intention, or unless the buyer had opportunity to inspect the goods and this inspection would have disclosed the defect.<sup>77</sup> If the seller holds himself out to the buyer as the manufacturer of the subject-matter of the bargain, the case is governed by the principles applicable to sales by manufacturers.<sup>78</sup> If there was opportunity

<sup>77</sup> *Shepherd v. Pybus*, 3 M. & G. 868; *Jones v. Bright*, 5 Bing. 533; *Jones v. Padgett*, 24 Q. B. D. 650; *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608 (C. A.); *Kansas City Bolt Co. v. Rodd*, 220 Fed. 750, 136 C. C. A. 356; *Baer v. Mobile Cooperage Co.*, 159 Ala. 491, 49 So. 92; *Main v. Dearing*, 73 Ark. 470, 84 S. W. 640; *Main v. El Dorado Dry Goods Co.*, 83 Ark. 15, 102 S. W. 681; *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418; *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939; *Chicago Packing Co. v. Tilton*, 87 Ill. 547; *Fuchs & Lang Mfg. Co. v. Kittredge*, 242 Ill. 88, 89 N. E. 723; *Rice v. Friend Bros. Co.*, 179 Iowa, 355, 161 N. W. 310; *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.*, 70 Kans. 664, 79 Pac. 141, 70 L. R. A. 653; *Philbrick v. Kendall*, 111 Me. 198, 88 Atl. 540; *Commercial*

*Realty Co. v. Dorsey*, 114 Md. 172, 78 Atl. 1099; *Copas v. Anglo-American Provision Co.*, 73 Mich. 541, 41 N. W. 690; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Berger Mfg. Co. v. Crites*, 178 Mo. App. 218, 165 S. W. 1163; *Toledo Computing Scale Co. v. Fredericksen*, 95 Neb. 689, 146 N. W. 957; *Acme Glass Co. v. Woods-Lloyd Co.*, 182 N. Y. App. D. 538, 170 N. Y. S. 448; *Rhodesia Mfg. Co. v. Tombacher*, 129 N. Y. S. 420; *Dr. Shoop Family Medicine Co. v. Davenport*, 163 N. C. 294, 79 S. E. 602; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Hood v. Bloch*, 29 W. Va. 244; *Berry v. Wadhams Oil Co.*, 156 Wis. 588, 146 N. W. 783; *Leggett v. Young*, 29 N. B. 675.

<sup>78</sup> *Brown v. Edgington*, 2 M. & G. 279.



for inspection there is no warranty implied as to defects which would have been obvious upon inspection.<sup>79</sup> Special circumstances may indicate in particular cases that the risk either wholly or in part, as to the quality of the goods, is assumed by the buyer.<sup>80</sup> When goods are sold at second-hand, for instance, even by a manufacturer, it cannot be supposed that a warranty is implied of the same sort that would be implied had the goods been new.<sup>81</sup> But though in such a

<sup>79</sup> *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. Ed. 86; *National Cotton Oil Co. v. Young*, 74 Ark. 144, 85 S. W. 92; *Glasgow Milling Co. v. Burgher*, 122 Mo. App. 14, 97 S. W. 950; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Hooven & Allison Co. v. Wirtz*, 15 N. Dak. 477, 107 N. W. 1078.

In *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. Ed. 86, 3 Sup. Ct. Rep. 537, the court said: "The authorities to which we have referred, although differing in the form of stating the qualifications and limitations of the general rule, yet indicate with reasonable certainty the substantial grounds upon which the doctrine of implied warranty has been made to rest. According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and, therefore, having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving

no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

<sup>80</sup> *Thielman v. Reinsch*, 103 Ark. 307, 146 S. W. 525.

<sup>81</sup> In *Morley v. Consolidated Mfg.*

sale it could not be implied that the goods were warranted equal in quality to new goods, it seems that there is a warranty that they were originally merchantable, and if the buyer relies on the seller's judgment, a warranty that they are still reasonably fit for the purpose for which they are intended should be implied.<sup>22</sup> Where a manufacturer sells goods which are a waste product, as such, it will generally be true, that the buyer assumes the risk of the quality and value of the goods.<sup>23</sup> But if a manufacturer sells a by-product of his manufacture not as such, but simply as one of the things he

Co., 196 Mass. 257, 81 N. E. 993, the plaintiff bought a second-hand automobile from an agent of the manufacturer. After two months' use the crank shaft broke and damaged the engine materially. The court held there was no implied warranty covering this damage, saying: "We are also of opinion that there was no implied warranty as to the length of time this crank shaft would stand the strain of use. The subject of sale was an automobile. Even if it be assumed that the plaintiff had the right to think the sale was made by the manufacturer, still the machine was not made specially for the plaintiff, but on the contrary was one which had been considerably used and was bought by him at what he knew was a sum below the usual price for a new machine of the same kind. If it be said that he had the right to suppose it was fit to run, the answer is that it was fit to run. Every part essential to the running of the machine was there at the time of the purchase—in other words the machine was an automobile in running order, and, after the purchase, was actually used by the plaintiff nearly, if not quite, two months before the shaft broke. If the shaft had been stronger it might have lasted for a longer time. There is no claim of fraud. Under these circumstances we think that there was no implied warranty as to the length of

time the shaft would last, but that as to that the doctrine of *caveat emptor* is applicable. See *Wilson v. Lawrence*, 139 Mass. 313, 1 N. E. 273." See also *Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646, 141 C. C. A. 402; *Yellow Jacket Min. Co. v. Tegarden*, 104 Ark. 573, 149 S. W. 518; *Bayer v. Winton Motor Car Co.*, 194 Mich. 222, 160 N. W. 642; *W. R. Colchord Mach. Co. v. Loy-Wilson Foundry Co.*, 131 Mo. App. 540, 110 S. W. 630. But representations of the seller which are an inducement to the sale will amount to an express warranty, though the goods are second-hand. *Walker, Evans & Cogswell Co. v. Ayer*, 80 S. C. 292, 61 S. E. 557; *Fairbank's Steam Shovel Co. v. Holt*, 79 Wash. 361, 140 Pac. 394, L. R. A. 1915, B. 477.

<sup>22</sup> See *Fairbanks Steam Shovel Co. v. Holt*, 79 Wash. 361, 140 Pac. 394.

<sup>23</sup> *Turner v. Mucklow*, 8 Jur. N. S. 870, 6 L. T. (N. S.) 690 (the seller sold "spent madder," the refuse product of his manufacture, and sold as such. It was held the buyer took the risk of its utility for producing gar-rancine); *Listman Mill Co. v. Miller*, 131 Wis. 393, 111 N. W. 496 (a flouring mill sold "280 tons No. 2 screenings more or less," its output for a specified period. There was held to be no warranty implied that the screenings in future would be of the same quality as those produced at the time the contract was made).

manufactures, it would seem immaterial that the production of such goods was not the main purpose of his business.

### § 987. The seller a dealer.

According to the English law (and also under the American Sales Act) the seller impliedly warrants the merchantable character of the goods which he sells as fully when he is merely a dealer in goods of that description as when he is a manufacturer.<sup>84</sup> In the United States some jurisdictions adopt the English law and hold that the dealer may be liable upon an implied warranty in sales of specified goods,<sup>85</sup> but the majority of American decisions have held no such warranty as exists where a manufacturer is the seller is imposed upon a seller who is a dealer.<sup>86</sup> The same qualification noticed

<sup>84</sup> *Jones v. Just*, L. R. 3 Q. B. 197; *Preist v. Last*, [1903] 2 K. B. 148 (C. A.); *Bristol Tramways Co. v. Fiat Motors*, [1910] 2 K. B. 831; *Wallis v. Russell*, [1902] 2 Ir. 585. The three cases last cited were decided under the Sale of Goods Act, but the statute adopted in this particular the rule previously existing. A sale by a manufacturer or dealer of goods which he does not habitually sell contains no implied warranty.

<sup>85</sup> *Dushane v. Benedict*, 120 U. S. 630, 636, 7 S. Ct. 696, 30 L. Ed. 810; *Oil Well Supply Co. v. Priddy* (Ind. App.), 83 N. E. 623; *Campion v. Marston*, 99 Me. 410, 59 Atl. 548; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 281, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436; *Skinner v. Kerwin Glass Co.*, 103 Mo. App. 650, 77 S. W. 1011; *Atkins Bros. Co. v. Southern Grain Co.*, 119 Mo. App. 119, 95 S. W. 949; *Toledo Computing Scale Co. v. Frederickson*, 95 Neb. 689, 146 N. W. 957. The Georgia Civil Code, § 365, provides: "If there is no express covenant of warranty, the purchaser must exercise caution in detecting

defects; the seller, however, in all cases (unless expressly or from the nature of the transaction excepted) warrants: 1. That he has a valid title and right to sell. 2. That the article is merchantable, and reasonably suited to the use intended. 3. That he knows of no latent defects undisclosed." It will be observed that the obligation of implied warranty is not even limited to dealers. On the construction of this provision, see *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939; *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418. California Civil Code, § 1771, enacts that there is an implied warranty where merchandise is sold which is inaccessible to the buyer's examination. See *Moore v. McKinlay*, 5 Cal. 471. A similar provision is contained in S. Dak. Comp. L., § 3635. See *Standard Rope Co. v. Olmem*, 13 S. Dak. 296, 83 N. W. 271. And in South Carolina, in the absence of circumstances, showing a contrary agreement any seller of personal property impliedly warrants it of value for the purpose to which such goods are ordinarily applied. *Walker, Evans & Cogswell Co. v. Ayer*, 80 S. C. 292, 61 S. E. 557.

<sup>86</sup> *Reynolds v. General Electric Co.*, 141 Fed. 551, 73 C. C. A. 23;

in the preceding section in regard to manufacturers must also apply to sales by dealers; that is, such jurisdictions as allow an implied warranty in any case in a sale by a dealer must restrict it to cases where the goods are not accessible to inspection, if examination would disclose the defect.<sup>87</sup> If the seller of specific goods is neither a manufacturer nor a dealer, generally no warranty of specific goods would be implied, but if the skill or judgment of the seller were evidently relied on, there seems no reason why the nature of the seller's occupation should make a difference, and the Sales Act has adopted this idea.<sup>88</sup>

### § 988. Inspection.

It is rightly held that in any case where the buyer has an opportunity to inspect goods, there should be no warranty implied as to defects which the examination ought to disclose,

*McCaa v. Elam Drug Co.*, 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88; *Chicago Provision Co. v. Tilton*, 87 Ill. 547; *Borden & Selleck Co. v. Fraser*, 118 Ill. App. 655; *Ehram v. Brown*, 76 Kans. 206, 91 Pac. 179; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Trafton v. Davis*, 110 Me. 318, 86 Atl. 179; *Flaherty v. Maine Motor Carriage Co.* 117 Me. 376, 104 Atl. 627; *Kernan v. Crook*, 100 Md. 210, 59 Atl. 753; *Howard Iron Works v. Buffalo Elevating Co.*, 113 N. Y. App. Div. 562, 99 N. Y. S. 163, *affd.*, without opinion, 188 N. Y. 619, 81 N. E. 1166; *Pascal v. Goldstein*, 100 N. Y. S. 1025; *Strauss v. Salzer*, 109 N. Y. S. 734; *Coleman v. Simpson*, 158 N. Y. App. D. 461, 143 N. Y. S. 587; *Hooven & Allison Co. v. Wirtz*, 15 N. Dak. 477, 107 N. W. 1078, citing N. Dak. Revised Codes (1899), §§ 3976, 3978. See also *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639.

<sup>87</sup> See statutes cited *supra*, n. 85, of California and Georgia; *Carleton v. Jenks*, 80 Fed. 937, 47 U. S. App. 734, 26 C. C. A. 265. See also *Fairrell v. Manhattan Market Co.*, 198 Mass.

271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436.

<sup>88</sup> Section 15 (1). *Wing v. Chapman*, 49 Vt. 33, was an action on the case for the false warranty of a yoke of oxen. After discussing the subject of the express warranty, the court said: "Even without any express warranty in this class of contracts, the law has now become pretty well settled, that where the special purpose of the buyer is made known to the seller, and the seller, with such knowledge, delivers the goods, the law implies that they are reasonably fit for the purpose specified. If the facts show that the buyer trusts to the judgment of the seller, the seller must see to it that he judges correctly. The question has been much discussed whether this doctrine applies in cases where the seller was not the manufacturer of the goods sold; but it is now settled that it applies generally to all sales of property for a special purpose, if the sale is made on the judgment and skill of the vendor." See also *Gage v. Carpenter*, 107 Fed. 886, 47 C. C. A. 39.

for the basis of implied warranty is the justifiable reliance of the buyer upon the seller's judgment. In case of latent defects, however, there is no reason why the buyer's right of inspection should limit the implication of a warranty in regard to such defects. He may naturally and justifiably trust to the seller as to such matters if the seller has superior knowledge. Accordingly under the English law, opportunity of inspection and actual inspection will not necessarily preclude the buyer from asserting a warranty in regard to latent defects.<sup>89</sup> In the United States, as has already been seen, where there is a contract to sell goods by description, there is an implied warranty that the goods shall be merchantable.<sup>90</sup> This warranty everywhere survives the inspection and acceptance of the goods where the defect is latent, and in some jurisdictions, or under some circumstances, even though the defect is obvious.<sup>91</sup> It is enough here to call attention to the fact that inspection is not held anywhere necessarily to destroy a promise or warranty created by a bargain previously made. But where inspection is had or may be had at the time the bargain itself is made, the tendency in the United States seems to be to hold that at least, in the absence of guilty knowledge on the part of the seller,<sup>92</sup> the inspection

<sup>89</sup> *Jones v. Bright*, 5 Bing. 533; *Prest v. Last*, [1903] 2 K. B. 148 (C. A.); *Bristol Tramway &c. Co. v. Fiat Motors*, [191] 2 K. B. 831; *Wallis v. Russell*, [1902] 2 Ir. 585 (C. A.). The same question is involved in sales by sample where the sample contains a latent defect. It is well settled in England that the buyer is entitled not simply to goods conforming to the sample, but also to goods free from latent defects in the sample. In *Mody v. Gregson*, L. R. 4 Ex. 49, 53, Willes, J., said: "The object and use of either inspection of bulk or sample alike are to give information, disclosing directly through the senses what any amount of circumlocution might fail to express." This was quoted with approval and followed in *Drummond v. Van Ingen*, 12 A. C. 284. See also *Heilbutt*

*v. Hickson*, L. R. 7 C. P. 438; *Ungerer v. St. Louis &c. Fish Co.*, 155 Mo. App. 95, 134 S. W. 56. Inspection of part will not necessarily affect the buyer's rights as to the remainder. *Borden v. Fine*, 212 Mass. 425, 98 N. E. 1073.

<sup>90</sup> See *supra*, § 984.

<sup>91</sup> See *supra*, §§ 700 *et seq.*

<sup>92</sup> In such a case a warranty may be implied. *Puls v. Hornbeck*, 24 Okla. 288, 103 Pac. 665, 29 L. R. A. (N. S.) 202; *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N. W. 48, 48 L. R. A. (N. S.) 224; *Nichthaus v. Friedman*, 161 N. Y. S. 199, or where the seller's conduct induces the buyer not to make careful examination. *Procter v. Atlantic Fish Co.*, 208 Mass. 351, 94 N. E. 281, commented on in 10 Mich. L. Rev. 73.

precludes the existence of any implied warranty, regardless of whether the defect is latent.<sup>93</sup> In some cases, however, reliance is placed on the fact that inspection would reveal the defect.<sup>94</sup> In the sale of drugs by a druggist to a customer, the Supreme Court of Texas has laid down the rule that opportunity of inspection or actual inspection does not make the doctrine of *caveat emptor* applicable, for in most cases it is obvious that inspection is useless and the druggist purports to have skill in regard to the nature of the goods he sells.<sup>95</sup> The reasoning upon which this rule is based, however, would extend to sales of other things than drugs.

### § 989. Fitness for a particular purpose.

The warranty of merchantability is not the only warranty that may be implied on the sale of goods. Where the buyer buys goods for a particular purpose a warranty is sometimes implied that the goods shall be fit for that purpose. Here again a distinction must be taken between a bargain for goods by description (which will generally be an executory contract to buy and sell), and a bargain for specified goods (which will generally be an executed sale). If a seller contracts to furnish

<sup>93</sup> *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Dorsey v. Watkins*, 151 Fed. 340; *Job v. Heidritter Lumber Co.*, 255 Fed. 311, 166 C. C. A. 481, Cal. Civil Code, § 1771; *Browning v. McNear*, 145 Cal. 272; *Martin v. Roehn*, 92 Ill. App. 87; *Horwich v. Western Brewery Co.*, 95 Ill. App. 162; *White v. Oakes*, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884; *Baker v. Kamantowsky*, 188 Mich. 569, 155 N. W. 430; *Ivans v. Laury*, 67 N. J. L. 153, 50 Atl. 355; S. Dak. Comp. L., § 3635; *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. 705, 22 L. R. A. 187, 39 Am. St. Rep. 864. This is also so stated in the first rule in *Jones v. Just*, L. R. 3 Q. B. 197, quoted *supra*, § 228. But the statement was based on an early decision and probably did not accurately express the English law

when it was made. See the second rule and the end of the fifth rule, *ibid*. It certainly does not express the present law of England. See cases cited *supra*, n. 84.

<sup>94</sup> In *Badger v. Whitcomb*, 66 Vt. 125, 28 Atl. 877, "the seller made no representation in respect to the boards sold. The defendants had an opportunity to inspect them, and were requested by the seller to inspect them, and by inspecting them they could have discovered the defect;" held that there was no implied warranty. *National Cotton Oil Co. v. Young*, 72 Ark. 144, 85 S. W. 92; *Brooks v. Camak*, 130 Ga. 213, 60 S. E. 456; *Doyle v. Parish*, 110 Mo. App. 470, 85 S. W. 646.

<sup>95</sup> *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280, a case involving the sale of paris green to kill cotton worms.

goods for a specified object it is often possible on a reasonable construction of the contract to hold that he has agreed to furnish something which will accomplish the object desired.<sup>96</sup> On the other hand, if the bargain relates to specified goods, it is more obviously an implication of law apart from the contract between the parties if the seller is held to warrant the fitness of the article for the purpose designed. It should be noticed also that fitness for a particular purpose may be merely the equivalent of merchantability. Thus the particular purpose for which a reaping machine is generally designed is reaping. If it will not fulfill this purpose it is not merchantable. The particular purpose, however, may be narrower; a reaping machine may be desired for operation on rough ground and though it may be a good reaping machine it may yet be impossible to make it work satisfactorily in the place where the buyer wishes to use it. The principle already laid down that a manufacturer impliedly warrants his goods to be merchantable includes, therefore, a doctrine sometimes stated in this way—that the manufacturer of goods impliedly warrants that they are reasonably fit for the general purpose for which they are manufactured.<sup>97</sup> Sometimes, however, a more extensive warranty exists by implication. The manufacturer is held to warrant not simply that the goods he sells are fit for the general purpose for which they are manufactured,

<sup>96</sup> See *Bobrick Chemical Co. v. Prest-O-Lite Co.*, 160 Cal. 209, 116 Pac. 747; *John Qurl's Sons v. Williams & Co.*, 136 N. Y. App. Div. 710, 121 N. Y. S. 478.

<sup>97</sup> *Randall v. Newsom*, 2 Q. B. D. 102 (C. A.); *Union Iron Works v. Spottswood*, 141 Fed. 834, 72 C. C. A. 300; *The Nimrod*, 141 Fed. 215; *Troy Grocery Co. v. Potter*, 139 Ala. 359, 36 S. W. 12; *Bobrick Chemical Co. v. Prest-O-Lite Co.*, 160 Cal. 209, 116 Pac. 747; *Murray Iron Works v. De Kalb Electric Co.*, 103 Ill. App. 78; *Telluride Power Co. v. Crane*, 103 Ill. App. 647, 208 Ill. 218, 70 N. E. 319; *Parsons Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580; *Redhead v. Wyoming Cattle Co.*, 126 Iowa,

410, 102 N. W. 144; *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840; *American Radiator Co. v. McKee*, 140 Ky. 105, 130 S. W. 977; *Queen City Glass Co. v. Pittsburg Clay Pot Co.*, 97 Md. 429, 55 Atl. 447; *St. Louis Brewing Assoc. v. McEnroe*, 80 Mo. App. 429; *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602; *Rogers v. Beckrich*, 61 N. Y. S. 725, 46 N. Y. App. Div. 429; *Southern Iron Co. v. Exeter Machine Works*, 109 Tenn. 67, 70 S. W. 614. But see *Rollins Engine Co. v. Eastern Forge Co.*, 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441; *Totten v. Stevenson*, 29 S. Dak. 71, 135 N. W. 715; *Kelsey v. J. W. Ringrose Net Co.*, 152 Wis. 499, 140 N. W. 66.

but also are fit for some special purpose of the buyer's which will not be satisfied by mere fitness for the general purpose goods of that sort fulfill. The test here, as elsewhere, is whether the buyer justifiably relied upon the seller's judgment or whether relying on his own he ordered or bought what is frequently called "a known, described, and definite article." In the cases cited below it was held that the manufacturer was liable as a warrantor of fitness for a special purpose though it did not appear that the goods sold were not fit for some purposes for which goods of the sort are naturally adapted.<sup>98</sup> Even though inspection would not reveal the defect in the

<sup>98</sup> *Marbury Lumber Co. v. Stearns Mfg. Co.*, 32 Ky. L. Rep. 739, 107 S. W. 200; *Queen City Glass Co. v. Pittsburg Clay Pot Co.*, 97 Md. 429, 55 Atl. 447 (in this case clay pots were purchased for annealing glass. For this use they were necessarily subjected to a very high temperature and some of them were unable to withstand so severe a test. The seller was held liable); *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840 (a heating plant purchased for a particular building was held impliedly warranted to heat the building. It was not enough that a merchantable and workmanlike plant was furnished which might have heated satisfactorily some other building. (Compare with this case, *Holt v. Sims*, 94 Minn. 157, 102 N. W. 386, and *Beggs v. James Hanley Co.*, 27 R. I. 385, 62 Atl. 373, 114 Am. St. Rep. 44); *Strongitharm v. North Lonsdale Steel Co.*, 21 Times L. Rep. 357 (limestone was bought of the plaintiff for use in the defendant's iron smelting works. This purpose was known to the sellers, and it was held they were bound to furnish limestone reasonably fit for such use, nor was the rule changed because the plaintiff's quarry was known to be a second-grade quarry, in which were beds of limestone of varying quality). See also *Jones v. Bright*, 5 Bing. 533;

*Brown v. Edgington*, 2 M. & G. 279; *Bristol Tramways, etc., Co. v. Fiat Motors*, [1910] 2 K. B. 831; *Bowser v. Kilgore*, 100 Ark. 17, 139 S. W. 541; *Doylestown Agric. Co. v. Ewing*, 2 Boyce, 421, 79 Atl. 212; *International Filters Co. v. Hartman*, 141 Ill. App. 239; *Edwards Mfg. Co. v. Stoops*, 54 Ind. App. 361, 102 N. E. 980; *Redhead v. Wyoming Cattle Co.*, 126 Iowa, 410, 102 N. W. 144; *West Michigan Furniture Co. v. Diamond Glue Co.*, 127 Mich. 651, 87 N. W. 92; *Omaha Coal Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 636; *Gold Ridge Mining Co. v. Tallmadge*, 44 Or. 34, 102 Am. St. Rep. 602; *Port Iron Co. v. Groves*, 68 Pa. St. 149; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Leopold v. Van Kirk*, 27 Wis. 152; *Crompton & Knowles Works v. Hoffman*, 5 Ont. L. Rep. 554. A somewhat novel but sound application of the principle was made in *Haynor Mfg. Co. v. Davis*, 147 N. C. 287, 61 S. E. 54. A manufacturer who sold a beverage to a dealer not licensed to sell intoxicants was held to warrant that the beverage was such as could be sold lawfully by such a dealer.



goods it is possible for the buyer to select them, relying upon his own judgment, and if he does this the seller, at least, in the absence of guilty knowledge,<sup>99</sup> will not be liable on an implied warranty.<sup>1</sup> Inspection by the buyer is always a fact of importance in considering whether in fact he exercised his own judgment or relied on that of the seller. If the seller is not informed of the buyer's purpose, this also shows that there can be no warranty of fitness for that purpose.<sup>2</sup>

### § 990. Known, described and definite articles.

If the buyer either enters into an executory contract for the purchase of goods exactly described, or makes an executed purchase of such goods, while he may be able to assert an obligation on the part of the seller to furnish merchantable goods of that description,<sup>3</sup> unless the description itself precludes merchantability, he cannot regard the seller, even though the seller be the manufacturer of the goods, as warranting that they are fit for any more special purpose than that which merchantable goods of the agreed description necessarily fulfill. By exactly defining what he wants the buyer has exercised his own judgment, instead of relying

<sup>99</sup> Negligence would also render the seller liable in an action on the case if the defect were a dangerous one.

<sup>1</sup> *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436. See also *Wallis v. Russell*, [1902] 2 Ir. 585 (C. A.); *Logeman Bros. Co. v. R. J. Preuss Co.*, 131 Wis. 122, 111 N. W. 64. The Sale of Goods Act has, perhaps, changed the law in England to some extent in this respect. In *Wallis v. Russell* the opinion was expressed that before the statute there was at least a presumption that a buyer who inspected the goods, bought on his own judgment, whereas under the statute the question is an open question of fact in every case. The provisions of the American Sales Act are not distinguishable from those of the English act.

<sup>2</sup> *Mark v. H. D. Williams Cooperage Co.*, 204 Mo. 242, 103 S. W. 20. It is also true that mere knowledge on the part of the seller that the buyer intends to make a particular use of the goods is not sufficient to establish a warranty that the goods are adapted to such use. *Middletown Mach. Co. v. Chaffin*, 108 Ark. 254, 157 S. W. 398; *Jones & Laughlin Steel Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290; *West End Mfg. Co. v. P. R. Warren Co.*, 198 Mass. 320, 84 N. E. 488; *W. R. Colchord Mach. Co. v. Loy-Wilson Foundry Co.*, 131 Mo. App. 540, 110 S. W. 630.

<sup>3</sup> *Flaherty v. Maine Motor Carriage Co.*, 117 Me. 376, 104 Atl. 627, 628. That there is at least this obligation is sometimes overlooked. Perhaps it was in *Ivans v. Laury*, 67 N. J. L. 153, 50 Atl. 355.

upon that of the seller.<sup>4</sup> It is often difficult to determine when the seller's judgment is justifiably relied upon and when the description is so definite as to preclude that supposition. Extreme cases may be put on one side and the other which are easily decided, but the question finally resolves itself into one of degree. The line drawn by the courts can best be gauged by examination of the facts of recent leading cases.<sup>4</sup>

<sup>4</sup> *Jones v. Just*, L. R. 3 Q. B. 197; *Olevant v. Bayley*, 5 Q. B. 288; *Chanter v. Hopkins*, 4 M. & W. 399; *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510, 12 S. Ct. 46, 35 L. Ed. 837; *Pullman Car Co. v. Metropolitan Ry.*, 157 U. S. 94, 15 S. Ct. 503, 39 L. Ed. 632; *Grand Ave. Hotel Co. v. Whar-ton*, 79 Fed. 43, 49 U. S. App. 108, 24 C. C. A. 441; *Frederick Mfg. Co. v. Devlin*, 127 Fed. 71, 62 C. C. A. 53; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 L. R. A. 973, 69 C. C. A. 662; *Bær Grocer Co. v. Barber Milling Co.*, 223 Fed. 969, 139 C. C. A. 449; *People ex rel. Oil Creek Gold Mining Co. v. The Court of Appeals*, 32 Colo. App. 355 74 Pac. 543; *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587; *Fuchs & Lang Mfg. Co. v. Kittedge*, 242 Ill. 88, 89 N. E. 723; *Ehram v. Brown*, 76 Kans. 206, 91 Pac. 179, 15 L. R. A. (N. S.) 877; *Lombard Water Wheel Co. v. Great Northern Paper Co.*, 101 Me. 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180; *City, etc., Ry. v. Basshor*, 82 Md. 397, 33 Atl. 635; *Day v. Mapes-Reeve Co.*, 174 Mass. 412, 54 N. E. 878; *Franklin Mfg. Co. v. Lamson Mfg. Co.*, 189 Mass. 344, 75 N. E. 624; *Gill v. National Gaslight Co.*, 172 Mich. 295, 137 N. W. 690; *Cosgrove v. Bennett*, 32 Minn. 371, 30 N. W. 359; *Gregg v. Page Belting Co.*, 69 N. H. 247, 46 Atl. 26; *Fairbanks v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *F. H. Gilcrest Lumber Co. v. Wilson*, 84 Neb. 583, 121 N. W. 989; *Rollins Engine Co. v. Eastern Forge Co.*, 73 N. H. 92, 59

Atl. 382, 68 L. R. A. 441; *Ivans v. Laury*, 67 N. J. L. 153, 155, 50 Atl. 355; *Stanford v. National Drill Mfg. Co.*, 28 Okl. 441, 114 Pac. 734; *Albree v. Philadelphia Co.*, 201 Pa. St. 165, 50 Atl. 984; *American Bank Co. v. Guardian Trust Co.*, 210 Pa. St. 320, 59 Atl. 1108; *John A. Roebling's Sons Co. v. American Amusement Co.*, 231 Pa. 261, 80 Atl. 647; *Beggs v. James Hanley Co.*, 27 R. I. 385, 62 Atl. 373, 114 Am. St. Rep. 44; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33; *Case Plow Works v. Niles*, 90 Wis. 590, 63 N. W. 1013; *H. McCormick Lumber Co. v. Winans*, 126 Wis. 649, 105 N. W. 945; *La Crosse Plow Co. v. Brooks*, 142 Wis. 640, 126 N. W. 3.

<sup>4</sup> *In Grand Ave. Hotel Co. v. Whar-ton*, 79 Fed. 43, 49 U. S. App. 180, 24 C. C. A. 441, the seller agreed to furnish "2 Harrison safety boilers of 150 horse power each and the services of an erector to set the same." Contract contained minute specifications of the material and construction of the boilers in all their parts. The sellers knew that the boilers were for use in a hotel in Kansas City, and that the only supply of water available there was from the Missouri river. The boilers could not be used satisfactorily with water from the Missouri river owing to the amount of mud in that water. It was held that there was no implied warranty protecting the buyer in this respect. The buyer got the exact thing he bargained for. *In Holt v. Sims*, 94 Minn. 157, 102 N. W. 386, the seller was to install in the

### § 991. The seller's obligation is not based on negligence.

The effect of an express warranty undoubtedly is to bind the seller absolutely for the existence of the warranted qualities. If an implied warranty is properly called a warranty, the

buyer's dwelling-house "A No. 3 St. Paul boiler with rated capacity of 320 feet" and also "to supply for a bank building of the buyer a heating plant, using for that purpose an old boiler then in the building and furnishing all necessary piping and fitting and labor to complete the job." It was held that no warranty could be implied that the house or bank building would be adequately heated. In *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840, there was held to be an implied warranty of fitness for the contemplated use when heating apparatus was installed. In this case, however, the description was less definite than in the Minnesota case, and, therefore, the seller's judgment was at least to some extent relied upon. See also *J. A. Fay & Eagan Co. v. Dudley*, 129 Ga. 314, 58 S. E. 826. In *Tilton Safe Co. v. Tisdale*, 48 Vt. 83, the buyer gave the written order for "A No. 4 safe with combination lock." Such a safe was furnished but the buyer asserted that the lock could not be used. The court charged the jury that there was no implied warranty that a person of ordinary skill and capacity could operate the lock; that it was the duty of the plaintiffs, upon the receipt and acceptance of defendant's order, to ship, in accordance with such order, one of their No. 4 safes with combination lock that would be merchantable both as respected the lock and the safe. The buyer excepted to this charge and in overruling the exception the court *in banc* said: "The plaintiffs shipped a No. 4 safe with combination lock of their make to the defendant. This was so far a

strict compliance with the defendant's order. It was the very thing the terms of the order called for. There was no implied warranty as to the merit or usability of the lock, but only that it should be answerable to the call of the order." This language is often quoted but it certainly is incorrect without qualification. It is submitted that the seller was bound not only to furnish a lock answering the description but a lock reasonably fit for its purpose if any combination locks are. The instruction of the trial court in that it required the lock to be merchantable (and it would not be merchantable if it was not fit for the purpose of locking the safe) is not open to the same objection. See *Crankshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S. E. 222.

In *Bristol Tramways, etc., Co. Lim., v. Fiat Motors, Lim.*, [1910] 2 K. B. 831 (C. A.) the plaintiff ordered by letter "the 24/40 h. p. Fiat Omnibus . . . which we inspected" and also "six 24/40 h. p. Fiat Omnibus Chassis." It was held that the proviso at the end of Sec. 14, subsec. 1, of the Sale of Goods Act [Sec. 14 (4) of Am. Act], did not protect the defendant, *Cozens-Hardy, M. R.*, saying (p. 837): "Fiat Omnibus was not a trade name. It no doubt meant an article sold by the defendants, an English company, and manufactured by an Italian company, having intimate business relations with the English company, but the whole design and structure and arrangement of the Fiat omnibus was a matter of uncertainty according as the makers might from time to time consider improvements to be desirable."

consequences should be similar. It should make no difference, therefore, whether the seller was guilty of any fault in the matter. Such is the well-settled law of England.<sup>5</sup> Some jurisdictions in the United States seem to follow the same rule.<sup>6</sup> In New York, however, an elaborate decision limits the liability of a manufacturer to cases where the process of manufacture is improper or carelessly carried on, or where improper material is negligently or knowingly used.<sup>7</sup> The rule laid

<sup>5</sup> In *Randall v. Newson*, 2 Q. B. D. 102, the plaintiff bought from the defendant, a carriage manufacturer, a carriage pole which was made of defective wood. Owing to the defect the pole broke and the buyer's horses were badly injured. It was held that the seller was liable for the damage to the horses even though the defect in the pole was latent and could not have been guarded against by reasonable skill or care on the part of the seller. In *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608 (C. C. A.), the defendant sold the plaintiff milk containing typhoid germs. The plaintiff's wife contracted typhoid fever and died. It was held that the defendant was liable for the expenses of her illness and other damages, although he was ignorant of the defect and apparently not negligent in allowing its existence, which could only have been discovered by prolonged investigation.

<sup>6</sup> In *Rodgers v. Niles*, 11 Ohio St. 48, 56, 78 Am. Dec. 290, the court said: "If the sellers have failed through defect of material procured by themselves, or of workmanship, their contract is broken, whether such defect be latent or visible, and however honest their intention may have been." The same rule seems adopted in *Leopold v. Van Kirk*, 27 Wis. 152. Section 2651 of the Code of Georgia, and section 1771 of the Civil Code of California, also seem to impose an absolute liability upon the seller irrespective of any fault on his part. So in *Farrell v. Manhattan Market Co.*,

198 Mass. 271, 84 N. E. 481, 487, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, the court said: "If the selection is left to the dealer due care by him is no defense." See also *Tennessee River, etc., Co. v. Leeds*, 97 Tenn. 574, 37 S. W. 389. So in many cases where the question is not discussed, but the seller is held liable as a warrantor, the decision in failing to say that negligence has been established necessarily holds it immaterial.

<sup>7</sup> *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163. To an action for the price of saws manufactured by the plaintiff, the defendant set up a breach of implied warranty. The court held that the basis of implied warranties was presumed knowledge of the defect and that while the seller must be presumed to know of defects caused by the manufacturer, he could not be disposed to know of latent defects in the material bought for manufacture. So in *Carleton v. Lombard*, 149 N. Y. 137, 153, where the seller contracted to deliver petroleum, the court said: "The defendant was bound to deliver an article of refined petroleum that was free from latent or hidden defects that rendered it unmerchantable at the time and place of delivery, and that could have been guarded against in the process of refinement or in the selection of the raw material by reasonable care and skill." To the same effect is *Howard Iron Works v. Buffalo Elevating Co.*, 113 N. Y. App. Div. 562, 99 N. Y. S. 163.

down by the New York court has been followed in some other jurisdictions.<sup>8</sup> Logically it seems difficult to find any intermediate ground between basing the seller's liability either wholly on negligence or on an obligation imposed by the law entirely irrespective of negligence, an obligation analogous to that created by an express warranty. If a manufacturer is not liable for the use of defective material, in the absence of negligence it is hard to see why any seller should be liable for selling unmerchantable goods in the absence of negligence. And indeed, the New Hampshire court seems to have gone to the full extent of resting the liability of the seller altogether upon negligence.<sup>9</sup> An alternative, the rule in force in the civil

\* *McKinnon Mfg. Co. v. Alpena Fish Co.*, 102 Mich. 221, 60 N. W. 472; *Wisconsin Brick Co. v. Hood*, 67 Minn. 329, 69 N. W. 1091, 64 Am. St. Rep. 418; *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102. In *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 S. Ct. 537, 28 L. Ed. 86, also, the court, in stating the rule of liability of the seller, inserted a qualification similar to that laid down in *Hoe v. Sanborn*, though it was not necessary for the decision of the case and no discussion of the matter occurs in the opinion. "When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture." See also *Archdale v. Moore*, 19 Ill. 565, and cases concerning food, *infra*, § 996.

\* In *Rollins Engine Co. v. Eastern Forge Co.*, 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441. "The obligation implied 'from natural reason and the just construction of law' [3 Bl. Com. 162], of one who undertakes to perform service for another, is due care. He

contracts to exercise the diligence and skill of the average man of the ability which he professes in like work. If he exercises such care, he is not liable, in the absence of express contract, merely because the expected result is not obtained; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Spoad v. Tomlinson*, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432. If the plaintiffs had taken to the defendants a steel billet, to be forged by them into a particular shape for a piston rod, the defendants' contract would have been to exercise the care and skill of average persons engaged in like work. Similarly, if the plaintiffs had employed the defendants to select for them a billet of steel suitable for such forging, the defendants would not be understood to warrant the correctness of their judgment merely because they undertook the commission. For failure to detect a defect which could not be found by ordinary care in the exercise of the skill they had or professed to have, they would not be liable. The fact that the plaintiffs by one order employed the defendants to select the steel and forge it into a specified shape for a certain use does not make the measure of their liability different from what it would have been under the separate contracts suggested. The

law, though intrinsically meritorious, is so opposed to all common-law authorities that it can hardly be regarded as a possibility.<sup>10</sup> The English rule may seem somewhat harsh at first sight, but on grounds of policy it is probably superior to any modification of it based upon negligence. If the buyer is compelled to contest the question of negligence with the seller he will find it very difficult to recover. In the nature of the case the evidence will be chiefly in the control of the seller, and the expense of even endeavoring to make out a case of this sort will be prohibitive in cases involving small amounts. Moreover, if the buyer cannot recover from the seller he cannot recover from any one for the defective character of the goods which he has bought. The wrong done by the sale of defective materials to the manufacturer who later sold the goods cannot form the basis of action by the ultimate buyer.<sup>11</sup> Consequently, the real wrongdoer who has caused the ultimate injury escapes. On the other hand, if the manufacturer is held to an absolute liability irrespective of negligence, it will unquestionably increase the degree of care which he will use and if in any case he is compelled to pay damages for breach of warranty where the real cause of the defect was defective material which he himself innocently purchased, he will have a remedy over against the person who sold him this defective material, and his damages will

defendants' evidence that the defect in the steel was undiscoverable by ordinary care tends to establish the possibility of an undiscoverable, inherent defect in the material of which the plaintiffs stipulated the rod should be forged. Having relied upon their own judgment as to the material to be used in the manufacture, or desiring an article necessarily made of such material, they cannot hold the defendants responsible for a defect which the skill and care which the defendants professed to possess, and which they were bound to exercise, could not discover. Ordinary care is such care as persons of average prudence exercise under like circumstances. *Nashua Iron & Steel Co. v. Railroad,*

62 N. H. 159, 161. The defendants knew the forging was to be used for a piston rod for a steam engine. Merely purchasing the steel from a reputable manufacturer may not be due care in the selection of the material for such a purpose. It may be, and the evidence which the defendants offered indicates, that there are tests which can be applied to determine the character of steel. Whether the defendants did all that due care required was for the jury, and the question should have been submitted to them, as requested by the defendants."

<sup>10</sup> For the rule in the Civil law, see *infra*, § 999.

<sup>11</sup> See *infra*, § 998.

include whatever he himself has had to pay for breach of warranty.<sup>12</sup> Thus the loss will be borne ultimately by the person who should be responsible.

### § 992. Subsidiary warranties by manufacturer.

Even though the goods supplied by a manufacturer have been so exactly defined as to preclude the existence of any warranty of fitness for the purpose for which they are desired, and probably even though because of inspection or the language of the bargain there is no warranty of fitness for any purpose or of merchantability, there is nevertheless a warranty that the manufacture of the goods shall have been properly done and that the material used shall have been reasonably proper, except in so far as the obvious character of the defects or the terms of the bargain show a different intent, or unless the rule in regard to inspection precludes a warranty.<sup>13</sup> It has also been held that a manufacturer selling goods of the sort which he manufactures warrants that the goods were manufactured by him,<sup>14</sup> and are new.<sup>15</sup>

### § 993. Exclusion of implied warranty.

Though the goods which form the subject of the bargain may be so described or identified as to preclude any implication of a warranty of fitness for a particular purpose, nevertheless, there may be, under the principles already considered, a warranty that the goods are merchantable unless goods of the sort agreed upon necessarily cannot be.<sup>16</sup> It must be, however, possible to sell unmerchantable goods even if the seller is a dealer or manufacturer, and though the buyer either does not inspect the goods or his inspection in the

<sup>12</sup> See *infra*, § 997.

<sup>13</sup> *Archdale v. Moore*, 19 Ill. 565; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Union Hide & L. Co. v. Reissig*, 48 Ill. 75; *Ricketts v. Sisson*, 9 Dana, 358, 35 Am. Dec. 141; *Little v. Van Syckle*, 115 Mich. 480, 73 N. W. 554; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; *Waring v. Mason*, 18

Wend. 425; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364.

<sup>14</sup> *Johnson v. Raylton*, 7 Q. B. D. 438.

<sup>15</sup> *Grieb v. Cole*, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533.

<sup>16</sup> There was held to be no warranty that "May eggs" sold in December were fresh. *J. D. Best Mercantile Co. v. Brewer*, 50 Cal. 455, 115 Pac. 726. See *supra* §§ 984 *et seq.*

nature of the case can reveal nothing because the defects are latent. The ordinary way to do this is for the seller expressly to state that the buyer must take the goods as they are. Any words or conduct tending to show that this was the intention of the parties will prevent a warranty from being implied.<sup>17</sup> The common illustration of this principle is where the seller expressly refuses to warrant. Such a refusal shows an intention that the buyer shall take the risk of the quality of the goods;<sup>18</sup> and a statement by the seller that he has no personal knowledge of the article sold also precludes reliance by the buyer on the seller's judgment.<sup>19</sup> In some cases it has been held that an express warranty in a contract to sell or sale

<sup>17</sup> *Taylor v. Bullen*, 5 Ex. 779. This was a case involving the sale of a vessel which was expressly agreed to be "taken with all faults." *Curwen v. Quill*, 165 Mass. 373, 43 N. E. 203, seems to have been a case of this sort. The plaintiffs constructed a machine according to drawings made by the defendants. The machine would not work but the plaintiffs were held entitled to recover nevertheless. See also *Stamps v. Tennessee Marble Co.* (Tenn. Ch.), 59 S. W. 769. It is on this ground that the case of *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987, must be rested. In this case the seller agreed to sell at a certain price provided that the buyers examined the wool and reported whether they would take it. The wool was, in fact, dishonestly packed and the interior of the bales was filled with inferior goods, and ordinary inspection of the bales would not reveal this. It was held there was no warranty. Compare *Prentice v. Fargo*, 53 N. Y. App. Div. 608, 65 N. Y. S. 114, where the defendant in selling seed said that the plaintiff might have it at a certain price if he would take it "just as it is" or "just as it is without cleaning." It was held that these words related only to the uncleanness of the seed and did not excuse the buyer from an implied

warranty that the seed was fit for sowing. See also *Ward v. Hobbs*, 4 A. C. 13. Cf. *Wallis v. Pratt*, [1911] A. C. 394; *Ross v. Northrup*, 156 Wis. 327, 144 N. W. 1124.

<sup>18</sup> *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Hartin Commission Co. v. Pelt*, 76 Ark. 177, 88 S. W. 929; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Jones v. Quick*, 28 Ind. 125; *Figge v. Hill*, 61 Iowa, 430, 16 N. W. 339; *Monroe v. Hickox*, 144 Mich. 30, 107 N. W. 719; *Potter v. Shields*, 174 Mich. 121, 140 N. W. 500; *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. 196; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5; *F. H. Gilcrest Lumber Co. v. Wilson*, 84 Neb. 583, 121 N. W. 989; *Hardt v. Western Elec. Co.*, 84 N. Y. App. Div. 249, 82 N. Y. S. 835; *Henson v. King*, 3 Jones L. 419; *J. I. Case Threshing Mach. Co. v. McClamrock*, 152 N. Car. 405, 67 S. E. 991; *Farr v. Gist*, 1 Rich. L. 68; *Boinest v. Leignex*, 2 Rich. L. 464; *Jacot v. Grossmann & Co.*, 115 Va. 90, 78 S. E. 646; *Leonard Seed Co. v. Crary Canning Co.*, 147 Wis. 166, 132 N. W. 902, 37 L. R. A. (N. S.) 79 Ann. Cas. 1912 D. 1077; But see *American & Co. v. Frey*, 127 La. 183, 53 So. 486.

<sup>19</sup> *Young v. Plattner Implement Co.*, 41 Colo. 65, 91 Pac. 1109.



necessarily excludes any implied warranty.<sup>20</sup> If express warranties in a contract are in their nature inconsistent with the warranties which would have been implied had none been expressed, it would indeed be violating the intention of the parties to imply warranties,<sup>21</sup> but the principle should extend no further. An express warranty is generally exacted for the protection of the buyer, not to limit the liability of the seller. The fact that a seller expressly warrants a machine to be made of the best steel ought not to exclude an implied warranty that the machine is properly manufactured and will do the work such machines are designed to do, if such warranties would otherwise be implied. Excellent authority supports this view.<sup>22</sup> Though a contract is in writing and no

<sup>20</sup> *De Witt v. Berry*, 134 U. S. 306, 10 S. Ct. 536, 33 L. Ed. 896; *Thomas v. Thomas*, 146 Ala. 533, 41 So. 141; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143; *Springer v. Indianapolis Brewing Co.*, 126 Ga. 321, 55 S. E. 53; *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *Gaar v. Hodges*, 28 Ky. L. Rep. 889, 90 S. W. 580; *Guhy v. Nichols & Shepherd Co.*, 33 Ky. L. Rep. 237, 109 S. W. 1190; *Forsythe v. Russell Co.*, 148 Ky. 490, 146 S. W. 1103; *Philbrick v. Kendall*, 111 Me. 198, 88 Atl. 540; *Hall v. Duplex Power Co.*, 163 Mich. 634, 135 N. W. 118; *McGraw v. Fletcher*, 35 Mich. 104; *Cosgrove v. Bennett*, 32 Minn. 371; *Fairbanks v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *John Turl's Sons v. Williams & Co.*, 136 N. Y. App. D. 710, 121 N. Y. S. 478; *Chase-Hackley Piano Co. v. Kennedy*, 152 N. C. 196, 67 S. E. 488; *Totten v. Stevenson*, 29 S. Dak. 71, 135 N. W. 715; *Sheafe v. Zastrow*, 30 S. Dak. 159, 138 N. W. 16; *International Harvester Co. v. Smith*, 105 Va. 683, 54 S. E. 859; *La Crosse Plow Co. v. Helgeson*, 127 Wis. 622, 106 N. W. 1094.

<sup>21</sup> *Reynolds v. General Electric Co.*, 141 Fed. 551, 73 C. C. A. 23; *Alderson v. General Elec. Co.*, 210 Fed.

775, 127 C. C. A. 325; *White v. Gresham*, 52 Ill. App. 399; *Winnemucca Water Co. v. Medal Gas Engine Co.*, 179 Ind. 542, 101 N. E. 1007; *Dowagiac Mfg. Co. v. Mahon*, 13 N. Dak. 516, 101 N. W. 903; *Wasatch Orchard Co. v. Morgan Canning Co.*, 32 Utah, 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540.

<sup>22</sup> *Bigge v. Parkinson*, 7 H. & N. 955; *The Venezuela*, 173 Fed. 834; *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939; *Hawley Furnace Co. v. Van Winkle Machine Works*, 4 Ga. App. 85, 60 S. E. 1008; *O'Brien v. Ellarbee*, 14 Ga. App. 333, 80 S. E. 864; *Ideal Heating Co. v. Kramer*, 127 Iowa, 137, 102 N. W. 840; *Loxtercamp v. Lininger & Co.*, 147 Ia. 29, 125 N. W. 830, 33 L. R. A. (N. S.) 501; *George E. Pew Co. v. Karley*, 154 Ia. 559, 134 N. W. 529; *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591; *Aultman v. Hunter*, 82 Mo. App. 632; *Boulware v. Victor Auto. Mfg. Co.*, 152 Mo. App. 567, 134 S. W. 7; *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471; *Cooper v. Payne*, 103 N. Y. App. Div. 118, 93 N. Y. S. 69; *Bell v. Mills*, 78 N. Y. App. Div. 42, 80 N. Y. S. 34; *Hooven & Allison Co. v. Wirtz*, 15 N. Dak. 477, 107 N. W. 1078.

warranty expressed, one may be implied; for the implied warranty is not based on a supposed agreement of the parties, but is an obligation imposed by law.<sup>23</sup> The effect of the parol evidence rule upon the proof of express warranties not contained in a written bargain has previously been considered.<sup>24</sup>

#### § 994. Meaning of manufacturer.

The word "manufacturer" is given a wide meaning in the law of implied warranty. All sellers who produce the articles which they sell are classed in this category—thus a grower of plants or seeds,<sup>25</sup> or of crops,<sup>26</sup> a nursery man,<sup>27</sup> and one who breeds horses or cattle,<sup>28</sup> are included.

#### § 995. Food; early law.

There is considerable talk in the early law in regard to a special obligation of warranty in the sale of provisions more extensive than that arising in the sale of other articles. The old authorities seem to have been rested, in part at least, upon the language of an old statute.<sup>29</sup> But whatever the

<sup>23</sup> *Elgin Jewelry Co. v. Estes*, 122 Ga. 807, 50 S. E. 939. See, however, *De Witt v. Berry*, 134 U. S. 306, 312, 10 S. Ct. 536, 33 L. Ed. 896.

<sup>24</sup> *Supra*, § 643.

<sup>25</sup> *Shaw v. Smith*, 45 Kans. 334, 25 Pac. 886, 11 L. R. A. 681; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Landreth v. Wyckoff*, 67 N. Y. App. Div. 145, 73 N. Y. S. 383; *Coleman v. Simpson*, 178 N. Y. App. Div. 461, 143 N. Y. S. 587; *Totten v. Stevenson*, 29 S. Dak. 71, 135 N. W. 715; *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916. The Pennsylvania rule denying the existence of any implied warranties in executed sales led to an opposite result for such a sale in Pennsylvania before enactment of the Sales Act. *Shisler v. Baxter*, 109 St. 443, 58 Am. Rep. 738.

<sup>26</sup> *Pfloh v. Porter*, 23 Cal. App. 59, 137 Pac. 44.

<sup>27</sup> *Grisinger v. Hubbard*, 21 Ida. 469, 122 Pac. 853, Ann. Cas. 1913 E.

87; *Kitchin v. Oregon Nursery Co.*, 65 Or. 20, 130 Pac. 408; *Kelly v. Lum*, 75 Wash. 135, 134 Pac. 819.

<sup>28</sup> *Bateman v. Warfield*, 12 Ga. App. 259, 77 S. E. 104; *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135, 37 Am. St. Rep. 199; *Merchants' Bank v. Frase*, 9 Ind. App. 161, 36 N. E. 378; *Redhead v. Wyoming Cattle Co.*, 126 Iowa, 410, 102 N. W. 144. Compare with these cases *Scott v. Renick*, 1 B. Mon. 63, 35 Am. Dec. 177; *Wood v. Ross* (Tex. Civ. App.), 26 S. W. 148; *White v. Stelloh*, 74 Wis. 435, 43 N. W. 99; *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. 705, 22 L. R. A. 187, 39 Am. St. Rep. 864. In the cases last cited either the seller did not raise the animals which he sold or the circumstances showed an intention to buy a specified animal without reliance on the seller's judgment.

<sup>29</sup> In *Burnby v. Bollett*, 16 M. & W. 644, Parke, B., thus summarized the early law: The argument for the plaintiff was, that the sale of victuals

basis of the doctrine it was laid down broadly by Blackstone, that "in contracts for provisions it is always implied that they are wholesome, and if they be not, the same remedy

to be used as food for man differed from the sale of other commodities, and that the vendor of such, if they were unwholesome, was liable to the vendee, without fraud or warranty. This position is laid down, apparently in general terms, in Keilway, 91; but the cases there referred to, in the Year Books, 9 Hen. VI, 37, pl. 53, and 11 Ed. IV, Trin. 10, pl. 6, and other authorities, when considered, lead to this conclusion, that there is no other difference between the sale of victuals for food, and other articles, than this, that victuallers, butchers, and other common dealers in victuals are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances as they are, so that, if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article; but they are also liable to punishment for selling corrupt victuals, by virtue of an ancient statute (certainly it they do so knowingly, and probably if they do not), and are, therefore, responsible civilly to those customers to whom they sell such victuals, for any special or particular injury by the breach of the law which they thereby commit. That they, the common dealers, not all persons, are liable criminally for selling corrupt victuals, is clear; for Lord Coke says, in 4 Inst. 261: "This court of the leet may inquire of corrupt victual, as a common nuisance, whereof some have doubted, both for that it is omitted in the statute of the leet, and of the weak authority of the book of the 9 Hen. VI, where Martyn saith that it is ordained that none should sell corrupt victual. And Cottismore held the opinion that it is *actio popularis*,

whereupon it is collected that the conusance thereof belongeth to the leet; and Martyn and Neal (11 Hen. IV), agreeing with him, said truly; for, by the statute of 51 Hen. III, Stat. 'pillor', et tumbrel', et assise' panis et cervis,' and by the statute made in the reign of Edw. I, intituled Stat. 'de pistoribus et brasiatoribus, et aliis vitellariis,' it is ordained that none shall sell corrupt victuals." The statute of 51 Hen. III, of the Pillory and Tumbrel, and Assize of Bread and Ale, applies only to vintners, brewers, butchers, and cooks. Amongst other things, inquiry is to be made of the vintners' names, and how they sell a gallon of wine, or if any corrupted wine be in the town, or such as is not wholesome for man's body; and if any butcher sell contagious flesh, or that died of the murrain, or cooks that seethe unwholesome flesh, etc. Lord Coke goes on to say, that Britton, who wrote after the statute 51 Hen. III, and following the same, saith, "Puis soit inquire de ceux queux achatent per un manner de mesure, et vendent per meinder mesure faux, et ceux sont punis come vendors des vines, et auxi ceux que serront atteint de faux aunes, et faux poys, et auxi les macegrievs (*macellarii*, butchers), et les gents que de usage vendent a trespassants (passengers) mauvaise vians corrupus et wacrus, et autrement perillous a la sauntie de home, encountre le forme de nous statutes." This view of the case explains what is said in the Year Book, 9 Hen. VI, 53, that "the warranty is not to the purpose; for it is ordained that none shall sell corrupt victuals;" and what is said by Tanfield, C. B., and Altham, B., Cro. Jac. 197, "that if a man sells corrupt victuals, without

(damages for deceit), may be had."<sup>30</sup> This statement is frequently repeated and relied on as a ground for decision.<sup>31</sup>

### § 996. Food; modern law.

It is doubtful, however, if it would now generally be held that there is any broader warranty in the case of food than of other goods unless the seller is a dealer, and importance is also attached to the fact that the buyer was buying for immediate consumption. But that under these circumstances there is a warranty is well settled.<sup>32</sup> So far as reliance on the

warranty, an action lies, because it is against the Commonwealth;" and also explains the note of Lord Hale, in 1st Fitzherbert's *Natura Brevium*, 94, that there is diversity between selling corrupt wines as merchandise; for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, if it prejudice any.

<sup>30</sup> 3 Comm. 165.

<sup>31</sup> *Hoover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327; *Copas v. Anglo-American Provision Co.*, 73 Mich. 541, 41 N. W. 690; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; *Divine v. McCormick*, 50 Barb. 116 (compare *Moses v. Mead*, 1 Denio, 378, 5 Denio, 617); *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753.

<sup>32</sup> *Burnby v. Bollett*, 16 M. & W. 644; *Emmert v. Mathews*, 31 L. J. Ex. 139; *Smith v. Baker*, 40 L. T. (N. S.) 261; *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288; *Askam v. Platt*, 85 Conn. 448, 83 Atl. 529; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Humphreys v. Comline*, 8 Blackf. 516; *Malone v. Jones*, 91 Kan. 815, 139 Pac. 387, L. R. A. 1915 A. 328; *Parks v. C. C. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202, L. R. A. 1915 C. 179; *Doyle v. Fuerst*, 129 La. 838, 56 So. 906, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913 B. 1110; *Farren v. Dam-*

*eron*, 99 Md. 323, 58 Atl. 367; 105 Am. St. Rep. 297; *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. 538, 1 Am. St. Rep. 472 (citing earlier Massachusetts cases); *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884; *Cook v. Darling*, 160 Mich. 475, 125 N. W. 411; *Baker v. Kamantowsky*, 188 Mich. 569, 155 N. W. 430; *Ryder v. Neitge*, 21 Minn. 70; *Hanson v. Hartse*, 70 Minn. 282, 73 N. W. 163, 68 Am. St. Rep. 527; *Bark v. Dixon*, 115 Minn. 172, 131 N. W. 1078, Ann. Cas. 1912 D. 775; *Tomlinson v. Armour*, 74 N. J. L. 274, 65 Atl. 883, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; *Race v. Crum*, 222 N. Y. 410, 118 N. E. 853; *Houk v. Berg* (Tex. Civ. App.), 105 S. W. 1176; *Walters v. United Grocery Co.*, (Utah, 1918), 172 Pac. 473; *Warren v. Buck*, 71 Vt. 44, 42 Atl. 979, 76 Am. St. Rep. 754. See also *Baer Grocer Co. v. Barber Milling Co.*, 223 Fed. 969, 139 C. C. A. 449; *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915 C. 140. In Pennsylvania, by statute of May 4, 1889 (P. L. 87), in a sale of food it must correspond in kind or quality with the description given, and there is an implied warranty unless the parties otherwise agree that the goods are fit for household consumption. See *Cantani v. Swift*, 251 Pa. 52, 95 Atl. 931, L. R. A. 1917 B. 1272.

seller's skill and judgment is essential to establish a warranty of provisions, the mere fact of purchase from a dealer for immediate consumption seems to have been regarded generally as sufficient evidence, but in England and Massachusetts it is held that such reliance is essential and is not to be assumed.<sup>33</sup> Accordingly it has been held in an elaborately considered case in Massachusetts that where the buyer at a shop selects provisions himself, the seller's warranty does not go beyond the implied assertion that the seller believes the food he is selling to be sound, and he is, therefore, not liable unless he knew that the food sold was not fit to be eaten.<sup>34</sup> A few recent decisions also hold that a dealer who sells in good faith canned goods of a reputable brand is not liable if the contents of cans prove to be bad because he could have no means of knowing of the quality or of guarding against it.<sup>35</sup> It is probable that no general statement that a buyer of canned goods never relies on the dealer's judgment could be sustained, and if there is reliance,<sup>35a</sup> the fact that the seller was guilty of no negligence should be immaterial.<sup>36</sup> A manufacturer of food products, apart from any special severe rule governing provisions, impliedly warrants food which he

<sup>33</sup> In *Bigge v. Parkinson*, 7 H. & N. 955, it was held that the rule in regard to provisions was like the rule as to other goods. So in the English Sale of Goods Act there is no separate rule established for provisions, and under the general rule of section 14 (1) reliance upon the seller's skill or judgment is essential. See *Wren v. Holt*, [1903] 1 K. B. 610; *Jackson v. Watson*, [1910] 2 K. B. 193. This provision has been copied in the American Sales Act, § 15 (1). See concerning its application *Flaccomio v. Eysink*, 129 Md. 367, 100 Atl. 510; *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916 D. 1006; *Tomlinson v. Armour*, 74 N. J. L. 274, 65 Atl. 883. See also on the general question: *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436; *Walden v. Wheeler*, 153

Ky. 181, 154 S. W. 1088, 44 L. R. A. (N. S.) 597.

<sup>34</sup> *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436. See also *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916 D. 1006 (under Sales Act).

<sup>35</sup> *Bigelow v. Maine Central R.*, 110 Me. 105, 85 Atl. 396; *Trafton v. Davis*, 110 Me. 318, 86 Atl. 179; *Julian v. Laubenberger*, 16 N. Y. Misc. 646, 38 N. Y. S. 1052.

<sup>35a</sup> In *Jackson v. Watson* [1909] 2 K. B. 193, the jury expressly found that there was reliance.

<sup>36</sup> See *supra*, § 991. The seller (a dealer) of canned goods though apparently guilty of no negligence was held liable in *Jackson v. Watson*, [1909] 2 K. B. 193; *Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620.

sells to be free from latent defects, making it unfit for consumption.<sup>37</sup> In jurisdictions, therefore, which follow the English law in imposing an implied warranty in sales of goods of any kind by dealers in that kind of merchandise, the doctrine in regard to sales of provisions probably differs little, if at all, from the doctrine prevailing as to other kinds of goods, and the Uniform Sales Act contains no special rule concerning provisions;<sup>38</sup> but in jurisdictions where that statute is not in force, and where manufacturers only are held to warrant impliedly the goods which they sell, the special rule as to provisions still has importance. The rule does not extend to food for cattle.<sup>39</sup> But the seller of such food may be liable under the principles governing implied warranties of goods other than food.<sup>40</sup>

#### § 996a. Restaurant keeper's liability.

The liability of a restaurant keeper for damages caused by bad food eaten in a restaurant has given rise to some difference of opinion. The question is sometimes supposed to depend on whether the restaurant keeper makes a sale to the customer of the injurious food. It is indeed true that if the transaction amounts to a sale the numerous authorities referred to in the preceding section establish liability. On excellent authority,<sup>41</sup> however, it is held that the title to food served by an innkeeper never passes. Whether this analogy holds good in a restaurant where a customer pays not for a meal, but for a definite portion of food, may perhaps be questioned. May not one who secures and pays for a

<sup>37</sup> *Nixa Canning Co. v. Lehmann-Higginson Grocery Co.*, 70 Kan. 664, 79 Pac. 141, 70 L. R. A. 653; *Copas v. Anglo-American Provision Co.*, 73 Mich. 541, 41 N. W. 690; *Leggett v. Young*, 29 N. B. 675. But a purchaser from a dealer cannot sue the canner of food on the theory of warranty. *Tomlinson v. Armour*, 74 N. J. L. 274, 65 Atl. 883.

<sup>38</sup> See *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916 D. 1006.

<sup>39</sup> *National Cotton Oil Co. v. Young*, 72 Ark. 144, 85 S. W. 92; *Lukens v. Freund*, 27 Kans. 664, 41 Am. Rep. 429; *Dulaney v. Jones*, 100 Miss. 835, 57 So. 225; *F. A. Piper Co. v. Oppenheimer* (Tex. Civ. App.), 158 S. W. 777.

<sup>40</sup> *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Provost v. Cook*, 184 Mass. 315, 68 N. E. 336; *Houk v. Berg* (Tex. Civ. App.), 105 S. W. 1176.

<sup>41</sup> See *Beale, Innkeepers*, § 169, and cases cited.

piece of pie at an 'automat' or luncheon spa take it from the plate and walk off with it without wrong? <sup>42</sup> Whether or not because the transaction has been held not to be a sale, it has generally been assumed that the liability of a restaurant-keeper is based only on willful fault or negligence, and many cases have been brought on this assumption. In most of them no contention was made by the plaintiff that the defendant was absolutely liable as a warrantor, but in a few recent cases the claim was made on behalf of the plaintiff and denied by the court.<sup>43</sup> The Massachusetts Supreme Court,<sup>44</sup> and the Appellate Division of the New York Supreme Court,<sup>45</sup> however, have recently upheld such a claim, and with good reason. Even though the transaction is not a sale, every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer at an inn or restaurant. The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor, and to charge the seller of an unopened can of food for the consequences of the inferiority of the contents of the can, and to hold free from liability a restaurant-keeper who opens the can on his premises and serves its contents to a customer, would be a strange inconsistency. A sale is not the only transaction in which a warranty may be implied.

If it is admitted that the restaurant-keeper is a warrantor there should be no necessity to prove negligence on the part of the defendant even if it is alleged, since the negligence is an immaterial allegation and action on a warranty may be in tort without allegation of either *scienter* or negligence.<sup>46</sup> This has not always been observed.<sup>47</sup>

<sup>42</sup> This distinction is suggested in *Valeri v. Pullman Co.*, 218 Fed. 519, 520.

<sup>43</sup> *Valeri v. Pullman Co.*, 218 Fed. 519; *Travis v. Louisville, etc., R. Co.*, 183 Ala. 415, 62 So. 851; *Sheffer v. Willoughby*, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; *Loucks v. Moreley* (Cal. App.), 179 Pac. 529; *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533, L. R. A. 1915 B. 481, Ann. Cas. 1916 D. 1917.

<sup>44</sup> *Friend v. Child's Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407.

<sup>45</sup> *Leahy v. Essex Co.*, 164 N. Y. App. Div. 903, 148 N. Y. S. 1063; *Muller v. Child's Co.*, 185 N. Y. App. Div. 881, 171 N. Y. S. 541; *Barrington v. Hotel Astor*, 184 N. Y. App. Div. 317, 171 N. Y. S. 840.

<sup>46</sup> *Shippen v. Bowen*, 122 U. S. 575, 30 L. Ed. 1172, 7 Sup. Ct. Rep. 1283.

<sup>47</sup> Thus in Massachusetts, though the restaurant-keeper has been held

### § 997. What is meant by merchantable.

The requirement when it exists that goods shall be merchantable does not require that the goods shall be of first quality or even that they shall be as good as the average of goods of the sort.<sup>48</sup> In some cases it is indeed said that goods must be of "medium quality,"<sup>49</sup> but this seems to go too far. On the one hand it is not enough that the article is such as would in ordinary parlance be called by the name which the buyer and seller used to describe the object of their bargain, but, on the other hand, if there is no warranty of fitness for a particular purpose the buyer cannot claim more than that the goods with their defects known shall be salable as goods of the general kind which was named in the contract, or to which the goods, if specific, were supposed to belong.<sup>50</sup>

### § 998. Warranty not available to subpurchaser.

It is a general rule that one who has a right in contract may assign that right in effect by giving the assignee the power to enforce it in the name and stead of the assignor. There seems no reason why a warranty should be an exception to this rule; and therefore a right of action of the first buyer should be assignable to a subpurchaser.<sup>51</sup> But however this may be it seems settled that the mere resale of a warranted

a warrantor, it has also been held that where a plaintiff alleges negligence, he must prove it. *Ash v. Child's Dining Hall Co.*, 231 Mass. 86, 120 N. E. 396.

<sup>48</sup> Thus in *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331, in a sale of "Manila sugar" it was held the buyer had no cause to complain because the sugar contained a percentage of sand and was worse than the average Manila sugar. It was not, however, claimed by the buyer that the sugar was not a salable article as Manila sugar. So in *Wilson v. Lawrence*, 139 Mass. 318, 1 N. E. 278, a piano the case of which began to check, diminishing its value, was nevertheless treated as merchantable.

<sup>49</sup> *Howard v. Hoey*, 23 Wend. 350,

35 Am. Dec. 572; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290.

<sup>50</sup> *Wieler v. Schilizzi*, 17 C. B. 619, 624; *Kenney v. Grogan*, 17 Cal. App. 527, 120 Pac. 433, 436. In *McClung v. Kelley*, 21 Iowa, 508, the principle was thus stated: "The article shall not have any remarkable defect." See also *Harris v. Waite*, 51 Vt. 481, 31 Am. Rep. 694.

<sup>51</sup> It is, however, said that a warranty is not negotiable in *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220. By this statement, however, the court merely meant that a buyer of goods with a warranty could not by reselling the goods with a warranty give the subpurchaser an action for his damages against the original seller.



article does not give the subpurchaser a right to sue the original seller for damages caused him by defects either in the title or quality of the goods.<sup>52</sup> Two reasons may be given for this result. In the first place the sale of the chattel does not indicate that the seller means to part with his right of action for damages against one who previously sold the article to him. On the contrary, it may be assumed, that if the original warranty has been broken, the original purchaser means to retain whatever right he may have.<sup>53</sup> Another reason is that a warranty must, it seems, like an insurance policy, be construed as a contract of personal indemnity. Therefore, though one who purchased goods with a warranty might assign a right of action already accrued on the warranty he could not enlarge its scope so as to make it include the in-

<sup>52</sup> *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288 (quality); *Welshausen v. Charles Parker Co.*, 83 Conn. 231, 76 Atl. 271 (quality); *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220 (title); *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918 (quality); *Flaccomio v. Eysink*, 129 Md. 367, 100 Atl. 510 (quality); *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341, 80 N. E. 482; *Roberts v. Anheuser-Busch Brewing Assoc.*, 211 Mass. 449, 98 N. E. 95 (quality); *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916, D. 1006 (quality); *Tomlinson v. Armour*, 74 N. J. L. 274, 69 Atl. 883 (quality); *Walrus Mfg. Co. v. McMehen*, 39 Okl. 667, 136 Pac. 772 (quality), 51 L. R. A. (N. S.) 1111; *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213 (quality). In *Childs v. O'Donnell*, 84 Mich. 533, 538, 47 N. W. 1108, however, the court said *obiter* of a warranty that it "runs with the goods; and see *Richardson Machinery Co. v. Brown*, 95 Kan. 685, 149 Pac. 434; *Conestoga Cigar Co. v. Finke*, 144 Pa. 159, 22 Atl. 868, 13 L. R. A. 438;

*Trustees v. Siers*, 68 W. Va. 125, 69 S. E. 468.

In *Boyd v. Whitfield*, 19 Ark. 447; *York Mfg. Co. v. Bonnell*, 24 Ind. App. 667, 57 N. E. 590, it was held that where the subpurchaser assumed payment of the price on the original sale he might recover; but in the absence of a novation to which the original seller was a party it is hard to see why assumption of the price should affect the question. Such a subpurchaser was denied recovery in *Walrus Mfg. Co. v. McMehen*, 39 Okl. 667, 136 Pac. 772, 51 L. R. A. (N. S.) 1111.

In *Cantani v. Swift*, 251 Pa. 52, 95 Atl. 931, L. R. A. 1917, B. 1272, it was held that a subpurchaser of dangerous food might maintain an action against the manufacturer on a warranty. The court relied on cases sounding in tort where the original seller was either negligent or had guilty knowledge. Neither of these elements appeared in the Pennsylvania case. See also *Parks v. C. C. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202, L. R. A. 1915, C. 179.

<sup>53</sup> *Dukes v. Nelson*, 27 Ga. 457, 463; *Olson v. Hurd*, 20 Idaho, 47, 116 Pac. 358.

demnification of subpurchasers. The right would always remain a right to damages for the injury the first buyer suffered by the defective condition of the article. As stated in a subsequent section,<sup>53a</sup> however, it is generally held that a buyer who has bought goods with a warranty may recover damages which he has been compelled to pay a subpurchaser to whom the goods were resold with a similar warranty. In this way the original warrantor is frequently in effect made liable in the same amount that he would have been had the warranty been held to run with the goods as a covenant of warranty runs with land. The question discussed in this section must not be confused with the question concerning the liability in tort to a subpurchaser of one who knowingly or negligently sells a dangerous article.

#### § 999. Warranty in the Civil law.

The Roman law did not make the close analogy between express warranties and implied warranties that is made in our law. Either a promise on the part of the seller in regard to the goods or fraud imposed an obligation upon the seller similar to that imposed in our law; that is—the buyer could recover damages for the injury caused by the seller's wrong. Moreover, as is also everywhere the rule of the Common law, the buyer could rescind the sale because of fraud. Unlike the rule of the English law, however, but like the rule in many of the United States,<sup>54</sup> the buyer could also rescind a contract of sale for breach of a promise or warranty. In applying these rules, it was held to be a fraud if the seller knew at the time of the contract of defects in the goods which would impair their usefulness for the purpose for which they were designated, and deliberately refrained from apprising the purchaser of the defects. If the seller was innocent of fraud and made no express representation or promise in regard to the goods, he was never liable in damages; but as it seemed unjust that a seller who, even innocently, had sold an unsound article for the price of a sound one should retain the price, the buyer was allowed the right of rescission. Such defects in the goods as would justify the buyer in returning the goods

<sup>53a</sup> *Infra*, § 1355.

<sup>54</sup> See *infra*, §§ 1461, 1462.

were called redhibitory defects. It was necessary to constitute such a defect that it could not readily have been observed by the buyer by inspection at the time of the sale.<sup>55</sup> The modern Civil law universally follows the general principle established by the Roman law.<sup>56</sup> The only one of the United States, where the Civil law is in force is Louisiana.<sup>57</sup> But in South Carolina the fundamental theory of the Civil law that a bargain to sell goods for the price of sound goods implies a representation that they are sound has also been

<sup>55</sup> The details of the Roman Law are more fully stated in Moyle, *Contract of Sale in the Civil Law*, 188-216.

<sup>56</sup> The French Civil Code provides in substance: Art. 1641. The seller is bound for latent defects which make the goods unfit for the use for which they were designed or so diminish their usefulness that the buyer would not have bought them, or would only have bought them at a lower price. Art. 1642. The seller is not bound for patent defects. Art. 1643. The seller is bound for latent defects though he did not know of them, unless the contrary is expressly stipulated. Art. 1644. The buyer has the chance of returning the goods or of keeping them and paying part of the price to be fixed by arbitration. Art. 1645. If the seller knew of the defects he is also liable for damages. Art. 1648. The buyer must bring a redhibitory action within a reasonable time.

Owing to the influence of the French Code, which has been largely adopted in Italy, Spain, Belgium, Netherlands and most countries of Central and South America, it may safely be assumed that a rule substantially similar prevails in these countries.

The German Civil Code provides: § 459. The seller is bound that the thing sold has not defects which will impair its value or usefulness for ordinary purposes or for purposes

provided for by the contract. § 460. The seller is not bound for defects known to the buyer or for defects which would have been known had it not been for gross negligence of the buyer unless the seller promised that the defects did not exist or fraudulently concealed their existence. § 462. In case of default by the seller, the buyer may have rescission or diminution of the price. § 463. If the thing sold lacks a quality expressly represented by the seller, or if the seller fraudulently concealed the defect, he is liable for damages as an alternative to rescission or diminution of the price.

<sup>57</sup> See *George v. Shreveport Cotton Oil Co.*, 114 La. 498, which shows that the rules of the Civil law are still in force in Louisiana and also lays down the principle that a manufacturer is presumptively bound to know the qualities of articles of his manufacture which he sells. This doctrine is particularly important under the rule of the Civil law that a seller who knows of defects in the things which he sells, but omits to declare them, is liable in damages. See also *McLellan v. Williams*, 11 La. Ann. 721; *Doyle v. Fuerst & Kræmer, Ltd.*, 129 La. 838, 56 So. 906, 40 L. R. A. (N. S.). 480, Ann. Cas. 1913, B. 1110; *Meraux v. Kenilworth Sugar Co.*, 135 La. 39, 64 So. 974; *Bigman v. Loris*, 135 La. 285, 65 So. 266.

in force from an early date, and the maxim of *caveat emptor* rejected.<sup>58</sup>

### § 1000. Warranties in sales by sample under the Sales Act.

The Uniform Sales Act provides for warranties in sales by sample as follows: <sup>59</sup>

In the case of a contract to sell or a sale by sample—

(a) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.<sup>60</sup>

This section of the Sales Act follows, with slight changes, section 15 of the English act. The English act inserts at the beginning a definition which seems somewhat too narrow.<sup>61</sup> The English act also uses the word "condition" instead of the word "warranty." As will be seen in the next sections, if the English distinction between condition and warranty were adopted, the obligation of the seller would sometimes be properly classed as a condition and sometimes as a warranty. According to the definition of warranty in the American Sales Act, however, and the remedies there allowed the buyer, there is no occasion to distinguish between a warranty and a promissory condition. In the American act the exception at the end of (b) is not found in the English statute because section 47 (3), also (to which reference is made), is not contained in the English act. In subsection (c) the qualification has

<sup>58</sup> *Timrod v. Shoolbred*, 1 Bay, 324, 1 Am. Dec. 620; *Bulwinkle v. Cramer*, 27 S. C. 376, 3 S. E. 225, 13 Am. St. Rep. 645.

<sup>59</sup> Sec. 16.

<sup>60</sup> *Gascoigne v. Cary Brick Co.*, 217 Mass. 302, 104 N. E. 734; *Stewart v. Voll*, 81 N. J. L. 323, 79 Atl. 1041.

<sup>61</sup> Sale of Goods Act, § 15 (1).

"A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect." This definition could hardly include cases considered *infra*, § 252.

been inserted in the American act, "if the seller is a dealer in goods of that kind." The English act in regard to sales by sample seems to go beyond the previous section relating to implied warranties of quality, in fastening upon the seller an obligation to furnish merchantable goods; for the English section here under consideration imposes such an obligation upon the seller irrespective of whether the buyer was justified in relying upon the seller's judgment because the seller was a manufacturer or dealer, or for any other reason. It may frequently happen that the buyer who examines the sample is quite as competent to detect defects in the sample, which are not obvious, as the seller. It seemed reasonable, therefore, to restrict the obligation of the seller to furnish merchantable goods to cases where he was a dealer, which will also include, necessarily, cases where he is a manufacturer. As in the case of a warranty in a sale by description, the warranty is here called an implied warranty because that usage is common, but as is true of warranties in sales by description, the warranty might more properly be called express.<sup>62</sup>

**§ 1001. There may be a contract to sell or a sale by sample.**

It is common to speak of sales by sample rather than contracts to sell by sample, and in New York apparently, the term "sale by sample" is restricted to cases where "the goods are *in esse*" and "the sample is taken from the bulk,"<sup>63</sup> but this usage is not the common one, and there seems no reason why a contract to produce goods like a pattern should not be called a contract to sell by sample.<sup>64</sup> In truth, a sample

<sup>62</sup> It was so called in *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122, where the court said: "A sale by sample is tantamount to an express warranty that the sample is a true representative of the kind." The warranty is also called "express" in *Gurney v. Atlantic, etc., Ry. Co.*, 58 N. Y. 358, and in *Vanderhorst v. MacTaggart*, 1 Brev. 269, 2 Am. Dec. 667.

<sup>63</sup> *Gurney v. Atlantic, etc., Ry. Co.*, 58 N. Y. 358; *Smith v. Coe*, 55 N. Y.

App. Div. 585, 170 N. Y. 162, 612, 63 N. E. 57; *Ideal Wrench Co. v. Garvin Mach. Co.*, 92 N. Y. App. Div. 187, 87 N. Y. S. 41, *affd.* 181 N. Y. 573, 74 N. E. 1118; *Lowenberg v. Block*, 140 N. Y. S. 375.

<sup>64</sup> The following cases apparently related to unspecified goods. The seller contracted to furnish goods in the future of a kind like a sample. *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Jones v. Padgett*, 24 Q. B. D. 650; *Drummond v. Van Ingen*, 12

is simply a way of describing the subject-matter of the bargain, and the principles which are applicable to contracts to sell and sales by description are applicable here.<sup>65</sup> Description may be used as a means of identifying existing goods or as a means of describing the qualities of existing goods which are otherwise identified; and again, as a means of describing nonexisting or unidentified goods. The same principles are applicable where the description is by means of a sample. In the first case where the description or sample is itself the means provided for identifying the goods which are the subject of the bargain, if the goods are not like the description or sample, the means of identification fails and no title can pass, though the parties purported to make an executed sale.<sup>66</sup>

A. C. 284; *Meyer Drug Co. v. Puckett*, 139 Ala. 331, 35 So. 1019; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Atl. 422; *Love v. Barnesville Mfg. Co.*, 3 Pennewill, 152, 50 Atl. 536; *Home Lightning Rod Co. v. Neff*, 60 Iowa, 138, 14 N. W. 216; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Pike v. Fay*, 101 Mass. 134; *Androvette v. Parks*, 207 Mass. 86, 92 N. E. 1006; *Gascoigne v. Cary Brick Co.*, 217 Mass. 302, 104 N. E. 734, Ann. Cas. 1917 C. 336; *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Hargous v. Stone*, 5 N. Y. 73; *Hardt v. Western Electric Co.*, 84 N. Y. App. Div. 249; *Washington Brick Co. v. Sinnott*, 92 N. Y. S. 504; *Dayton v. Hooglund*, 39 Ohio St. 671; *Hume v. Sherman Cotton Co.*, 27 Tex. Civ. App. 366, 65 S. W. 390. In the following cases the decisions apparently related to a sale of specified goods: *Tye v. Fynmore*, 3 Campb. 462; *Gardiner v. Gray*, 4 Campb. 144; *Russell v. Nicolopulo*, 8 C. B. (N. S.) 362; *Webster v. Granger*, 78 Ill. 230; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Atwater v. Clancy*, 107 Mass. 369; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455;

*Texas Fruit Co. v. Lane*, 101 Mo. App. 712, 74 S. W. 100; *Bernstein v. Loomis*, 87 N. Y. S. 134; *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648, 88 N. Y. S. 256. In *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447, 451, a case where goods were warranted "about equal to sample," Blackburn, J., says: "Generally speaking, when the contract is as to any goods such a clause is a condition going to the essence of the contract, but when the contract is as to specific goods the clause is only collateral to the contract, and is the subject of a cross-action, or matter in reduction of damages."

<sup>65</sup> Thus in *Drummond v. Van Ingen*, 12 A. C. 284, 295, Lord Macnaghten said: "After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract, which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself." See also *Columbus &c. Iron Co. v. See*, 169 Mich. 661, 135 N. W. 920; *Kupfer v. Pellman*, 67 N. Y. Misc. 149, 152, 121 N. Y. S. 1081.

<sup>66</sup> Thus, in *Azemar v. Casella*, L. R. 2 C. P. 431, the plaintiff sold 128 specific bales of cotton, to arrive to

In the second case, however, if the parties purport to make an executed sale and the goods are clearly identified as being the goods in regard to which the bargain related, there seems no reason why title should not pass though the goods be not equal to sample.<sup>67</sup> In case the goods in regard to which parties are dealing are not specified, the bargain is necessarily executory, and even though the goods are specified, the bargain may, nevertheless, be executory if the parties so intend. But these cases need not be distinguished, so far as the obligation of the seller is concerned. His obligation in each of them is the same. If he does not deliver the goods equal to the sample, whether the bargain was a sale or a contract to sell, he will be liable. The buyer's remedies may, however, vary and the acceptance of the goods may have an effect in destroying this liability, and the difference in this respect, if any, in the several cases, will be hereafter considered. Risk of loss and other incidents of title will also be affected if the sale is executed.

### § 1002. A sample is a term of the contract.

In the typical case of a contract to sell or a sale by sample, the defendants, guaranteeing them equal to a sealed sample. The sample was of "long staple Salem." The bales were "Western Madras," which required different machinery to make it up. The defendants refused to accept the bales, and it was held they were not bound to, in spite of a clause in the contract "should the quality prove inferior to the guarantee, a fair allowance to be made." The court held that there was an essential difference of the species of the sample and the cotton tendered. See also *Varley v. Whipp*, [1900] 1 Q. B. 513; *Gill v. M'Dowell*, [1903] 2 Ir. K. B. 463; *Gardner v. Lane*, 12 Allen, 39; s. c., 9 Allen, 492, 85 Am. Dec. 779, 98 Mass. 517; *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648, 88 N. Y. S. 256. These decisions go farther than the text in since all of them there were other means of identifying the goods than the sample or description, so that in fact there could be no

doubt that the goods in question were the goods as to which the parties had been bargaining, although not possessing the nature or quality guaranteed. See also *infra*, §§ 1008, 1009.

<sup>67</sup> As to what constitutes sufficient identification, see *Holmes*, Common Law, 310, commenting on *Gardner v. Lane*, 12 Allen, 39; s. c., 9 Allen, 492, 85 Am. Dec. 779, 98 Mass. 517. In this case the purchaser was held to have no title as against the seller's creditors to specific barrels pointed out to the buyer, but erroneously stated to contain No. 1 mackerel, whereas in fact some contained No. 3 mackerel and some contained salt. The subject-matter of the sale was here identified both as being the contents of specific barrels and also by description. The primary intention of the buyer was probably not to take title to those specific barrels, but rather to take title to No. 1 mackerel.

the seller expressly agrees or guarantees that the bulk of the goods are, or shall be, equal to the sample. There can be no question of his obligation to furnish such goods or of his liability in case he fails to do so. This has often been decided.<sup>68</sup> In Pennsylvania alone a narrower obligation was formerly placed upon the seller. He was held bound to furnish goods of the same kind as the sample, but not of the same quality.<sup>69</sup> But the Pennsylvania law was corrected by a statute<sup>70</sup> providing that there should be a warranty in a sale by sample that the bulk is of the same quality as the sample;<sup>71</sup> and in 1915 the Uniform Sales Act was enacted. It is also settled that if the goods do not correspond with the sample, the buyer may refuse to receive them.<sup>72</sup> The English Sale of

<sup>68</sup> *Parkinson v. Lee*, 2 East, 314 (Lawrence, J., said of such a bargain, that the contract was "no more than that the bulk should agree with the sample"); *Parker v. Palmer*, 4 B. & Ald. 387 (Chief Justice Abbott said: "The words 'per sample' introduced into this contract may be considered to have the same effect as if the seller had in express terms warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale"); *Meyer v. Everett Pulp Co.*, 193 Fed. 857, 113 C. C. A. 643; *Love v. Barnesville Mfg. Co.*, 3 Pennew. 152, 50 Atl. 536; *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291; *Gunther v. Atwell*, 19 Md. 157; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Atwater v. Clancy*, 107 Mass. 369; *Borden v. Fine*, 212 Mass. 425, 98 N. E. 1073; *Texas Fruit Co. v. Lane*, 101 Mo. App. 712, 74 S. W. 100; *Bloom v. Reisman*, 135 N. Y. S. 547, 76 Misc. 524; *Dickinson Brick Co. v. Crowe*, 63 Wash. 550, 115 Pac. 1087.

<sup>69</sup> *Boyd v. Wilson*, 83 Pa. St. 319, 24 Am. Rep. 176. This rule was in line with the Pennsylvania decisions in regard to sales by description. *Fraley v. Bisphan*, 10 Pa. St. 320, 51 Am. Dec. 486. And generally in regard to

representations inducing a sale. *Williston, Sales* § 199. On the whole subject, the Pennsylvania law has been open to criticism, but the enactment of the Uniform Sales Act has presumably corrected its archaisms.

<sup>70</sup> Act of April 13, 1887 (P. L. 21, § 1).

<sup>71</sup> See *Cox v. Andersen*, 194 Mass. 136, 80 N. E. 236.

<sup>72</sup> *Hibbert v. Shee*, 1 Campb. 113 (Lord Ellenborough said in regard to a sale by sample: "If I buy a commodity wholly discordant to that which is promised me, I am not bound to accept of a compensation for the dissimilarity. This is not a performance of the contract"); *Wells v. Hopkins*, 5 M. & W. 7; *Azamar v. Casella*, L. R. 2 C. P. 431, 466; *McGee v. Billingsley*, 3 Ala. 679; *Penn v. Smith*, 93 Ala. 476, 9 So. 609, 98 Ala. 560, 12 So. 818, 104 Ala. 445, 18 So. 38; *Merriman v. Chapman*, 32 Conn. 146; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Atl. 422; *Love v. Barnesville Mfg. Co.*, 3 Pennew. 152, 50 Atl. 536; *Gill v. Kaufman*, 16 Kans. 571; *Home Lightning Rod Co. v. Neff*, 60 Iowa, 138, 14 N. W. 216. *Gunther v. Atwell*, 19 Md. 157; *Pike v. Fay*, 101 Mass. 134; *National Engraving Co. v. Queen City Laundry*,



Goods Act by calling the obligation of the seller a condition implies that in every case the seller may thus refuse to receive the goods, making no exception in case the goods are specific goods identified in some other way than by the sample. The American Sales Act, though it calls the obligation a warranty, produces the same result because rescission is allowed as a remedy for breach of warranty. To permit the buyer to reject the goods in every case if not up to sample seems in conformity with justice, and if, as under the American Sales Act, rescission is allowed of an executed sale for breach of warranty, there is entire consistency in the law. But where rescission of an executed transfer of title is not allowed, as in England, an absolute right given in the case of a sale by sample seems inconsistent<sup>73</sup> with the general rule. Whether a buyer who has received and accepted the goods although not conforming to the sample, has assented to receive those specific goods as full satisfaction of the seller's obligation has been previously considered.<sup>74</sup> But if the acceptance of the goods does not thus operate, the buyer, as an alternative remedy to those already referred to, may recoup from the contract price the difference in value of the goods received and those promised.<sup>75</sup> The seller is bound, moreover, to deliver

92 Neb. 402, 138 N. W. 575; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Washington Brick Co. v. Sinnott*, 92 N. Y. S. 504; *Hume v. Sherman Cotton Co.*, 27 Tex. Civ. App. 366, 65 S. W. 390.

<sup>73</sup> This has been observed by the learned editors of the fifth English edition of Benjamin, Sale, who make the following comment on page 642, note 3: "Whether, however, the word 'condition' should not, in the case of a contract for the sale of specific goods, be interpreted as 'stipulation,' having regard to the provisions of s. 11 (1) (c), is doubtful. If the Legislature intended to declare the common law, as laid down in *Street v. Blay*, [1831] 2 B. & Ad. 456, under which the buyer of specific goods, in whom the property is vested, cannot treat

the breach of a stipulation as to quality as the breach of a condition, it seems doubtful whether this intention has been carried out," citing *id.* p. 567, and as to sales of specific goods according to sample *per Cur.* in *Dawson v. Collis*, [1851] 10 C. B. 523; and *per Cur.* in *Heyworth v. Hutchinson*, [1867] L. R. 2 Q. B. 447. The English decisions prior to the Sale of Goods Act had, as already observed, gone very far in holding that a difference in the bulk of specified goods sold by sample is such a difference of species as to prevent a transfer of title. *Azemar v. Casella*, L. R. 2 C. P. 431. See *supra*, n. 66.

<sup>74</sup> See *supra*, §§ 700 *et seq.*

<sup>75</sup> *McGee v. Billingsley*, 3 Ala. 679; *Graff v. Foster*, 67 Mo. 512; *Washington Brick Co. v. Sinnott*, 92 N. Y.

goods not simply conforming to the sample, but also conforming to any verbal description given of the goods.<sup>76</sup>

**§ 1003. The sample as a representation as to the bulk.**

In many cases it has been held that the mere fact that a sample is exhibited does not make the transaction a sale by sample. It has even been said that there must be an intention to contract that the bulk shall be equal to the sample or the seller is not liable as warranting that fact. The question here, however, is precisely the same as that considered in connection with express warranties.<sup>77</sup> If, as was urged, an affirmation in regard to goods to induce the buyer to enter into a bargain is an express warranty irrespective of an intention to contract, no difference of principle can be found if a sample is used as a means of making such a representation instead of words. As might be expected, the authorities are somewhat divided.<sup>78</sup> The actual decisions, however, are not so conflicting as some of the language used might lead one to suppose. By regarding a representation as evidence of a promise by the seller, courts which hold that it is necessary

S. 504; *Dayton v. Hooglund*, 39 Ohio St. 671; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Hume v. Sherman Cotton Co.*, 27 Tex. Civ. App. 366, 65 S. W. 390.

<sup>76</sup> See *infra*, § 1007.

<sup>77</sup> See *supra*, § 971.

<sup>78</sup> In the following cases the view was expressed that the parties must have manifested an intention to contract that the bulk should be like the sample: *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722; *Imperial Portrait Co. v. Bryan*, 111 Ga. 99, 36 S. E. 291; *Gunther v. Atwell*, 19 Md. 157; *Day v. Raguet*, 14 Minn. 273; *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963; *Hargous v. Stone*, 5 N. Y. 73; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Burrowes Co. v. Rapid Safety Filter Co.*, 97 N. Y. S. 1048; *Proctor v. Spratley*, 78 Va. 254; *American Canning Co. v. Flat*

*Top Grocery Co.*, 68 W. Va. 698, 70 S. E. 756, 758. On the other hand, excellent authorities uphold the view, which it is submitted is the better one, that an exhibition of a sample under circumstances which make it tantamount to a representation that the bulk of the goods is, or will be, equal to the sample, amounts to a warranty if a bargain is induced thereby. *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Atwater v. Clancy*, 107 Mass. 369; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Bernstein v. Loomis*, 87 N. Y. S. 134; *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648, 88 N. Y. S. 256. See also *Russell v. Nicolopule*, 8 C. B. (N. S.) 362; *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619, 40 L. R. A. 612; *Dayton v. Hooglund*, 39 Ohio St. 671.

that the seller should contract that the goods are like the sample are enabled to cover most cases where the seller exhibits a sample and represents that the bulk corresponds with the sample.<sup>79</sup>

#### § 1004. The sample not always a representation as to the bulk.

Though a representation express or implied on the part of the seller that the bulk is, or will be, equal to the sample, should amount to a warranty regardless of whether this representation formed part of the contract or merely induced it, it must not be assumed that in every case where a sample

<sup>79</sup> Thus in *Browning v. McNear*, 145 Cal. 272, 279, the court said: "The sale by sample contemplated by the law is one the circumstances of which indicate something in the way of representation by the vendor, to the effect that a sample exhibited fairly represents the bulk." But immediately followed this by saying: "To constitute a sale by sample it must appear that the parties 'contracted solely in reference to the sample exhibited, that they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it.' *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321, and note; *Benjamin, Sale*, American note (7th ed.), p. 685; 15 Am. & Eng. Encyc. of Law (2d ed.), p. 1227." These two sentences lay down inconsistent tests. The same inconsistency is found in two successive sentences in *Tiedeman, Sales*, § 188, quoted in *Imperial Portrait Co. v. Bryan*, 111 Ga. 99. A representation is first suggested as the test and then an intention to contract. But a representation need not be part of the contract. Thus, in *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612, an order was given for a monument "the same to be made of first-class Westerly granite." Prior to the

formation of the contract, samples had been exhibited. The court held the sale was by description and not by sample, but added: "Possibly the fact that the sample had been exhibited might have some bearing on the meaning of 'white Westerly granite,' and of 'first class,' so far as it applied to the quality of the stone, but the letter made the test of performance conformity to the words of description used, not conformity to the piece of stone previously shown." It is submitted that if the seller had represented the sample to be a fair sample of "first quality white Westerly granite," he would have been held to the truth of that representation as of any other affirmation of fact made to induce the sale, though the words could hardly be said to form part of the contract. In *Dayton v. Hooglund*, 39 Ohio St. 671, a foreign manufacturer of iron, who had sold some to a customer in this country, advised another customer, known to be a manufacturer of bolts and nuts, to buy of the first customer "a ton or two for sample." The latter having acted upon the advice, and having found the iron satisfactory for his purpose, ordered twenty tons of the foreign manufacturer. It was held that there was a warranty that the twenty tons should be like the sample.

is shown a warranty of this sort arises. Thus the seller may take a sample of the goods, being himself ignorant as to their quality, and may represent to the buyer merely that the sample which he exhibited was fairly taken from the bulk. If this representation is true and the seller neither represents nor promises that the goods shall be equal to the sample, he would not be liable if the bulk proved, in parts, not to be equal to the sample.<sup>80</sup> Whether a seller who exhibits a sample does represent that the bulk is like the sample, or merely that the sample was honestly and properly taken, and that the buyer must take his own risk as to the bulk, is a question of fact in each case.<sup>81</sup> So a sample may be shown which is confessedly not identical with the goods which form the subject of the bargain, merely to give an idea of the general kind of goods.<sup>82</sup> Again, though the seller may exhibit a

<sup>80</sup> See *Gardiner v. Gray*, 4 Campb. 144. Samples of waste silk were exhibited. Lord Ellenborough said: "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity." That is, the seller submitting a fairly taken sample as such to the buyer's inspection and judgment does not necessarily represent anything more than that the sample was honestly and properly taken. See also *Gunther v. Atwell*, 19 Md. 157; *Androvette v. Parks*, 207 Mass. 86, 92 N. E. 1006; *Hargous v. Stone*, 5 N. Y. 73; *American Canning Co. v. Flat Top Grocery Co.*, 68 W. Va. 698, 70 S. E. 756, 758; *Borthwick v. Young*, 12 Ont. App. 671.

<sup>81</sup> *Atwater v. Clancy*, 107 Mass. 369; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Columbia River Packers' Assoc. v. Springfield Grocer Co.*, 129 Mo. App. 132, 108 S. W. 113; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321.

<sup>82</sup> In *Wood v. Michaud*, 63 Minn. 478, 65 N. W. 963, a contract was

made for the sale of canned corn. A sample was shown of the seller's manufacture of the previous year. The court held this was not a sale by sample because it was matter of common knowledge that corn grown in one year was not precisely like that grown in another year, and, therefore, the corn of the ensuing year when canned would not be precisely the same as canned corn of the past year. It is submitted, however, that in this case, though there was no warranty that the goods should be just like the sample, there was a warranty that the goods furnished should be similar in methods of preparation and general appearance. See also *In re Nathan*, 200 Fed. 379, 118 C. C. A. 531; *Christian v. Knight*, 128 Ga. 501, 57 N. E. 763; *Androvette v. Parks*, 207 Mass. 86, 92 N. E. 1006; *Cox v. Andersen*, 194 Mass. 136, 80 N. E. 236; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321 (a decision the correctness of which may be doubted. There seems to have been ground for finding that there was a representation that the bulk was like the sample); *Smith v. Coe*, 55 N. Y. App. Div. 585,

sample, he may expressly require the buyer to examine the goods and make the purchase on the basis of such inspection.<sup>83</sup> Sometimes the buyer himself takes the sample. It is evident in such a case that unless the seller makes some express representations he cannot be held to warrant that the goods are, or shall be, like the sample.<sup>84</sup> Sometimes the sample is taken by an official, as both parties know.<sup>85</sup> As the warranty in a sale by sample, like other warranties, requires for its existence reliance by the buyer upon the statement or representation of the seller, if the buyer refuses to rely upon the sample and makes an examination of the bulk for himself, upon which he places his sole reliance, the idea of warranty is excluded.<sup>86</sup> It is not necessary, however, that the buyer should place his sole reliance upon the sample; it is enough if the representation made by the sample is part of the inducement which leads him to make the bargain.

#### § 1005. Buyer's right of inspection.

It is a general principle of the law of sales that unless the terms of the contract necessarily imply the contrary, the buyer shall not be obliged to pay the price unless and until he has

67 N. Y. S. 350, 170 N. Y. 162, 612, 63 N. E. 57.

<sup>83</sup> *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987, illustrates this. The buyer requested the seller to furnish samples of a certain wool and the seller did so. The buyer thereupon offered to take the wool if equal to the samples furnished and the seller replied accepting, provided Kellogg & Co. examined the wool. The buyer did so and bought it. It proved to be falsely packed, the interior of the bales being made up of inferior wool and foreign matter. The seller was ignorant of the defect. It was held the seller was not liable, the court saying: "That the wool was not sold by sample clearly appears, and it is equally clear that both sides understood that the buyer if he bought was to be his own judge of

the quality of the article he purchased." See also *Salisbury v. Stainer*, 19 Wend. 159, 32 Am. Dec. 437; *Hargous v. Stone*, 5 N. Y. 73.

<sup>84</sup> The seller may, however, adopt the action of the buyer in taking the sample and virtually represent the sample to represent the bulk. *Abel v. Murphy*, 43 N. Y. Misc. Rep. 648, 88 N. Y. S. 256. In *Ames v. Jones*, 77 N. Y. 614, though the buyer bought on the faith of the sample, the seller did not even know that it had been taken. Of course no warranty could be found.

<sup>85</sup> In the leading case of *Gunther v. Atwell*, 19 Md. 157, the court's remarks on this matter are instructive (pp. 169, 170).

<sup>86</sup> See *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987, stated *supra*, n. 83; *Salisbury v. Stainer*, 19 Wend. 159, 32 Am. Dec. 437.

had an opportunity to inspect the goods.<sup>87</sup> The effect of the provision in regard to inspection in section 16 of the Sales Act<sup>87a</sup> is that the mere fact that a contract to sell or a sale is made by sample does not exclude the operation of the general rule, and that, therefore, the buyer need not take the goods or pay the price until he has had a chance to see them, and the seller is bound to give him a chance.<sup>88</sup>

### § 1006. Merchantability.

As a general rule all the buyer is entitled to, in case of a sale or contract to sell by sample, is that the goods shall be like the sample. He has no right to have the goods merchantable if the sample is not.<sup>89</sup> The reason upon which this rule is based is identical with that which denies an implied warranty generally to a buyer who has inspected the goods which he buys.<sup>90</sup> As should be the case, however, where the buyer inspects or has opportunity to inspect the bulk, but the defect in the goods is of such a character that inspection will not reveal it, so in the case of a sale by sample, if the sample is subject to a latent defect, and the buyer reasonably relies on the seller's skill or judgment, the buyer is entitled not simply to goods like the sample, but to goods like those which the sample seems to represent, that is, merchantable goods of that kind and character. It was thought in drawing the

<sup>87</sup> See *supra*, § 959.

<sup>87a</sup> *Supra*, § 1000.

<sup>88</sup> The provision of the English act from which the American act is copied is based on *Lorymer v. Smith*, 1 B. & C. 1. The defendant, having bought by sample two lots of wheat, asked to see the bulk; permission was given him to inspect one lot, but the seller refused to show the other, whereupon the buyer repudiated the bargain. Some days later the seller offered to give the buyer an opportunity to inspect all the wheat and make delivery, and on refusal of the latter brought suit. The buyer was held justified in refusing to take the wheat. See also *Heilbutt v. Hickson*,

L. R. 7 C. P. 438, 456; *Meyer v. Everett Pulp Co.*, 193 Fed. 857, 113 C. C. A. 643; *Magee v. Billingsley*, 3 Ala. 697, 695; *McNeal v. Braun*, 53 N. J. L. 617, 624, 23 Atl. 687, 26 Am. St. Rep. 441.

<sup>89</sup> *Mody v. Gregson*, L. R. 4 Ex. 49, 53; *Sayers v. London Glass Co.*, 27 L. J. Ex. 294; *Meyer Drug Co. v. Puckett*, 139 Ala. 331, 35 So. 1019; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Ala. 422; *Chicago House Wrecking Co. v. Durand*, 105 Ill. App. 175; *Remy, Schmidt & Pleissner v. Healy*, 161 Mich. 266, 126 N. W. 202.

<sup>90</sup> See *supra*, § 988.

Sales Act that this wider obligation should be restricted to the case of dealers in goods of the kind in question, but as to dealers of that character, the provision is clearly sound.<sup>91</sup>

### § 1007. Implied warranty in sale by description.

The Uniform Sales Act provides—<sup>92</sup> “Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.”<sup>93</sup> This section enacts the rule of the common law.<sup>94</sup>

<sup>91</sup> *Mody v. Gregson*, L. R. 4 Ex. 49. This was a contract to manufacture gray shirting like a sample. The goods were made and accepted as according to sample, but they contained china clay put in for the purpose of increasing the weight of the goods. The court held the seller liable irrespective of whether the sample did or did not contain the same foreign substance. So in *Heilbutt v. Hickson*, L. R. 7 C. P. 438, the plaintiff agreed to buy 30,000 pairs of shoes as per sample, to be inspected and quality approved before shipment. The plaintiffs appointed an inspector and many shoes were rejected and many approved. Some of the shoes were afterward found to contain paper in the soles which could not be detected by inspection without opening the sole. It was found that the sample shoe also contained paper. Nevertheless, the court held the seller liable for damages because the defect in the sample was a hidden one. See also *Drummond v. Van Ingen*, 12 A. C. 284; *Leggett v. Young*, 29 N. B. 675; *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 790, 56 Am. St. Rep. 636.

<sup>92</sup> Sec. 14.

<sup>93</sup> Decisions under this section are

*Stuart v. Burlington County Farmers' Exch.*, 90 N. J. L. 584, 101 Atl. 265; *Mastin v. Boland*, 178 N. Y. App. D. 421, 165 N. Y. S. 468. The section is identical in meaning with section 13 of the English act and identical in language except for the use of the words “contract to sell” and “sale” instead of the English words “contract for the sale” and “sale:” and the substitution of the word “warranty” for “condition,” which is used in the English act as including both condition proper and promise. The meaning of the word “condition” is restricted in the American act to condition proper, see *supra*, §§ 665, 1000. As breach of warranty justifies rejection of the goods, and also an action for damages under this Act, the buyer's rights are at least as extensive as under the English law.

<sup>94</sup> *Lissberger v. Kellogg*, 78 N. J. L. 85, 73 Atl. 67. A good illustration of the seller's duty to comply with the description as well as to furnish goods like the sample may be found in the case of *Drummond v. Van Ingen*, 12 A. C. 284. The defendants ordered of the plaintiffs goods described in the contract as “mixt worsted coatings” which were to be in quality and weight equal to certain

It is customary to call the warranty in a sale by description an implied warranty, and for that reason this nomenclature has been preserved in this section of the Sales Act. The warranty might more properly, however, be called express, since it is based on the language of the parties.<sup>95</sup>

**§ 1008. What is meant by sale by description.**

The term "contract to sell or sale by description" is common, but there has been little attempt at exact definition of its meaning. It seems, however, the term should be confined to cases where the identification of the goods which are the subject-matter of the bargain depends upon the description. Such a case may occur either in a contract to sell or a sale. Where there is a contract to sell goods by describing them as of a certain kind, the goods require for their identification a determination of the question whether they are in fact of that kind. So, if parties agree to make a present sale of all the goods of a certain kind in the seller's warehouse, title may pass at once to such goods, their identification depending upon the description. Cases of this sort, however, are not the only ones where description is important. The seller may contract to sell a specified horse, adding a description of him, or he may agree to make an immediate sale of him. In these cases the description is not necessary to fix the identity of the property sold; its purpose is rather to induce the buyer to purchase goods otherwise identified. In a recent English case <sup>96</sup> the court gave a wider meaning to the term "sale by

numbered samples. The goods which were furnished, in point of fact, were exactly like the samples. Both the samples and the bulk of the goods were so loosely woven that the cloth could not be properly used for coating. It was held the seller was liable as on breach of warranty for this failure of the goods. See also *Ungerer v. St. Louis &c. Fish Co.*, 155 Mo. App. 95, 134 S. W. 56. The English case may be compared with *Meyer Drug Co. v. Puckett*, 139 Ala. 331, 35 So. 1019. There the plaintiff submitted samples of medicinal roots

to the defendant and asked their value; the defendant named the samples "Pink root," and offered to buy a quantity at a specified price. Roots were sent like the sample but the name given by the purchaser was erroneous. The seller, however, did not know this and it was held that there was no warranty that the root was pink root.

<sup>95</sup> See *supra*, § 970.

<sup>96</sup> *Varley v. Whipp*, [1900] 1 Q. B. 513; followed in *Boys v. Rice*, 27 New Zealand L. R. 1038. See also *Wallis v. Russell*, [1902] 2 Ir. 585, C. A.



description" than is here suggested as proper, including every case where the buyer has not seen the goods but relies solely on the description given by the seller. By this definition, even though there can be no question as to the identity of the goods in regard to which the parties were dealing, the sale is one by description if any attributes are ascribed to the property by the seller.<sup>97</sup> The distinction is artificial between such a case and a case where the buyer sees the goods and agrees to buy what he sees, relying on a description given by the seller, the truth of which inspection cannot determine. Whether the buyer sees the goods or not, it is the description which induces him to buy, but it is not the description which identifies the goods.<sup>98</sup> The question is important, however, only so far as the transfer of title is concerned. The words of description, if an inducement of the purchase, constitute an express warranty, whether the goods are identified otherwise or not.<sup>99</sup>

#### § 1009. Warranty in sales by description.

In case of a contract to sell goods by description, using that term in the narrower sense suggested in the preceding section, namely, where the description is all that fixes the

<sup>97</sup> The case is criticised on this ground in Benjamin, *Sale* (5th Eng. Ed.), 613. See also *Wren v. Holt*, [1903] 1 K. B. 610. In *Cotter v. Luckie*, [1981] N. Zeal. L. R. 811, the court called a sale of a bull at auction a sale by description and though the buyer removed the bull and kept him for four days until he discovered that he was impotent, it was held title never passed because the animal was only "nominally" a bull.

<sup>98</sup> In *Thornett v. Beers*, [1919] 1 K. B. 486, *Bray, J.*, intimates that there may be a sale by description though the buyer has seen the goods, if he relies partly on the description.

In *Gage v. Carpenter*, 107 Fed. 886, 47 C. C. A. 39, the case disclosed a sale of all the ice in five icehouses. This ice could not be inspected at

the time of the sale. Later it turned out that the ice was in large part snow ice and not merchantable. It was held that there was no warranty because the buyer did not rely on the seller's judgment. The court distinguished the case of *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 528, on the ground that in one view of the evidence in that case which the court held possible, the bargain was a contract to sell unidentified ice. "The case decided nothing concerning a sale of specific ice like the sale here before us." The distinction seems sound, but *Gage v. Carpenter* is inconsistent with *Varley v. Whipp* *infra*, n. 5. Cf. also *Campion v. Marston*, 99 Me. 410, 59 Atl. 548.

<sup>99</sup> See *supra*, § 969.

identity of the goods bargained for, there is no doubt that the buyer may refuse to take goods tendered if they do not fulfill the description, for the goods are not within the terms of his promise to buy.<sup>1</sup> It is for this reason that English writers and others refer to the stipulation in regard to description as a condition. It is, however, also a promise, and that the seller is liable if he fails to furnish goods of the kind described, is clear.<sup>2</sup>

Whether acceptance of goods which do not conform to the description discharges this liability of the seller has previously been considered.<sup>3</sup> In case the parties attempt to make an executed sale by description, again using the term in the narrow sense previously suggested, the same principles apply. The property cannot pass if the description does not apply to the goods in question because there has been no assent to give or receive the property in goods other than those described. Further, as an attempted sale imposes on the seller the obligation of one who contracts to sell he is liable for failure to deliver the goods he agreed to sell.<sup>4</sup> If the term "contract to sell or sale by description" is used in the broad sense suggested by the English court, a difference must be observed. It is entirely possible for the goods in regard to

<sup>1</sup> *Chanter v. Hopkins*, 4 M. & W. 399; *Bowes v. Shand*, 2 A. C. 455, 480; *Azemar v. Casella*, L. R. 2 C. P. 431; *Vigers v. Sanderson*, [1901] 1 K. B. 608; *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198; *Pope v. Allis*, 115 U. S. 363, 29 L. Ed. 393; *Timken Carriage Co. v. Smith*, 123 Iowa, 554, 99 N. W. 183; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *Gould v. Stein*, 149 Mass. 570, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Day v. Mapes-Reeve Co.*, 174 Mass. 412, 54 N. E. 878; *Fullam v. Wright & Colton Co.* 196 Mass. 474, 82 N. E. 711; *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 67 N. W. 298, 57 Am. St. Rep. 563; *Boothby v. Scales*, 27 Wis. 626; *Fairfield v.*

*Madison Mfg. Co.*, 38 Wis. 346. Where a contract for starch stated that it was to be in 280 lb. bags, a tender in 220 lb. bags was insufficient. *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198.

<sup>2</sup> *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Johnston v. Lanter*, 87 Kans. 32, 123 Pac. 719; *Munford v. Kevil*, 109 Ky. 246, 58 S. W. 703; *Lens v. Blake*, 44 Or. 569, 76 Pac. 356; *Handy v. Roberts* (Tex. Civ. App.), 165 S. W. 37. And see cases cited in the preceding note, and *supra*, §§ 1000-1002.

<sup>3</sup> See *supra*, §§ 700 *et seq.*

<sup>4</sup> *Lunn v. Thornton*, 1 C. B. 379; *Bates v. Smith*, 83 Mich. 347, 47 N. W. 249; *Battle Creek Bank v. First Bank*, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124.

which the parties are dealing to be identified, although the buyer does not see them and relies on the description by the seller. In such a case the English court holds that the property in the goods does not pass.<sup>5</sup> That court was without doubt led to this result by its doctrine that the buyer of goods who has taken title cannot rescind the title for breach of warranty,<sup>6</sup> and in jurisdictions where such a doctrine is held,<sup>7</sup> undoubtedly the buyer must be compelled to seek his remedy in damages against the seller unless the unnatural meaning which the English court has given to the term "sale by description" is adopted. In jurisdictions where rescission is allowed for breach of warranty as provided by the Sales Act,<sup>8</sup> there is no necessity of adopting the strained nomenclature of the English court in order to reach the same result. If the goods are identified the property in them will pass if the parties so intended, but if a description of them was also given by the seller and relied on by the buyer, there will be a breach of warranty if the description is untrue and the buyer may rescind the transfer of title. Even if the broad definition of sales by description which the English court has adopted be accepted, there are still many cases where the seller describes the goods which cannot be called sales by description. Thus, if the goods are seen by the buyer and his agreement is to purchase those goods, it is not a case of sale by description though the buyer's inspection could reveal nothing because the defect in quality was latent, and the seller's description was the inducement to the sale. But as has already been seen,<sup>9</sup> such a description amounts to a warranty. It is an advantage of the doctrine allowing rescission for breach of warranty that

<sup>5</sup> *Varley v. Whipp*, [1900] 1 Q. B. 513. In this case the parties were dealing in regard to a reaping machine which the defendants had never seen and which the plaintiff said was new the previous year, and had been used to cut only fifty or sixty acres. These statements were untrue, and though the machine was delivered it was held the title never passed. It can hardly be fairly said, however, that the machine delivered to the buyer was

not the machine in regard to which the parties bargained. The case was really one of false statements in regard to an identified machine rather than a failure to identify the subject-matter of the sale. See also *Harrison v. Knowles*, [1917] 2 K. B. 606; *Cotter v. Luckie*, [1918] N. Zeal. L. R. 811.

<sup>6</sup> See *infra*, §§ 1461, 1462.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Supra*, § 969.

it will generally render unnecessary any nice distinction between cases where the description is the agreed means of identifying the goods sold and cases where the description is merely an assertion of qualities of goods otherwise identified. In either class of cases, where rescission is allowed, if the buyer has not received the goods he need not take them unless they conform to the description, and if he has taken them he may promptly return them. He may also bring an action against the seller if he fails to deliver such goods as he agreed.

### § 1010. Sales to arrive.

A bargain either in the form of a contract to sell or of an immediate sale, if in terms conditional upon the arrival of the goods, may by general usage be called a "sale to arrive."<sup>10</sup> In a contract to sell, the arrival of the goods is a condition precedent to any sale. In a sale, if the goods existed at the time of the bargain but do not arrive, the condition is subsequent, the property in the goods transferred by the bargain being divested by the failure to arrive. If the vessel arrives but without the goods which were the subject of the bargain, whether the seller's contract was conditional not simply on the arrival of the named vessel but also of the goods is a question of fact. But generally as the power of the seller to deliver the goods and the value of the bargain to the buyer both depend on the arrival of the goods, the true construction will be that the condition is not satisfied by the arrival of the vessel.<sup>11</sup> There may, however, be cases where the only

<sup>10</sup> It is true that in *Neldon v. Smith*, 36 N. J. L. 148, the court said of a sale to arrive: "The contract is executory and does not pass the property in the goods to arrive. It is merely an agreement for the sale and delivery of the articles named at a future period when they shall arrive," and similar statements may be found in other cases. *Shields v. Pettie*, 4 N. Y. 122; *Dike v. Reitlinger*, 23 Hun, 241. Doubtless there is no liability on either side unless the goods arrive, which is the point courts have been primarily interested in establishing. For this

point it is immaterial whether the title passed subject to be divested or whether the bargain was executory. It seems impossible to doubt, however, that the parties may pass title to existing goods subject to a condition subsequent if the goods do not arrive; and where goods in course of transportation are specifically described, and the parties expressly state that they have been bought and sold, it seems most accurate to give their language its natural meaning.

<sup>11</sup> In *Boyd v. Siffkin*, 2 Campb. 326, the bargain was for the sale of "32

condition is that of the arrival of the vessel, so that if the vessel arrives without the goods the seller is not protected from liability on his promise to sell.<sup>12</sup> The converse case is not so clear. Suppose goods arrive but the vessel does not, or the goods arrive and the vessel also arrives but not carrying the goods. Here again the question is one of construction. If the parties clearly indicate by their language that the goods must arrive in the named vessel, there will be no liability otherwise.<sup>13</sup> As it is the arrival of the goods, however, which makes it possible to perform the contract, and the arrival of the vessel merely affects the means or time of performance, a contract may well bear the contrary construction.<sup>14</sup>

tons, more or less, of Riga Rhine hemp, arrival per Fanny Almira." It was held that the seller's obligation was conditional not simply on the arrival of the vessel, but of the hemp. He was, therefore, held not liable when the vessel arrived without the hemp. So in *Hawes v. Humble*, 2 Campb. 327, note "for and by your order, on arrival, 100 tons, etc." So in *Johnson v. Macdonald*, 9 M. & W. 600, a memorandum of sale of 100 tons of nitrate of soda, "to arrive ex Daniel Grant, provided, "should the vessel be lost this contract to be void." The vessel arrived without the goods on board. The court held the contract conditional not simply on the arrival of the vessel but also on the goods being in the vessel. In *Vernede v. Weber*, 1 H. & N. 311, the bargain was for the sale of 400 tons of Aracan Necrensie rice per Minna "at 11s. 6d. per cwt. for Necrensie or 11s. for Larong, the latter quality not to exceed fifty tons, or else at the option of the buyer to reject any excess." The vessel arrived without any Necrensie rice but with 285 tons of Larong rice and 159 tons of a third variety. The court held the buyer was neither entitled to damages for failure to deliver Necrensie rice nor for failure to deliver either the whole cargo that arrived or

the portion thereof consisting of Larong rice. Compare this case with *Simond v. Braddon*, 2 C. B. (N. S.) 324.

<sup>12</sup> *Hale v. Rawson*, 4 C. B. (N. S.) 85. This was a contract to sell tallow "to be delivered on safe arrival of the Countess of Elgin." The vessel arrived without the tallow and the seller was held liable. See also *Dike v. Reitlinger*, 23 Hun, 241.

<sup>13</sup> In *Lovatt v. Hamilton*, 5 M. & W. 639, a sale of palm oil "to arrive per Mansfield" had this express stipulation: "In case of nonarrival, or the vessel's not having so much in after delivery of former contracts, this contract to be void." A part of the cargo of the Mansfield was transferred into another vessel while en route. Not only did the oil safely arrive on this second vessel but the Mansfield also arrived. The court, however, held that it was clearly a condition precedent to the buyer's right to claim the oil that it should arrive in the Mansfield.

<sup>14</sup> In *Harrison v. Fortlage*, 161 U. S. 57, 16 S. Ct. 488, 40 L. Ed. 616, there was a contract to sell 2,500 tons of sugar "to be shipped per steamship Empress of India, no arrival, no sale." This amount of sugar was shipped on the vessel named but 700 tons were transhipped en route into another

**§ 1011. Extent of the seller's obligation in a sale to arrive.**

Whether the seller promises that the condition of the contract shall happen is also a question of construction. It is well settled, however, that the words "to arrive" or their equivalent, do not of themselves import a promise that the goods shall arrive.<sup>15</sup> The same effect was given in a New York decision to the words attached to a sold note, "on board" a specified vessel, known to be then at sea.<sup>16</sup> Not infrequently, however, the seller promises or warrants that the goods shall be shipped, or that the goods are on board at the time of the bargain, or that the goods are of a particular quality.<sup>17</sup> Some

vessel. Both vessels arrived safely but the buyers refused to take the cargo of either on the ground that the *Empress of India* did not carry the required cargo and the other vessel was not that named in the contract. The court held, however, that the only condition in regard to the vessel was shipment in that vessel, the condition in regard to arrival relating only to the goods. Compare with this case *Idle v. Thornton*, 3 Campb. 274, a contract for tallow "on arrival ex *Catherina Evers*" and "if it should not arrive before the 31st of December the bargain to be void." The *Catherine Evers* was wrecked but most of the tallow was saved and could have been forwarded to the port of destination before the 31st of December. It was held that the seller was not liable for failure to forward it, at least, unless the buyer so requested and indemnified the seller.

<sup>15</sup> *Johnson v. Macdonald*, 9 M. & W. 600; *Neldon v. Smith*, 36 N. J. L. 148; *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329; *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276. See also *Hale v. Rawson*, 27 L. J. C. P. 189. So of the words "subject to arrival." *Penn. &c. Glass Co. v. Harshaw &c. Co.*, 46 Ind. App. 645, 90 N. E. 1047.

<sup>16</sup> *Shields v. Pettie*, 4 N. Y. 122.

To similar effect, see *Kirsch v. Ben-yunes*, 105 N. Y. Misc. 648, 174 N. Y. S. 794.

<sup>17</sup> *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329. In this case the memorandum of the bargain stated that there were sold "85,000 Tein-Sin goat skins" of specified quality which were "expected to arrive." By letter the bargain was modified by the addition of the condition "no arrival, no sale." Goods were shipped by the defendants and duly arrived. The court held these goods were "obviously intended to be furnished under the agreement," but they were not of the quality the contract called for. It was held that the seller was liable for their defective character. The condition imposed by the words "expected to arrive," and "no arrival, no sale," applied only to the risks of navigation, not to the shipment of proper goods. In *Simond v. Braddon*, 2 C. B. (N. S.) 324, there was an express engagement by the seller "to deliver what is shipped on his account and in conformity with his invoice." To the same effect is *Dike v. Reitlinger*, 23 Hun, 241. In *Gorriessen v. Perrin*, 2 C. B. (N. S.) 681, a sale of a specified number of bales "now on passage" was held to import a warranty by the seller that these bales were then on passage.

of the early cases seem to have gone to an unreasonable extent in holding the seller free from any promise, whenever goods of the particular description called for by the contract do not arrive.<sup>18</sup> It seems a more probable intent that the condition in regard to arrival is merely to protect the seller from risks of transportation, as was held in the most recent New York decisions,<sup>18'</sup> though doubtless a broader intent is possible, and if expressed should be made effectual.<sup>19</sup> If part of the goods arrive but part do not, when the condition applies not simply to the arrival of the vessel but to the arrival of the goods, neither the buyer is bound to take the portion that

In *Strahl v. Herbst*, (App. Term 1916), 159 N. Y. S. 718, the contract called for "October shipment from Brasil. Goods to arrive during the month of November." This was held to bind the seller to ship in October through he would not be liable if the goods failed to arrive in November.

<sup>18</sup> Thus in *Shields v. Pettie*, 4 N. Y. 122, a contract was concluded in these terms: "New York, July 19, '47. Sold for Messrs. Geo. W. Shields & Co., to Messrs. Pettie & Mann, 150 tons Gartshemi pig iron, No. 1, at \$29 per ton, one-half at 6 mos., one-half cash less 4 pr. ct., on board Siddons. Thos. Ingham, broker." The court said: "There was no warranty, express or implied, either that any iron should arrive, or that arriving, it should be of a particular quality. One hundred and fifty tons of Gartshemi pig iron of the quality denominated No. 1 was expected to arrive by the Siddons, and the contract was to the effect, that if that quantity and quality of iron did so arrive, one party should sell and the other should receive it at a certain price per ton. The iron called for by the contract did not arrive, but iron of a different quality, and I think the contract was at an end." This decision seems inconsistent with the later case of *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E.

329, stated in the preceding note. The earlier New York case is, however, supported by *Vernede v. Weber*, 1 H. & N. 311, stated *supra*, n. 11. In *Barnett v. Javeri & Co.*, [1916] 2 K. B. 390, Bailhache, J., distinguishing earlier cases where the contracts had stated particular vessels in which the goods were to be shipped from the case before him where the seller's promise was made "subject to safe arrival" of the goods but named no vessel by which shipment was to be made, held that there was a warranty that the goods would be shipped and that the seller was liable, though his failure to ship was due to breach of a contract of one from whom he had contracted to obtain the goods.

<sup>18'</sup> *Abe Stein Co. v. Robertson*, 167 N. Y. 101, 60 N. E. 329; *Strahl v. Herbst* (App. Term), 159 N. Y. S. 718; *Haber v. S. A. Jacobson Co.*, 185 N. Y. App. D. 650, 173 N. Y. S. 524. To the same effect is *Barnett v. Javeri*, [1916] 2 K. B. 390.

<sup>19</sup> In *Penn, etc., Glass Co. v. Harshaw, etc., Co.*, 46 Ind. App. 645, 90 N. E. 1047, the seller was held excused when the goods were never shipped owing to breach of contract by a third person from whom the seller had contracted to obtain them. But see *Barnett v. Javeri & Co.*, [1916] 2 K. B. 390.

arrives nor the seller to deliver it. The arrival of part of the goods is not the happening of the condition requisite for the validity of the bargain.<sup>20</sup> Whether an arrival is sufficiently near the date stated to be a compliance with the condition is a question of fact in each case. Whether the goods were expected by sea or by rail and the length and risks of delay in the route by which they were expected will usually be controlling circumstances.<sup>21</sup>

<sup>20</sup> *Vernede v. Weber*, 1 H. & N. 311; *Shields v. Pettie*, 4 N. Y. 122, 124.

<sup>21</sup> In *Bowman & Bull Co. v. Linn*, 279 Ill. 397, 117 N. E. 61, the contract was for butter "due to arrive

in Seattle [from New Zealand] about January 7." It was held that the buyer was bound to take it though it did not reach Seattle until January 15.



## CHAPTER XXX

### CONTRACTS OF EMPLOYMENT AND CONTRACTS TO MARRY

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#### § 1012. Principal and agent, and master and servant.

The difference customarily stated to exist between the relation of principal and agent and that of master and servant is that where the employer has the right to direct the manner in which work shall be done, the relation is that of master and servant; but where the right is only to require that the act shall be done, the relation is that of principal and agent.<sup>1</sup> The distinction, however, is not wholly satisfactory. One of the duties of an agent is obedience to his principal's directions so far as the contract between the two, or the customs of business give the principal the right to direct the agent's conduct. The extent to which the employer may dictate

<sup>1</sup> *Yewens v. Noakes*, 6 Q. B. D. 530, *Butler v. Townsend*, 126 N. Y. 105, 532; *Singer Mfg. Co. v. Rahn*, 132 U. S. 26 N. E. 1017; *Bailey v. Troy, etc., R. Co.*, 57 Vt. 252, 52 Am. Rep. 129.

the precise mode in which the employee shall achieve the result for which he is employed, varies according to the contract between the parties, and according to the nature of the business in hand. Probably the question is purely one of degree, and cases could be put in an unbroken series from one where the employer had no right of directing the manner of performance to one where he had the right to direct every detail. However necessary it may be to draw the dividing line in some connections between a servant and an agent, in considering the mutual obligations of employer and employee to one another, the distinction is generally immaterial.<sup>2</sup> The duties of the employee, whether he is called an agent or a servant, are those imposed by the contract between the parties as construed in the light of existing usages. In considering the mutual obligations of the parties, gratuitous agencies, and agencies terminable by will, must be distinguished from other employments. In a purely gratuitous employment, there is no contract, and the obligations of the parties must be such as are imposed by law irrespective of contract. In employments terminable at will, though the rights of the parties arising from present or past performance are governed by their contract continuously as the employment proceeds,<sup>3</sup> there is no obligation as to the future. These exceptional cases may be put aside for the moment and the typical case of an employment for reward and for a term considered. In defining the mutual obligations of the parties, two questions must be considered. First, what are the respective duties of the parties and, second, what effect will a particular breach of duty by one of the parties have on the obligations of the other party?

#### § 1013. Duties of the employer and employee to one another.

The duties of the employee whether he be an agent of the highest class, or a servant even of a menial class, are fundamentally alike. The employee is bound to render

<sup>2</sup> Whether the principle that a disloyal agent forfeits a right to any compensation (*infra*, § 1477), would be applied with the same strictness

to all classes of employees, is doubtful. See *Rathenberger v. Jacob*, 167 Wis. 273, 167 N. W. 271.

<sup>3</sup> See *supra*, § 49.

reasonably diligent and skilful service. He must act in obedience to the authority given him, and in obedience to instructions, so long as these instructions are such as the employer by contract or usage is entitled to give. The employee is likewise bound to fidelity to his employment, and in case of pecuniary dealings on account of the employer is bound to render an account of expenditures. On the other hand, the employer is bound to compensate the employee in accordance with the terms of the agreement between them, and is bound to reimburse and indemnify the employee for all expense or loss incurred by the latter in the rightful exercise of his employment. Moreover, each must observe such rules of propriety in his personal conduct as are appropriate for the employment. A violation of his duty by either party will necessarily give rise to liability for any damage caused thereby,<sup>4</sup> but whether it will justify a termination of the relationship will depend on the materiality of the breach of duty.<sup>5</sup>

<sup>4</sup> If there is no damage, there is nevertheless a cause of action, and nominal damages should be given. *Adams v. Robinson*, 65 Ala. 586; *Mills v. United States Slicing Mach. Co.*, 230 Mass. 95, 119 N. E. 690.

<sup>5</sup> In *Potter v. Barton*, 86 Minn. 288, 289, 90 N. W. 529, the court said: "Where a contract for work and labor has been substantially performed as to time and in its most material parts, an employer has no right to dismiss an employee and to refuse to carry out a contract previously made for a term not yet expired. *Shaver v. Ingham*, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712; *Park v. Bushnell*, 60 Fed. 583, 9 C. C. A. 138."

In *Loos v. Geo. Walter Brewing Co.*, 145 Wis. 1, 5, 129 N. W. 645, 140 Am. St. Rep. 1052, the court said: "It is not for every breach of duty that an employer is warranted in putting an end to a contract of employment before the appointed time. In a controversy

over such a matter, especially where the employment is of a business nature, requiring the exercise of judgment and discretion, the breach of duty is not *per se* a legal justification for a discharge of the employee, unless such breach evidences moral turpitude, or the conduct is manifestly injurious to the employer's business. So, where the question of the breach itself is undisputed but the evidence leaves it in doubt as to whether there was any wrong intended, or any real injury inflicted upon the employer's business, whether it constituted reasonable ground to discharge the employee is always a fact to be found by the jury." *Schumaker v. Heinemann*, 99 Wis. 251, 255, 74 N. W. 785." See also *Caşavant v. Sherman*, 213 Mass. 23, 26, 99 N. E. 475; *Gerber v. Kalmar*, 104 N. Y. Misc. 85, 171 N. Y. S. 92; *Bookhout v. Vuich*, 101 Wash. 511, 172 Pac. 740.

### § 1014. Diligent and skilful service.

The employee's promise of service, whether express or implied, includes an obligation to do the work for which he is employed diligently and in a reasonably skilful way. Just as in a contract to sell goods it is implied that the goods to be sold shall be merchantable, so in a contract of employment it is implied that the services shall be of the character which is customarily paid for in contracts of the kind in question. The standard of diligence may be much the same in every contract of employment, whatever its nature, but the standard of skill necessarily is subject to great variation. Unless the contract contains some definition, the question is one of fact for the jury <sup>6</sup> to determine what degree of skill the employer was justified in expecting—in other words, what was reasonable taking into account the nature of the employment and the usages connected with it. The nature of the employment, and perhaps the amount of compensation may affect the degree of skill to which an employee is bound. One who holds himself out as exercising a profession or occupation in business, thereby represents that he is competent to perform services incident to that profession, or occupation; and is bound to exercise the skill which is reasonable in view of that representation.<sup>7</sup> The employee is none the less liable though the principal was negligent,<sup>8</sup> for the basis of liability

<sup>6</sup> *Doorman v. Jenkins*, 2 Adol. & El. 256; *Maratta v. Heer Dry Goods Co.*, 190 Mo. App. 420, 177 S. W. 718.

<sup>7</sup> *Beal v. South Devon Ry. Co.*, 3 H. & C. 337, 341; *Jenkins v. Betham*, 15 C. B. 168; *Harmer v. Cornelius*, 5 C. B. (N. S.) 236; *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46; *Arkansas Machine &c. Works v. Moorhead* (Ark.), 205 S. W. 980; *Carroll v. Cohen*, 5 Boyce (Del.), 233, 91 Atl. 1001; *Hattaway v. Sanderlin*, 145 Ga. 219, 88 S. E. 941; *Parker v. Platt*, 74 Ill. 430, 432; *Lambert v. King*, 12 La. Ann. 662; *Baltimore Base Ball Club v. Pickett*, 78 Md. 375, 385, 23 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304; *Maratta v. Heer Dry Goods Co.*, 190 Mo. App. 420, 177 S. W.

718; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Snow v. Wathen*, 127 N. Y. App. D. 948; *Weill v. Goodman, Shirt Waists*, 102 N. Y. Misc. 524, 169 N. Y. S. 47; *Eubanks v. Alspaugh*, 139 N. Car. 520, 52 S. E. 207; *Wenger v. Marty*, 135 Wis. 408, 116 N. W. 7. See also *Prindle v. Producers' Turpentine Co.*, 126 La. 1095, 53 So. 359. Even though the service undertaken is gratuitous, the employee is liable for the damage caused by lack of reasonable skill. *Harlow v. Bartlett*, 170 Mass. 584, 592, 49 N. E. 1014; *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 167 N. Y. 531, 60 N. E. 1113.  
<sup>8</sup> *Becker v. Medd*, 13 T. L. Rep. 313.

is not tort but contract, and the employer is under no duty to the employee to be careful about his own affairs. The negligence of the employer may, however, be important as tending to show in a particular case that the employee's conduct, under the circumstances, was reasonable, though it might not have been so had the employer not been negligent.<sup>9</sup> Illustrations of the duty of the employee are very various. Each case must be judged by itself in the light of the broad general principles which have been suggested. Whether the default was wilful may have a bearing on the question of the sufficiency of the breach of duty to justify a discharge,<sup>10</sup> but not on the question whether it is a breach of duty, and if the damage or the likelihood of damage from a single act of mere forgetfulness is serious, it will warrant the employee's discharge.<sup>11</sup>

#### § 1015. Duty to employ.

Whether the employer is bound to furnish the employee with work, or may completely fulfil his obligation by giving the employee the stipulated compensation, is a question which has been somewhat litigated. The answer, like that to most questions in the law of employer and employee which are not in terms controlled by the contract between them, must depend upon usage. If performance of work by the employee could be regarded as solely for the benefit of the employer he might decline to provide work and waive such advantage as the employee's work would give him.<sup>12</sup> On the other hand, if in view of custom and the natural understanding of the

<sup>9</sup> Thus, neglect to inform the employee of facts calling for special action or care on the part of the employee, will relieve the latter from liability. *Freeholders v. State Bank*, 32 N. J. Eq. 467; *Chapman v. Union Bank*, 32 How. Pr. 95.

<sup>10</sup> In *Casavant v. Sherman*, 213 Mass. 23, 26, 99 N. E. 475, the court in speaking of an action by an employee for wrongful discharge said: "It is settled that while inadvertent or unimportant departures would not de-

feat the right of recovery, the plaintiff became bound to a substantial performance of the objects intended to be accomplished."

<sup>11</sup> *Baster v. London, etc., Works*, [1899] 1 Q. B. 901.

<sup>12</sup> *Emmens v. Elderton*, 4 H. L. Cas. 624; *Turner v. Sawdon*, [1901] 2 K. B. 653. The latter case was criticised with good reason in *Rubel Bronze &c. Co. v. Vos*, [1918] 1K. B. 315, 324.

parties to the agreement, any advantage might be derived by the employee from the opportunity to exercise his trade or profession, and thereby to increase his skill or improve his acquaintance and connections, and bring himself to the attention of the public, the employer is bound to give reasonable opportunity for the performance of the work for which the employee was engaged. This principle has been chiefly applied in England for the benefit only of stage performers.<sup>13</sup> There seems no reason, however, why the principle should not be one of general application wherever the performance of work must be regarded as one of the advantages which the contract contemplated should enure to the employee.<sup>14</sup> Where the employee agrees to work, and the work is a prerequisite of his right to payment of wages or salary, it seems immaterial whether the contract contains express words of agreement by the employer such as "employ" or "retain and employ,"<sup>15</sup> for in any case the implied promise to co-operate so far as may be necessary to enable the employee

<sup>13</sup> *Fechter v. Montgomery*, 33 Beav. 22 (an actor was held justified in leaving his employment at a theatre after waiting a reasonable time for opportunity to appear on the stage); *Bunning v. Lyric Theatre*, 71 L. T. (N. S.) 396 (the plaintiff who had been engaged to conduct a theatrical orchestra under an agreement providing that his name should appear in advertisements as conductor, was held entitled to recover when another conductor was employed, the court holding that the provision in regard to advertisements carried with it the implication that such a state of things should exist that the defendants should be in a position truthfully to make such an announcement).

<sup>14</sup> *Rubel Bronze &c. Co. v. Vos*, [1918] 1 K. B. 315. In *Manubens v. Leon*, [1919] 1 K. B. 208, a wrongfully discharged employee was held entitled to recover damages based not only on wages payable by the defendant, but also on tips habitually paid by

customers. In *Sigmon v. Goldstone*, 116 N. Y. App. Div. 490, 101 N. Y. S. 984, the employee was held justified in refusing to continue as designer and foreman in a manufacturing establishment when he was not given work, although his salary was regularly paid. In *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 27 L. R. A. (N. S.) 1011, 126 N. W. 541, changing the plaintiff from manager of a department to saleswoman was held to justify her in leaving the employment and suing for damages though there was no reduction of salary. Cf. *Turner v. Sawdon*, [1901] 2 K. B. 653, where a salesman was denied a right of action for refusal to provide him with work, his stipulated salary being paid. See also *infra*, § 1359.

<sup>15</sup> Such words were contained in the contracts in suit in *Emmens v. Elderton*, 4 H. L. Cas. 624, and *Turner v. Sawdon*, [1901] 2 K. B. 653.

to perform his promise,<sup>16</sup> involves an agreement on the part of the employer to employ, and thereby to enable the employee to earn the promised compensation. If the contract does not expressly or by implication indicate that the parties by the agreement have made it the duty of the employer to give the employee an opportunity to work, the only question should be whether employment in the sense of furnishing work for the employee is to be regarded, in view of the nature of the contract, the character of the business, and prevailing usage, as wholly for the benefit of the employer. If the employee's compensation depends on the amount of work performed, it is obvious that the advantage of the contract to the employee depends on work being furnished him. The natural implication in such a case, therefore, is that the employer is bound to furnish a reasonable supply of work.<sup>17</sup>

The implied promise of the employer to cooperate may be varied by the terms of the contract, which may define the amount of work which the employer shall give. Even though the definition in the contract makes the amount to some extent dependent on the volition of the employer, the agreement will not be illusory if the employer agrees that all work of the kind in question which he desires to have performed shall be done by the employee,<sup>18</sup> or if the employer is bound to the exercise of a reasonable judgment and is excluded from exercising mere whim or caprice.<sup>19</sup> Usage may play an important part in determining the true interpretation of the

<sup>16</sup> See *infra*, § 1292.

<sup>17</sup> *Pilkington v. Scott*, 15 M. & W. 657; *Queen v. Welch*, 2 El. & Bl. 357, *Churchward v. Regina*, L. R. 1 Q. B. 173, 195; *Turner v. Goldsmith*, [1891] 1 Q. B. 544; *Thayer v. Wadsworth*, 19 Pick. 349, 352; *Lewis v. Atlas, etc., Ins. Co.*, 61 Mo. 534; *Jacquin v. Boutard*, 89 Hun, 437, 35 N. Y. S. 496; *Cook v. Sandford*, 15 N. S. Wales L. Rep. 377. *Cf. Williamson v. Taylor*, 5 Q. B. 175; *Moon v. Camberwell*, 89 L. T. (N. S.) 595.

<sup>18</sup> See *supra*, §§ 43, 104.

<sup>19</sup> In *Meyer-Bridges Co. v. American Warehouse Co.*, 94 Kans. 288, 146

Pac. 361, the defendant was given a right to sell corn for the plaintiff on a commission based on a selling price to be fixed by the plaintiff. The court held that the plaintiff was bound to fix prices in order to enable the defendant to sell and earn its commission; saying: "It is suggested that the plaintiff might have fixed a price impossible to be procured, but, while such a contingency has not arisen, it may be said that the law presumes that parties to contracts will act, not unreasonably, but reasonably and in good faith."

contract. Thus an agreement to retain a lawyer may involve no agreement to give him employment even though the contract provides for a higher rate of compensation if actual employment is furnished. So the contract of a theatrical understudy may not contain any implication that employment will be furnished even though the principal performer is unable to appear.<sup>20</sup> How far the employer when unable to provide work for the employee is excused from his obligation to give him compensation is another question, to be considered under the heading of impossibility.<sup>21</sup> The point here under consideration is the existence of an obligation on the part of the employer to provide work as distinguished from an obligation to give compensation.

#### § 1016. Agents' duty to obey instructions.

The minuteness of the instructions which either an agent or a servant is bound to obey may vary with the character of the employment. Not only a servant but an agent also is under a duty to obey instructions in regard to the matter of his employment so far as these instructions are not inconsistent with the terms of his contract.<sup>22</sup> Even though the instructions are in violation of the terms of the contract with the agent, it must be remembered that unless the agency is coupled with an interest,<sup>23</sup> the principal always has power to revoke the authority of the agent though he may render himself liable in damages by so doing. Accordingly, it seems that, even in violation of his original contract, the principal

<sup>20</sup> In *Grimston v. Cunningham*, [1894] 1 Q. B. 125, it was held that there was no obligation to furnish work unless the principal performer should leave. In *Newman v. Gatti*, 24 T. L. Rep. 18, it was further said that a contract to employ as understudy involved no obligation to allow the employee to act if the regular performer was unable to do so. In these cases, however, it is to be observed that the employee receives compensation as understudy though not the same compensation as where the part is played on the stage.

<sup>21</sup> See *supra*, § 838; *infra*, §1940.

<sup>22</sup> *Adams v. Robinson*, 65 Ala. 586; *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152, 6 Am. Rep. 207; *Coker v. Ropes*, 125 Mass. 577; *Northern Assurance Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226 *Spatz v. Interborough Rapid Transit Co.* (N. Y. Misc.) 169 N. Y. S. 458; *Kraber v. Union Ins. Co.*, 129 Pa. 8, 18 Atl. 491, and see cases in last notes of this section.

<sup>23</sup> See *supra*, § 280.



may give directions to the agent which the latter cannot wholly disregard. He may, it is true, refuse to obey them and retire from his agency, but he cannot continue as agent and violate them without rendering himself liable. An agent is not bound, under any circumstances, to obey instructions which require an act in violation of law, morals, or public policy.<sup>24</sup> Indeed such an instruction if obeyed will not save the employee from personal liability.<sup>25</sup> In case of sudden emergency where there is no sufficient time to consult the employer and ask him to revise his instructions, the agent, if he acts with reasonable prudence, may pursue a different line of conduct from that laid down by his principal.<sup>26</sup> This is most frequently applied in favor of the master of a ship.<sup>27</sup>

A violation by the agent of any instructions rightfully given him will have the same effect as any breach of contractual duty; namely, he will be liable in damages for the consequences of his breach.<sup>28</sup>

Whether the employer will be justified in discharging the agent is another matter which must depend upon principles previously discussed.<sup>29</sup> If the disobedience is persistent or wilful, or involves serious consequences, the agency may be terminated.<sup>30</sup>

<sup>24</sup> *Brown v. Howard*, 14 Johns. 119, 123.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Williams v. Shackelford*, 16 Ala. 318; *Greenleaf v. Moody*, 13 Allen, 363; *Milbank v. Dennistoun*, 21 N. Y. 386.

<sup>27</sup> See *Catlin v. Bell*, 4 Camp. 183; *Forrestier v. Bordman*, 1 Story, 43; *Gould v. Rich*, 7 Metc. 538. In *Gwilliam v. Twist*, [1895] 2 Q. B. 84 86, the suggestion was made by Lord Esher, that the doctrine of authority by necessity was confined to exceptional cases like those of the master of a ship or the acceptor of a bill of exchange. But there seems no reason to doubt that special circumstances might justify the application of this principle to any kind of agency.

<sup>28</sup> *Pape v. Westacott*, [1894] 1 Q. B. 272; *Harlan v. Ely*, 68 Cal. 522, 9

Pac. 947; *Union Hardware Co. v. Plume Mfg. Co.*, 58 Conn. 219, 20 Atl. 455; *Robinson Machine Works v. Vorse*, 52 Iowa, 207, 2 N. W. 1108; *Clark v. Roberts*, 26 Mich. 506; *Sheffield v. Linn*, 62 Mich. 151, 28 N. W. 761; *Nichols v. Wadsworth*, 40 Minn. 547, 42 N. W. 541; *Zimmermann v. Heil*, 86 Hun, 114, *affd.* 156 N. Y. 703, 51 N. E. 1094; *Paul v. Grimm*, 165 Pa. 139, 30 Atl. 721, 183 Pa. 330, 38 Atl. 1017; *Tate v. Marco*, 27 S. C. 493, 4 S. E. 71; *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. 32, 50 Atl. 286, 55 L. R. A. 408, 88 Am. St. Rep. 470; *Fuller v. Ellis*, 39 Vt. 345, 94 Amer. Dec. 327.

<sup>29</sup> See *supra*, §§ 812 *et seq.*

<sup>30</sup> *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205. And see cases of servants in the following two sections.

### § 1017. Servants' duty of obedience.

Like the agent, the servant is bound to obey all reasonable orders of the master, and the principles involved are the same, but as the relation of master and servant involves a greater control of the master over the manner of performing the service than does the relation of principal and agent, there is more frequent opportunity for the exercise of control. Though there can be no question of the liability in damages of the servant for failure to obey any rightful order,<sup>31</sup> the question generally raised has been the justification of the master for discharging a servant on account of some act of disobedience.

A distinction not always observed is important here between several possible kinds of disobedience:

1. Disobedience which is due merely to negligence or forgetfulness of a general order, or a particular instruction.

2. Disobedience which is wilful in the sense that the employee is conscious that he is disobeying orders but his action is not accompanied with an element of defiance or insubordination.

3. Disobedience which is accompanied with an element of insubordination and involves a direct refusal to recognize the master's authority in regard to the matter in question.

Disobedience of the last kind, though relating to a trivial matter and though causing no damage, will always justify immediate discharge.<sup>32</sup> So trenchant a rule cannot be laid

<sup>31</sup> *Levison v. Kirk*, Lane, 65, 67; *Hussey v. Pusy*, Sid. 298; *Brown v. Smith*, 12 Cush. 366.

<sup>32</sup> *Jerome v. Queen City Cycle Co.*, 163 N. Y. 351, 57 N. E. 485 (the superintendent of a factory absented himself for the day in violation of a specific order not to go. The court held it immaterial that no actual damage was caused by the absence); *Standidge v. Lynde*, 120 Ill. App. 418 (a lawyer's clerk disobeyed his employer's direction to stay after office hours to work on a brief); *Degen v. Manistee &c. R. Co.*, 113 Mich. 66, 71 N. W. 459 (refusal by superin-

tendent of street railway to reinstate an employee when ordered to do so by the president); *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524 (disobedience accompanied with defiance); *Green v. Watson*, 60 Hun, 582, 14 N. Y. S. 820 (Refusal to work with another employee); *Youngash v. Saskatchewan, etc., Co.*, 4 Sask. L. R. 63.

In *Connell v. Gisborne Times Co.*, 28 N. Zeal. L. Rep. 300, the court said: "a single deliberate act of disobedience of a particular order given in a particular matter in such manner as to indicate the intention to defy the

down in regard to disobedience of either of the other kinds. Persistent failure to obey instructions or observe the rules of the employment whether due to carelessness or wilfulness will undoubtedly justify dismissal;<sup>33</sup> but aside from such disobedience it can only be said that the right to discharge the employee depends upon the importance of the matter in question, the length of the contract, and whether it is divisible so that the employee has or will receive payment for such part performance as he has rendered.<sup>34</sup> Some decisions, it

authority of the master, warrants the instant dismissal of the servant." See further *Spain v. Arnott*, 2 Starkie, 256; *Darst v. Mathieson Alkali Works*, 81 Fed. 284; *The Bertha*, 111 Fed. 550; *Shields v. Carson*, 102 Ill. App. 38; *Rogers v. Rogers*, (Ind. App. 1919), 122 N. E. 778; *Kenner v. Southwestern Oil Co.*, 113 La. 80, 36 So. 895; *Degen v. Manistee &c. R.*, 113 Mich. 66, 71 N. W. 459; *Ernst v. Grand Rapids Engraving Co.*, 173 Mich. 254, 138 N. W. 1050; *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524; *Smith v. Herring-Hall-Marvin Co.* (N. Y. Misc.), 115 N. Y. S. 204; *Standing v. Brady*, 157 N. Y. App. Div. 657, 142 N. Y. S. 656; *McGregor v. Harm*, 19 N. D. 599, 125 N. W. 885, 30 L. R. A. (N. S.) 649; *Peniston v. John Y. Huber Co.*, 196 Pa. 580, 46 Atl. 934; *Parker v. School Dist. No. 38*, 5 Lea, 525; *Thomas v. Beaver Dam Mfg. Co.*, 157 Wis. 4, 27, 147 N. W. 364, Ann. Cas. 1916 A. 1020; *Green v. Somers*, 163 Wis. 96, 157 N. W. 529; *Dick v. Canada Jute Co.*, 30 L. Can. Jur. 185. This principle has been applied though the master's order was very harsh. In *Turner v. Mason*, 14 M. & W. 112, a domestic servant asked permission to be absent for a single night to visit her mother who was ill and believed herself to be dying. Permission was refused, but the servant, nevertheless, went and remained over night. It was held that her discharge was justified. This decision

is criticised in *Shaver v. Ingham*, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712, where the reasonableness of the servant's conduct was held properly left to the jury, though there seems to have been defiance and not simply disobedience. Somewhat similar in principle to the Michigan decision is *Jordan v. Weber Moulding Co.*, 77 Mo. App. 572.

<sup>33</sup> *Lilley v. Elwin*, 11 Q. B. 742; *Martin v. Everett*, 11 Ala. 375; *Wiley v. California Hosiery Co.* (Cal.), 32 Pac. 522; *Kendall v. West*, 196 Ill. 221, 63 N. E. 683, 89 Am. St. Rep. 317; *Mandel v. Hocquard*, 99 Ill. App. 75; *Kenner v. Southwestern Oil Co.*, 113 La. 80, 36 So. 895; *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524; *Milligan v. Sligh Furniture Co.*, 111 Mich. 629, 70 N. W. 133; *McCain v. Deanoysers*, 64 Mo. App. 66; *Sabin v. Kendrick*, 58 N. Y. App. Div. 108, 68 N. Y. S. 546; *Costet v. Jeantet*, 108 N. Y. App. Div. 201, 95 N. Y. S. 638; *Macaulay v. Press Pub. Co.*, 155 N. Y. S. 1044; *Matthews v. Park*, 159 Pa. 579, 28 Atl. 435; *Wyatt v. Brown* (Tenn.), 42 S. W. 478; *Thomas v. Beaver Dam Mfg. Co.*, 157 Wis. 427, 147 N. W. 364, Ann. Cas. 1916 A. 1020; *Guildford v. Anglo-French S. S. Co.*, 9 Can. S. C. 303; *McIntyre v. Hockin*, 16 Ont. App. 498.

<sup>34</sup> In *Fillieul v. Armstrong*, 7 A. & E. 557, an under teacher absented himself from his duties two days after

should be said, seem to go far in the direction of justifying the master in discharging the servant for a single act of disobedience though unaccompanied by defiance and though the previous conduct of the servant may have been in conformity with his duty.<sup>35</sup>

An express promise in the contract on the part of the employee to obey directions imposes no different obligation than would otherwise be implied.<sup>36</sup> But it is entirely possible for the parties by specific agreement to give a larger power of direction to the employer than would be otherwise implied,<sup>37</sup> or to make any breach whatever of the duty of obedience go to the essence of the contract and therefore justify discharge under circumstances which would be insufficient in the absence of such a special agreement.<sup>38</sup> The fact that serious injury to himself or his interests will follow obedience to his employer's instructions doubtless affects the employee's liability for disobedience.<sup>39</sup> But the fact that in such a case the employee may be free from liability for disobedience, does not necessarily indicate that he may not be rightly discharged. A situation may arise analogous to that presented by illness of the employee, which excuses him from liability for non-performance of the duties of his employment, but does not protect him from discharge, if the illness is so protracted as to amount to an essential breach.<sup>40</sup>

the expiration of the Christmas vacation. No damage was alleged to have been caused thereby. The court held this did not justify the teacher's discharge, and set aside a verdict in favor of the employer. See also *Farmer v. First Trust Co.*, 246 Fed. 671, 158 C. C. A. 627, L. R. A. 1918 C. 1027, and decisions in the previous note.

<sup>35</sup> *Hallward v. Snell*, 2 T. L. Rep. 836 (an assistant teacher broke a rule forbidding smoking in a certain room before a certain time of day); *Chell v. Hall*, 12 T. L. Rep. 408 (a miner sent up coal-dust in violation of a rule); *Beckman v. Garrett*, 66 Ohio St. 136, 64 N. E. 62 (a salesman was absent without excuse for two or three days. His contract was for five years of which

two and a half had expired. No damage was caused by his absence).

<sup>36</sup> *The Lady Eileen v. Pouliot*, 11 Can. Exch. 87, 95.

<sup>37</sup> *Lehigh Valley R. Co. v. Snyder*, 56 N. J. L. 326, 28 Atl. 376.

<sup>38</sup> See *Bowes v. Press* [1894] 1 Q. B. 202; *Gallagher v. Wayne Steam Co.*, 188 Pa. 95, 41 Atl. 296.

<sup>39</sup> In *Jerome v. Queen City Cycle Co.*, 163 N. Y. 351, 57 N. E. 485, the court said: "The law does not permit a servant to defy his master unless serious injury threatens him, his family, or his estate."

<sup>40</sup> In *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93, the plaintiff had been confined in jail for two weeks, as the court assumed without fault on his

**§ 1018. Limits of servants' duty of obedience.**

In order that disobedience shall create either liability on the part of the servant or a right of the master to discharge him the master's direction must have been reasonable.<sup>41</sup> This is merely stating in another way that the implied promise of the employee is not one of universal obedience, but merely of such obedience as is usual and proper for the performance of the duties of the employment.

"As long as the servant is permitted to perform the services he contracts for, he cannot treat a mere request or direction to perform additional services as a discharge. Neither would a master be justified in discharging a servant for a refusal to perform services outside the scope of his employment."<sup>42</sup>

"But when there is a refusal to permit the servant to perform the substantial or principal service he agreed to perform and a direction to substitute a different service . . . then the servant may treat such refusal and direction as a discharge."<sup>43</sup> On the other hand, "a master has the right to give reasonable orders to a servant, even though the master knows that the work required is distasteful to the servant, and even though the master gives the order with the expectation that the servant will leave the employment rather than obey, as the motive of the master is unimportant, and the servant is bound to obey all reasonable orders, even if given

part. Nevertheless the court held his discharge proper as his absence was a material injury to his employer. See also *infra*, § 1940.

<sup>41</sup> *Rex v. Polesworth*, 2 B. & Ald. 483; *Marx v. Miller*, 134 Ala. 347, 32 So. 765; *McIntosh v. Abbot*, 231 Mass. 180, 120 N. E. 383; *Lehigh Valley R. Co. v. Snyder*, 56 N. J. L. 326, 28 Atl. 376; *Walker v. John Hancock Mut. L. Ins. Co.*, 80 N. J. L. 342, 79 Atl. 354; *International, etc., R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559 (order not to patronize a certain hotel held unreasonable); *Lone Star Salt Co. v. Wilderspin* (Tex. Civ. App.), 81 S. W. 327; *Wright v. C. S. Graves Land Co.*, 100 Wis. 269, 75 N. W. 1000.

<sup>42</sup> *Loos v. Geo. Walter Brewing Co.*, 145 Wis. 1, 129 N. W. 645; *Koplitz v. Powell*, 56 Wis. 671, 14 N. W. 831.

<sup>43</sup> *Loos v. Geo. Walter Brewing Co.*, 145 Wis. 1, 129 N. W. 645, citing *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 126 N. W. 541, 27 L. R. A. (N. S.) 1011; *Marx v. Miller*, 134 Ala. 347, 32 So. 765; *Roserie v. Kiralfy Bros.*, 12 Phila. 209; *Warner v. Rector, etc.*, 1 City Ct. R. 419; *Pepper v. Kisch*, 2 City Ct. R. 131. See also *Colloraff v. Hickson*, 159 N. Y. S. 177. This rests upon the principle that both parties are entitled to a substantial compliance with the contract, and that he who refuses to permit it is guilty of a breach of his obligation.

in bad faith, while he is not bound to obey unreasonable orders, even when given in good faith." <sup>44</sup> The importance and responsibility of the employee's position, and the degree to which his work requires the exercise of his personal judgment are also circumstances to be considered.<sup>45</sup> And an employee whose contract is expressly or impliedly conditional on his work being directed by a certain person, cannot be required to obey another.<sup>46a</sup>

**§ 1019. Liability of a principal for default of a sub-agent.**

Unless the principal has authorized expressly or impliedly the employment of a sub-agent, the agent will be liable, if he delegates his authority, for any damages which may happen because of this breach of duty. Frequently, however, by usage, by necessary implication from the character of the act to be performed, or by the express terms of the authority given, the agent is justified in employing a sub-agent. How far the agent becomes personally liable for the acts of the sub-agent then becomes important. Several situations may be distinguished. The duty of the agent may be merely to employ an agent for his principal. The sub-agent in such a case can hardly be called with propriety a sub-agent. He is the agent of the principal; all duties are owing to the latter and all rights are against him. Even where the agent's authority is not to employ an agent on behalf of the principal but to employ personally a sub-agent, if he so desires, to perform part of his own duties, it does not necessarily follow, as is sometimes supposed, that the agent is liable for the default of the sub-agent. It is argued that as a principal is bound by the default of his agent, when the latter is acting within the scope of his authority, so, therefore, the original

<sup>44</sup> *Smith v. Herring-Hall-Marvin Safe Co.*, 115 N. Y. S. 204, 207, citing *Development Co. v. King*, 161 Fed. 93, 88 C. C. A. 255, 24 L. R. A. (N. S.) 612. *Cf. Shaver v. Ingham*, 58 Mich. 649, 26 N. W. 162, 55 Am. Rep. 712. And see *supra*, § 839.

<sup>45</sup> *Park v. Bushnell*, 60 Fed. 583, 9 C. C. A. 138, 20 U. S. App. 425; *Carpenter Steel Co. v. Norcross*, 204 Fed.

537, 123 C. C. A. 63, Ann. Cas. 1916 A. 1035; *Crabtree v. Bay State Felt Co.*, 227 Mass. 68, 116 N. E. 535; *Schaub v. Arc Welding Co.*, 123 Mich. 487, 82 N. W. 235.

<sup>46a</sup> *Triangle Film Corp. v. Artercraft Pictures Corp.*, 250 Fed. 981, 163 C. C. A. 231; *Styblo v. Sokol*, 207 Ill. App. 340.

agent must on the same principle be liable for the defaults of the sub-agent. But this principle must be qualified by the observation that such liability will not arise in favor of one whose contract fixes a different standard of liability. The terms of the contract, implied as well as express, between the principal and his agent must, therefore, be considered. The question has generally become important with reference to banks in their collection of negotiable paper. A bank with which such paper has been deposited for collection may forward it to a bank in the place where it is payable. If the latter bank is negligent, some courts hold the bank of deposit liable though it used due diligence in selecting the channel for collection.<sup>46</sup> The contrary view, however, is preferable and is supported by much authority.<sup>47</sup> If it were

\* *Van Wart v. Woolley*, 3 B. & C. 439; *Exchange Bank v. Third Bank*, 112 U. S. 276, 28 L. Ed. 722, 5 Sup. Rep. 141; *Bailie v. Augusta Savings Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74; *Tyson v. State Bank*, 6 Blackf. 225, 38 Am. Dec. 139 (sub-agent was a branch of agent bank); *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Fort Dearborn Nat. Bank v. Security Bank*, 87 Minn. 81, 84, 91 N. W. 257; *Davey v. Jones*, 42 N. J. L. 28, 36 Am. Rep. 505; *Saint Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241; *McBride v. Illinois Nat. Bank*, 138 N. Y. App. Div. 339; *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 382, 387, 79 N. W. 859; *Reeves v. State Bank*, 8 Ohio St. 465. See also *Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 408, 24 So. 389; *Sherman v. Port Huron, etc., Co.*, 8 So. Dak. 343, 66 N. W. 1077. A case like *Mackersy v. Ramsays*, 9 C. & F. 818, must be distinguished. There after the collection of the bill in question by the collecting bank, the bank of deposit allowed the collection to stand to its own credit for some months after notice of the collection. It was

rightly held liable for the amount. See also *Haslett v. Commercial Nat. Bank*, 132 Pa. 118, 19 Atl. 55.

\* *East Haddam Bank v. Soovil*, 12 Conn. 303; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243, 79 Am. Dec. 328; *First Nat. Bank v. Bank of Whittier*, 221 Ill. 319, 77 N. E. 563, 567; *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101, 48 N. E. 601; *Guelich v. National Bank*, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110; *Bank of Lindsborg v. Ober*, 31 Kan. 599, 3 Pac. 324; *Beach v. Moser*, 4 Kan. App. 66, 46 Pac. 202; *Second Nat. Bank v. Merchants' Nat. Bank*, 111 Ky. 930, 65 S. W. 4, 55 L. R. A. 273, 98 Am. St. Rep. 439; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Jackson v. Union Bank*, 6 Har. & J. 146; *Lord v. Hingham Nat. Bank*, 186 Mass. 161, 71 N. E. 312; *Dorchester &c. Bank v. New England Bank*, 1 Cush. 177 (cf. *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443); *Finch v. Karste*, 97 Mich. 20, 56 N. W. 123; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; *Daly v. Butchers' &c. Bank*, 56 Mo. 94, 17 Am. Rep. 663; *Bedell v. Harbine Bank*, 62 Neb. 339, 86 N. W. 1060; *Planters' &c. Bank v.*

true, as said in a leading case by the Supreme Court of the United States,<sup>48</sup> that the agreement of the bank of deposit is to collect the paper intrusted to it, the consequence would follow that this bank would be liable for failure to fulfil its contract; but this does not seem a correct statement of the bank's obligation. Except as special instructions control the agreement between the depositor and the bank, the latter's undertaking is to exercise a reasonable degree of skill and judgment in endeavoring to collect.<sup>49</sup> Even with its obligation thus limited, however, if the bank's duty were to collect by its own officers or servants, loss resulting by the negligence of one of them would render it liable. The complete power of choice and the full control of the bank in regard to its officers and servants identifies them, so far as the depositor is concerned with the bank. But the situation is different when the instrument must be forwarded to a collecting bank. It may well happen where a check or note to be collected is payable at a small place that the bank of deposit, in view of business customs, has neither freedom of choice nor power of control in regard to the collecting bank. There may be but one bank to which the paper can be sent, and the case is then one where in effect the depositor has dictated the method of collection. Even where the bank of deposit has a choice, it has no control. It is in effect selecting an agency at the request of the depositor, and though the collecting bank looks to the bank of deposit, not to the original depositor as its employer, the only function that the bank of deposit exercises or is expected to exercise, is to select a

First Nat. Bank, 75 N. C. 534; *Bank v. Floyd*, 142 N. C. 187, 55 S. E. 95; *Mechanics' Bank v. Earp*, 4 Rawle, 384; *Morgan v. Tener*, 83 Pa. 305, 307; *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691; *Second Bank v. Cummings*, 89 Tenn. 609, 18 S. W. 115; *Stacy v. Dane County Bank*, 12 Wis. 629. See also *Dun v. City Nat. Bank*, 58 Fed. 174, 7 C. C. A. 152.

<sup>48</sup> *Exchange Nat. Bank v. Third*

*Nat. Bank*, 112 U. S. 276, 287, 28 L. Ed. 722, 5 Sup. Ct. Rep. 141.

<sup>49</sup> See *Bank v. Monongahela Nat. Bank*, 126 Fed. 436; *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520, 22 So. 976; *Manhattan Life Ins. Co. v. First Nat. Bank*, 20 Colo. App. 529, 80 Pac. 467; *Capitol State Bank v. Lane*, 52 Miss. 677, 679; *Taylor v. Sipp*, 30 N. J. L. 284; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, 82 N. W. 102; *Sahlien v. Bank*, 90 Tenn. 221, 16 S. W. 373.



channel of collection. For the same reason a collecting bank should not be, and generally is not held liable for the negligence of a notary to whom negotiable paper is intrusted for protest.<sup>50</sup>

**§ 1020. Duty in regard to proper behavior.**

The relation of employer and employee requires on the part of each an observance of the elementary principles of good behavior. The extent of the duty and the consequences of a breach of it must vary necessarily with the character of the employment. Insolent or disrespectful language or conduct on the part of a servant will justify dismissal.<sup>51</sup> Similarly the employer is under a duty to refrain from language or conduct of so severe or offensive nature as to be improper in view of the relation between the parties.<sup>52</sup> And though

<sup>50</sup> *Britton v. Nicolls*, 104 U. S. 577, 26 L. Ed. 917; *May v. Jones*, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Baldin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Frazier v. New Orleans, etc., Co.*, 2 Rob. (La.) 294; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Tiernan v. Commercial Bank*, 8 Miss. 648, 40 Am. Dec. 83; *Agricultural Bank v. Commercial Bank*, 15 Miss. 592; *Bowling v. Arthur*, 34 Miss. 41; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. 239; *Bank v. Butler*, 41 Oh. St. 519, 52 Am. Rep. 94; *Bellemire v. U. S. Bank*, 4 Whart. 105, 33 Am. Dec. 46. But see *contra Haynes v. Birks*, 3 B. & P. 599; *American Express Co. v. Haire*, 21 Ind. 4, 83 Dec. 334; *Davey v. Jones*, 42 N. J. L. 28, 36 Am. Rep. 505; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489.

<sup>51</sup> *Ridgway v. Hungerford Market Co.*, 3 Adol. & El. 171; *Champion v. Hartshorne*, 9 Conn. 564; *Parker v. Farlinger*, 122 Ga. 315, 50 S. E. 98; *Wade v. Hefner*, 16 Ga. App. 106, 84

S. E. 598; *Railey v. Lanahan*, 34 La. Ann. 426; *McIntosh v. Abbot*, 231 Mass. 180, 183, 120 N. E. 383; *Jordan v. J. R. Webber Moulding Co.*, 72 App. 325; *Wilke v. Harrison*, 166 Pa. 202, 30 Atl. 1125; *Eaken v. Harrison*, 4 McCord L. 249. *Cf. Edwards v. Levy*, 2 F. & F. 94; *Frachtman v. Fox*, 156 N. Y. S. 313 (refusal of a Christmas present held not such insolent conduct as to justify discharge of a dentist's assistant). See to the same effect where the disrespectful conduct was to a superior employee placed in charge by the employer. *Darst v. Mathieson Alkali Works*, 81 Fed. 284; *Abendpost v. Hertel*, 67 Ill. App. 501; *Youngblood v. Dodd*, 2 La. Ann. 187; *Forsyth v. McKinney*, 58 Hun, 1, 8 N. Y. S. 561. See also *Gerardo v. Brush*, 120 Mich. 405, 79 N. W. 646. *Cf. Burt v. Catlin*, 65 N. Y. App. Div. 456, 72 N. Y. S. 924, *affd.* in 175 N. Y. 486, 67 N. E. 1081.

<sup>52</sup> *Saunders v. Anderson*, 2 Hill Law (S. C.), 486. See also *McIntosh v. Abbot*, 231 Mass. 180, 120 N. E. 383. *Cf. Marsh v. Ruleson*, 1 Wend. 514; *Forsyth v. Hastings*, 27 Vt. 646.

the employer can probably not be held liable for the acts of third persons over whom he has no control, the conditions of the employment may be made so unreasonably disagreeable by such persons as to justify the employee in leaving.<sup>53</sup> The behavior of the employee, and doubtless in some degree that of the employer must also not be so dishonest, indecorous or immoral even aside from matters connected with the employment as to be inconsistent with the character of the employment. The extent to which such behavior will justify a termination of the contract must vary so widely with the nature of the employment and to some extent with the customs of the community, that little more can be done than to state that the matter depends upon what is reasonable under the circumstances.<sup>54</sup> "The test is . . . not morality in the abstract, but whether taking the nature of the plaintiff's employment into account the acts complained of rendered the plaintiff unfit to perform the duties which he had undertaken."<sup>55</sup> It is clear, however, that if the behavior of an employee was such that the public would be disposed on that account to curtail business relations with the employer, there is unfitness to perform the duties undertaken. In

<sup>53</sup> In *Patterson v. Gage*, 23 Vt. 558, 56 Am. Dec. 96, a female employee left her employment and was held justified in so doing because of the habitual misconduct of a third person living in the same house. In *Mather v. Brokaw*, 43 N. J. L. 587, an assault on an employee's child by a third person was held not to justify the employee in leaving. But it may be thought if continuance in the employment would probably subject the employee or his child to a series of assaults, the result reached must be different. See also *infra*, § 1940, cases excusing an employee because of danger of illness or death.

<sup>54</sup> See *Rex v. Brampton*, Cald. 11; *Atkin v. Acton*, 4 C. & P. 208; *Parsons v. London County Council*, 9 T. L. R. 619; *Rubel Bronze &c. Co. v. Vos*, [1918] 1 K. B. 315, 321; *Carpenter Steel Co. v. Norcross*, 204 Fed. 537,

123 C. C. A. 63, Ann. Cas. 1916 A. 1035; *Farmer v. First Trust Co.*, 246 Fed. 671, 158 C. C. A. 627, L. R. A. 1918, C. 1027; *Bixby v. Parsons*, 49 Conn. 483, 44 Am. Rep. 246; *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. 896; *Child v. Boyd & Corey Mfg. Co.*, 175 Mass. 493, 56 N. E. 608; *Larkin v. Hecksher*, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137; *Preyer v. Bidwell*, 11 N. Y. S. 71; *Brownell v. Ehrich*, 43 N. Y. App. D. 369, 60 N. Y. S. 112; *Burt v. Catlin*, 65 N. Y. App. D. 456, 72 N. Y. S. 924, *affd.* in 175 N. Y. 486, 67 N. E. 1081; *Hall-Moody Institute v. Copass*, 108 Tenn. 582, 69 S. W. 327; *Noa Spears Co. v. Inbau* (Tex. Civ. App.), 186 S. W. 357; *Moynahan v. Interstate, etc., Co.*, 31 Wash. 417, 72 Pac. 81.

<sup>55</sup> *Child v. Boyd & Corey Mfg. Co.*, 175 Mass. 493, 495, 56 N. E. 608.

some kinds of work, especially, any public immoral conduct, though having no direct relation to the employment, and though not impairing the physical or intellectual capacity of the employee, will destroy his usefulness to his employer. One who treads the primrose path of dalliance during his spare hours will not make an effective curate or pastor's assistant, whatever may be the regularity and unction with which he may labor at the fixed tasks of his employment. So, the standard of conduct for teachers of the young would obviously be higher than that of employees of most other classes.<sup>56</sup> Confirmed habits of intoxication on the part of an employee are necessarily inconsistent with the duties of any employment and justify discharge,<sup>57</sup> but the extent to which drinking of liquor or occasional excess may disqualify an employee depends upon the character of the employment. Thus more sobriety is required of a locomotive engineer,<sup>58</sup> or a pilot of a boat,<sup>59</sup> than in most classes of employment.<sup>60</sup> A contract of employment may make abstinence from intoxicating liquor an express condition precedent to a right to compensation or to the continuance of employment, and in such a case the condition will be enforced though breach of it has not resulted in intoxication or lessened efficiency.<sup>61</sup> Speculation on a margin has been held to justify the dis-

<sup>56</sup> See *Hall-Moody Institute v. Co-pass*, 108 Tenn. 582, 69 S. W. 327.

<sup>57</sup> *Speck v. Phillips*, 5 M. & W. 279; *Roberts v. Brownrigg*, 9 Ala. 106; *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 So. 315, 60 Am. Rep. 748; *Gonsolis v. Gearhart*, 31 Mo. 585; *Armour-Cudahy Packing Co. v. Hart*, 36 Neb. 166, 54 N. W. 262; *Mowbray v. Gould*, 83 N. Y. App. Div. 255, 82 N. Y. S. 102; *Ulrich v. Hower*, 156 Pa. 414, 27 Atl. 243.

<sup>58</sup> *Smith v. St. Paul & D. R. Co.*, 60 Minn. 330, 62 N. W. 392.

<sup>59</sup> *Gonsolis v. Gearhart*, 31 Mo. 585.

<sup>60</sup> See *Clouston v. Corry*, [1906] A. C. 122, where it was held a question for the jury whether a travelling salesman

was properly discharged who had been drunk and otherwise misconducted himself in a public road. So in *Ulrich v. Hower*, 156 Pa. 414, 419, the court said, "There is no fixed rule which allows the court to say as matter of law that drunkenness off duty is or is not a sufficient cause for forfeiture of wages. The test for that is the faithful and proper performance of his work, and that is a question of fact to be considered with all the circumstances."

<sup>61</sup> *Clark v. West*, 193 N. Y. 349, 86 N. E. 1. So refraining from publicly associating with a notorious woman, may be made of the essence of a contract of employment. *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. 896.

charge of a merchant's clerk,<sup>62</sup> and of a manager of a mercantile agency.<sup>63</sup>

In exceptional cases it seems that conduct previous to the contract of employment and unknown to the employer when the contract was made, may afford ground for discharge. The employee must be regarded as undertaking that he is competent for the employment, and if his previous character or reputation make it clear that he cannot safely be trusted to fulfil the duties of the employment, he does not fulfil that undertaking.<sup>64</sup>

### § 1021. Employee's duty to account.

Where the employment involves the expenditure of the employer's money, it is the duty of the employee not simply to expend the money properly but to keep account of his transactions and present the account at any proper time on demand to the employer, with such vouchers or receipts as business usage renders proper in view of the nature of the employment.<sup>65</sup> Money or other property belonging to the employer and in the possession of the employee must be kept distinct from the employee's own property;<sup>66</sup> and in case of money it should be earmarked in some way as belonging to the employer.<sup>67</sup>

<sup>62</sup> *Pearce v. Foster*, 17 Q. B. D. 536.

<sup>63</sup> *Priestman v. Bradstreet*, 15 Ont. 558.

<sup>64</sup> *Nolan v. Thompson*, 11 Daly, 314. See also *Carpenter Steel Co. v. Norcross*, 204 Fed. 537, 123 C. C. A. 63, Ann. Cas. 1916 A. 1035.

<sup>65</sup> *Gray v. Haig*, 20 Beav. 219; *Dodge v. Hatchett*, 118 Ga. 883, 45 S. E. 667; *Holmes v. Murdock*, 125 La. 916, 51 So. 1035; *Boyce v. Boyce*, 124 Mich. 696, 83 N. W. 1013; *Walker v. John Hancock Mut. L. Ins. Co.*, 80 N. J. L. 342, 79 Atl. 354, 35 L. R. A. (N. S.) 153; *Re Pierson's Estate*, 19 N. Y. App. Div. 478, 46 N. Y. S. 557; *Riley v. Bank of Allendale*, 57 S. C. 98, 35 S. E. 535.

<sup>66</sup> *Clarke v. Tipping*, 9 Beav. 284;

*First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174, s. c. *sub nom.* *First Nat. Bank v. Kilbourne*, 20 N. E. 681; *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488.

<sup>67</sup> An attorney who deposited money belonging to a number of clients in a bank in his own name, without a statement of the trust was held liable to the clients on failure of the bank though the money was deposited in an account by itself, and the bank was in good credit. *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61. See also *Robinson v. Ward*, 2 C. & P. 59, 60; *Mason v. Whitthorne*, 2 Coldw. 242; *Williams v. Williams*, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708.

**§ 1022. The employee's duty of fidelity to his employment.**

The duty of fidelity to his employment imposes on the employee not simply the positive duty of reasonably skilful performance of the work intrusted to him, but the negative duty of refraining from deception, and from entering into relations giving him an interest inconsistent with that of the employer. Thus deceptive and fraudulent statements or conduct not only renders the employee liable, but justifies his discharge.<sup>68</sup> Generally such conduct involves damage to the employer but it may be ground for discharge, though no damage is involved.<sup>69</sup> Besides more glaring cases of treachery, the decision of which is plain,<sup>70</sup> it should be observed that the employee may neither enter into business relations in competition with his employer,<sup>71</sup> even though the business is so conducted by agents or otherwise, as not to deprive the employer of the employee's attention,<sup>72</sup> nor seek to ac-

<sup>68</sup> *Baillie v. Kell*, 4 Bing. (N. C.) 638 (false and fraudulent entries in accounts); *Bixby-Theisen Co. v. Evans*, 174 Ala. 571, 57 So. 39 (misappropriation); *Krueger v. Roxford Knitting Co.*, 209 Ill. App. 496 (padding expense accounts); *Fuqua v. Massie*, 95 Ky. 387, 25 S. W. 875 (use of false weights); *Lartigue v. Peet*, 5 Rob. (La.) 91 (a false balance); *Sabin v. Kendrick*, 46 N. Y. App. Div. 90, 61 N. Y. S. 336 (selling below authorized prices and attempting to deceive in regard to the matter); *Stahl v. Allert*, 32 N. Y. Misc. 93, 65 N. Y. S. 493 (submitting false bills for goods alleged to have been furnished to the employer); *Hutchinson v. Washburn*, 80 N. Y. App. Div. 367, 80 N. Y. S. 691 (failing to give employer credit in an expense account for discount given the employee from regular hotel charges); *Brightson v. H. B. Claffin Co.*, 180 N. Y. 76, 72 N. E. 920 (an inaccurate inventory had been made by the employee. The court held that if the inaccuracy was either fraudulent or negligent, the employee was rightfully dis-

charged, but otherwise not); *London v. G. A. Kelly Plow Co.* (Tex. Civ. App.), 155 S. W. 556 (lack of integrity); *Bélanger v. Bélanger*, 24 Can. S. C. 678 (the editor of a newspaper reversed its political policy without the consent of the owner).

<sup>69</sup> *Wade v. William Barr Dry Goods Co.*, 155 Mo. App. 405, 134 S. W. 1084 (accepting gifts from customer); *Allen v. Aylesworth*, 58 N. J. Eq. 349, 44 Atl. 178 (secret examination of employer's books). See also *Horton v. McMurtry*, 5 H. & N. 667.

<sup>70</sup> See, *e. g.*, *Mercer v. Whall*, 5 Q. B. 447.

<sup>71</sup> *Puritas Laundry Co. v. Green*, 15 Cal. App. 654, 115 Pac. 660; *Lindsay v. Swift*, 230 Mass. 407, 119 N. E. 787; *Hibbard v. Wood*, 49 Pa. Super. 513; *Dieringer v. Meyer*, 42 Wis. 311, 24 Am. Rep. 415.

<sup>72</sup> *Dieringer v. Meyer*, 42 Wis. 311, 24 Am. Rep. 415. See also *Ward v. Beeton*, L. R. 19 Eq. 207; *Day v. American Machinist Press*, 86 N. Y. App. Div. 613, 83 N. Y. S. 263. But it is no breach of duty to plan and make preparations during the term

quire indirect advantages from third persons for performing his duty to his employer.<sup>73</sup> The employee's duty of fidelity forbids him, if his duty is to buy property for his principal, to furnish his own goods without disclosing the fact.<sup>74</sup> So, if his duty is to sell property on behalf of his employer, he may not sell his own property instead.<sup>75</sup> Nor can he without the employer's knowledge buy the latter's property intrusted to him for sale, and if he does so the sale is voidable by the employer.<sup>76</sup> This is true though the employee gave the price which the employer had set,<sup>77</sup> or the sale was at public auction. An employee who violates these fundamental duties of loyalty cannot recover even for the services he has rendered.<sup>78</sup> Therefore, an agent may not accept employment from one party to a transaction when he is already employed by the other, unless each employer consents to the double employment. If the agent takes such double employment, he is not only liable in damages to either employer who did not consent to it, and forfeits his right of compensation from him, but also holds as constructive trustee any profits made from the business.<sup>79</sup> Because of the tendency to promote disloyalty of an agreement between two or more agents, acting respectively on behalf of buyers and sellers of property, to pool their commissions and divide them, an agent who enters into such an agreement

of employment to enter into a competitive business at its expiration. *Nichol v. Martyn*, 2 Esp. 732; *Myers v. Roger J. Sullivan Co.*, 116 Mich. 193, 131 N. W. 521, 34 L. R. A. (N. S.) 1217; *Levy v. Jarrett* (Tex. Civ. App.), 198 S. W. 333.

<sup>73</sup> *Swale v. Ipswich Tannery*, 11 Comm. Cas. 88; *Holcomb v. Weaver*, 136 Mass. 265. See also *infra*, § 1737.

<sup>74</sup> *Armstrong v. Jackson*, [1917] 2 K. B. 822.

<sup>75</sup> *Gladiator, etc., Milling Co. v. Steele*, 132 Iowa, 446, 106 N. W. 737.

<sup>76</sup> *Robertson v. Chapman*, 152 U. S. 673, 14 S. Ct. 741, 38 L. Ed. 592; *Blank v. Aronson*, 187 Fed. 241, 109 C. C. A. 327; *Powell v. Conant*, 33 Mich. 396; *Merriam v. Johnson*, 86 Minn. 61, 90 N. W. 116; *Bain v. Brown*,

56 N. Y. 285; *Evans v. Wrenn*, 93 N. Y. App. Div. 346, 88 N. Y. S. 617; *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246.

<sup>77</sup> *Merriam v. Johnson*, 86 Minn. 61, 90 N. W. 116; *Meek v. Hurst*, 223 Mo. 688, 135 Amer. St. Rep. 531; *Rich v. Black*, 173 Pa. 92, 33 Atl. 880; *Selover v. Isle Harbor Land Co.*, 91 Minn. 451, 98 N. W. 344.

<sup>78</sup> See *infra*, § 1477, *ad fin.*

<sup>79</sup> *Andrew v. Ramsay*, [1903] 2 K. B. 635; *Stubbs v. Slater*, [1910] 1 Ch. 195; *Warren v. Burt*, 58 Fed. 101, 12 U. S. App. 591, 7 C. C. A. 105; *Little v. Phipps*, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046; *Hogle v. Meyering*, 161 Mich. 472, 126 N. W. 1063; and see *infra*, § 1532; *Mechem, Agency*, § 1590.

forfeits all right to compensation from his principal.<sup>80</sup> A failure of fidelity on the part of an attorney is treated with exceptional severity and all right to compensation is thereby forfeited.<sup>81</sup> The same requirement of fidelity imposed upon agents is imposed also on other analogous fiduciaries. Not only partners but those who undertake a joint adventure not involving a partnership fall within this category. Breach of the duty by one co-adventurer justifies the other in rescinding the contract between them.<sup>82</sup>

**§ 1023. Employee is chargeable as trustee with anything fraudulently acquired.**

Not only compensation secretly received from others than his employer for the performance of his duty must be surrendered by the employee, but all secret or fraudulent profit secured by him in any way from the exercise of his employment beyond the compensation to which he is entitled by the terms of his contract, is held by him on a constructive trust for his employer.<sup>83</sup> A common illustration of this principle is where an agent in buying or selling property for his principal receives a commission from the other party to the

<sup>80</sup> *Quinn v. Burton*, 195 Mass. 277, 81 N. E. 257; *Hobart v. Sherburne*, 66 Minn. 171, 68 N. W. 841; *Norman v. Roseman*, 59 Mo. App. 682; but see *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499. There is, however, no objection to an agent for one party agreeing with the adverse principal to surrender to the latter a portion of his commission. *Scott v. Lloyd*, 19 Colo. 401, 35 Pac. 733; *Chase v. Veal*, 83 Tex. 333, 18 S. W. 597.

<sup>81</sup> *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Larey v. Baker*, 86 Ga. 468, 12 S. E. 684; *Hoboken Trust Co. v. Norton* (N. J. Eq., 1919), 107 Atl. 67; *Andrews v. Tyng*, 94 N. Y. 16. See also *Kirchoff v. Bernstein* (Oreg., 1919), 181 Pac. 746; *Fulton Farmers' Assoc. v. Bomberger*, 262 Pa. 43, 104 Atl. 805. In *Ingersoll v. Coal Co.*, 117 Tenn. 263, 98 S. W. 178, 9 L. R. A. (N. S.) 282, 119 Am. St. 1003, 10 Ann.

Cas. 829, recovery of fees was disallowed where the attorney had obtained charge of the suits in question through the solicitation of a "runner," "though no lack of fidelity to the client appeared."

<sup>82</sup> *Menefee v. Oxnam* (Cal.), 183 Pac. 379; *Noble v. Fox*, 35 Okla. 70, 128 Pac. 102, 43 L. R. A. (N. S.) 933. See also *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Kennah v. Huston*, 15 Wash. 275, 46 Pac. 236. Cf. *Roas v. Burrage*, 233 Mass. 439, 124 N. E. 267.

<sup>83</sup> *Sandoval v. Randolph*, 222 U. S. 161, 32 Sup. Ct. 48, 56 L. Ed. 143; *Stenian v. Tasjian* (Cal.), 174 Pac. 883; *Salsbury v. Ware*, 183 Ill. 505, 56 N. E. 149; *Schick v. Suttle*, 94 Minn. 135, 102 N. W. 217; *Duryea v. Vosburgh*, 138 N. Y. 621, 33 N. E. 932; *Graham v. Cummings*, 208 Pa. 516, 57 Atl. 943; *Kreise v. Cartledge*, 262 Pa. 55, 104 Atl. 855.

transaction. The receipt of such a commission is a breach of duty, and it can be claimed by the employer.<sup>84</sup> So, too, an agent whose duty is to buy property for his employer, is chargeable as a trustee if he buy it for himself,<sup>85</sup> unless the Statute of Frauds stands in the principal's way.<sup>86</sup> It is immaterial that the title is taken by a third person if the benefit is for the employee.<sup>87</sup> And if such an agent brings about a genuine sale to a third person, he will be liable to his principal for the injury.<sup>88</sup> On the same principle an employee who obtains, by virtue of his employment, knowledge that his employer is intending to obtain or continue a lease of property will not be allowed to retain for himself a lease of the property which he obtains with such knowledge.<sup>89</sup>

#### § 1024. Effect of the Statute of Frauds on agent's duty in regard to real estate.

The English and most American Statutes of Frauds forbid the creation of trusts in real estate without a writing.<sup>90</sup> This does not preclude resulting trusts arising by operation of law, but relying on an early English decision,<sup>91</sup> Lord St.

<sup>84</sup> *Lister v. Stubbs*, 45 Ch. Div. 1; *Hovenden v. Millhoff*, 83 L. T. 41; *Cohen v. Kuschke*, 16 T. L. R. 489, *United States v. Carter*, 217 U. S. 286, 54 L. Ed. 769; *Reid v. Shaffer*, 249 Fed. 553, 161 C. C. A. 479; *Wells v. Cochran*, 84 Neb. 278, 120 N. W. 1123; see also cases in the last note to the preceding section. Cf. *Powell v. Jones*, [1905] 1 K. B. 11; *Struve v. Tatge*, 285 Ill. 103, 120 N. E. 549; *Wade v. William Barr Dry Goods Co.*, 155 Mo. App. 405, 134 S. W. 1084; *Loos v. Geo. Walter Brewing Co.*, 145 Wis. 1, 129 N. W. 645.

<sup>85</sup> *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646; *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 84 N. E. 133, 126 Am. St. Rep. 409; *Kert v. Endelman* (Mich.), 168 N. W. 423; *Kraemer v. Deustermann*, 37 Minn. 469, 35 N. W. 276; *Harrison v. Craven*, 188 Mo. 590, 87 S. W. 962; *Seacoast Co. v. Wood*, 65 N. J. Eq.

530, 56 Atl. 337; *Reitz v. Reitz*, 80 N. Y. 538; *Odegard v. Haugland* (N. Dak.), 169 N. W. 170; *Gashe v. Young*, 51 Oh. St. 376, 38 N. E. 20; *Wolford v. Herrington*, 74 Pa. 311, 15 Am. Rep. 548.

<sup>86</sup> See the following section.

<sup>87</sup> *Kruse v. Steffens*, 47 Ill. 112; *Cameron v. Lewis*, 56 Miss. 76; *Forbes v. Halsey*, 26 N. Y. 53.

<sup>88</sup> *Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230.

<sup>89</sup> *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Essex Trust Co. v. Enwright*, 214 Mass. 507, 102 N. E. 441, 47 L. R. A. (N. S.) 567; *Prebble v. Reeves*, [1910] Vict. L. R. 88.

<sup>90</sup> See Ames's *Cas. Trusts* (2d. Ed.). 176.

<sup>91</sup> *Bartlett v. Pickersgill*, 1 Eden, 515, S. C. 1 Cox, 15, 4 East, 577, n.



Leonards said:<sup>92</sup> "Where a man employs another person by parol, as an agent to buy an estate, who buys it for himself, and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the Statute of Frauds." And this statement has been followed in some of the United States.<sup>93</sup> It has, however, been overruled in England:<sup>94</sup> and the current of later American authority supports the view that a trust is enforceable against the agent in the case supposed, in spite of the statute.<sup>95</sup> Though the decisions are thus in conflict, the principle to be applied is well settled. A mere breach of promise to hold property in trust for another is unenforceable unless in writing.<sup>96</sup> On the other hand, where the acquisition or retention of property involves fraud, equity will enforce a trust, which is imposed by operation of law *ex maleficio*, and is therefore not within the statute.<sup>97</sup> The crucial question then is: Is an agent who repudiates his agency and buys land for himself which he has undertaken

<sup>92</sup> Vendors and Purchasers (14th Eng. Ed.), 703.

<sup>93</sup> Perry v. McHenry, 13 Ill. 227 (see also Heaton v. Gaines, 198 Ill. 479, 487, 64 N. E. 1081); Burden v. Sheridan, 36 Ia. 125, 14 Am. Rep. 505 (but see Havner Land Co. v. MacGregor, 169 Ia. 5, 149 N. W. 617); Tourtillotte v. Tourtillotte, 205 Mass. 547, 91 N. E. 909; Kennerson v. Nash, 208 Mass. 393, 94 N. E. 475; Allen v. Richard, 83 Mo. 55 (but see Harrison v. Craven, 188 Mo. 590, 609, 87 S. W. 962); Watson v. Erb, 33 Oh. St. 35.

<sup>94</sup> Heard v. Piller, L. R. 4 Ch. 548; Rochefoucauld v. Boustead, [1897] 1 Ch. 196. In view of the latter decision, the case of James v. Smith, [1891] 1 Ch. 384, which followed the early English law must be regarded as overruled.

<sup>95</sup> Boswell v. Cunningham, 32 Fla. 277, 13 So. 354, 21 L. R. A. 54; Havner Land Co. v. MacGregor, 169 Ia. 5, 12, 149 N. W. 617; Rose v. Hayden, 35

Kans. 106, 10 Pac. 554, 57 Am. Rep. 145; Wakeman v. Dodd, 27 N. J. Eq. 564; Brookings Land & Trust Co. v. Bertness, 17 S. Dak. 293, 96 N. W. 97. See also Cameron v. Lewis, 56 Miss. 76; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Wellford v. Chancellor, 5 Gratt. 39.

<sup>96</sup> Howland v. Blake, 97 U. S. 624, 24 L. Ed. 1027; Heaton v. Gaines, 198 Ill. 479, 487, 64 N. E. 1081; Pomeroy's Eq. Jur. (3d Ed.), § 1056. In the former case the court said (p. 628), "It is a naked promise by one to buy lands in his own name, pay for them with his own money, and hold them for the benefit of another. It cannot be enforced in equity and is void." Levy v. Brush, 45 N. Y. 589; Richardson v. Johnson, 41 Wis. 100, 22 Am. Rep. 712; Payne v. Patterson, 77 Pa. 134; Bander v. Snyder, 5 Barb. 63; Lathrop v. Hoyt, 7 id. 59; Story, Eq. Jur., Sec. 1201 a, (11th Ed.)."

<sup>97</sup> Pomeroy, Eq. Jur. (3d Ed.), § 1055.

to buy for his principal guilty of a mere breach of contract, or does he commit what equity regards as a fraud? The confidential and fiduciary character of the relation of an agent to his principal, which has been recognized in numerous decisions, seems to justify the acceptance of the latter alternative.

**§ 1025. Employee's duty in regard to information acquired by him.**

The employee must inform his employer of material facts coming to the employee's knowledge in relation to the matter of his employment.<sup>88</sup> Knowledge acquired by the employee during his employment cannot be used for his own advantage to the injury of the employer or in competition with him, during the employment; and even after the employment has ceased, the employee remains subject to a duty not to disclose or to use for his own advantage secret information confidentially intrusted to him.<sup>89</sup> A former employee has on this ground been enjoined from using medical recipes,<sup>1</sup> from using other trade secrets,<sup>2</sup> from using lists of customers obtained from his former employer's books,<sup>3</sup> from multiply-

<sup>88</sup> *Calmon v. Sarraile*, 142 Cal. 638, 76 Pac. 486; *Prince v. Depuy*, 163 Ill. 417, 45 N. E. 298; *Leonard v. Omstead*, 141 Iowa, 485, 119 N. W. 973; *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126; *Holmes v. Cathcart*, 88 Minn. 213, 92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513; *Humbird v. Davis*, 210 Pa. 311, 59 Atl. 1082.

<sup>89</sup> *Merryweather v. Moore*, [1892] 2 Ch. 518 (compiling and retaining a table of measurements of the employer's engines two days before leaving the employment was held a breach of duty). In the following cases the competitive use by a former employee, or of those associated with him of knowledge of secret processes obtained while in the complainant's employ was enjoined. *Philadelphia Extracting Co. v. Keystone Extracting Co.*, 176 Fed. 830; *O. & W. Thum Co. v. Tloczynski*,

114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469; *Sanitas Nut Food Co. v. Cemer*, 134 Mich. 370, 96 N. W. 454; *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102. See also cases of leases cited *supra*, § 1023, *ad fin.*

<sup>1</sup> *Yovatt v. Winyard*, 1 Jac. & W. 394; *Morison v. Moat*, 9 Hare, 241.

<sup>2</sup> *Merryweather v. Moore*, [1892] 2 Ch. 518; *Aronson v. Orlov*, 228 Mass. 1, 116 N. E. 651, cert. denied; 245 U. S. 662, 62 L. Ed. 536, 38 Sup. Ct. 61; *Field v. Ashley*, 79 Mich. 231, 44 N. W. 602; *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140; *Coddington v. Bispham*, 32 N. J. Eq. (9 Stew.) 574. See also *Kirchner v. Gruban*, [1909] 1 Ch. 413, 422.

<sup>3</sup> *Helmere v. Smith*, 35 Ch. D. 449; *Robb v. Green*, [1895] 2 Q. B. 1.

ing copies of pictures or photographs, which he had been employed to make.<sup>4</sup> But the experience and information acquired in the course of the employment, except so far as confidentially communicated or acquired, may be turned by the employee to his own advantage after the termination of the employment.<sup>5</sup> And, in the absence of special agreement to the contrary, an invention and a patent secured for it belong to the inventor, even though the invention was made while he was employed by another, and the invention relates to the matter in which the inventor was employed.<sup>6</sup> It was held in an early case that an employee who planned to leave his employment might solicit, while still engaged in the employment, the future custom of his employer's customers.<sup>7</sup> Such a decision cannot be accepted, however. After an employment has ceased, an employee in the absence of covenants to the contrary, may compete with his former employer and may solicit the business of his customers;<sup>8</sup> but while the employment continues, such conduct cannot be reconciled with the obligation of fidelity.

#### § 1026. Employee's right to indemnity.

An employee whether an agent or a servant is entitled to be reimbursed for all necessary expenses incurred in his employment;<sup>9</sup> but not for expenses incurred improperly or

<sup>4</sup> *Tuck v. Priester*, 19 Q. B. D. 629; *Pollard v. Photographic Co.*, 40 Ch. D. 345.

<sup>5</sup> *Proctor & Collier Co. v. Mahin*, 93 Fed. 875; *New Era, etc., Appliance Co. v. Shannon*, 44 Ill. App. 477.

<sup>6</sup> *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667, 11 Sup. Ct. 88; *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; *Gill v. United States*, 160 U. S. 426, 40 L. Ed. 480, 16 Sup. Ct. 322; *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; *Joliet Mfg. Co. v. Dice*, 105 Ill. 649; *Westervelt v. National Paper &c. Co.*, 154

Ind. 673, 57 N. E. 552; *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 84 N. E. 133, 126 Am. St. Rep. 409; *American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911, Ann. Cas. 1913 B. 509; and see note in 52 Am. St. Rep. 821. *Cf. Bayan v. Scurlock (Ia.)*, 168 N. W. 144.

<sup>7</sup> *Nichol v. Martyn*, 2 Esp. 732.

<sup>8</sup> *Re Irish*, 40 Ch. D. 49; *Proctor & Collier Co. v. Mahin*, 93 Fed. 875; *Lichtenhein v. Fisher*, 87 Hun, 397, 34 N. Y. S. 304. But see *supra*, n. 99. As to the validity of contracts restraining the employee from competition, see *infra*, § 1643.

<sup>9</sup> *Hayley v. Wilkins*, 7 C. B. 886; *Ellis v. Pond*, [1898] 1 Q. B. 426; *Bibb*

without necessity.<sup>10</sup> For the same reason an employee is entitled to indemnity against liability to third persons arising from the performance of the employment.<sup>11</sup>

The employer's obligation to indemnify, however, is subject to certain qualifications:

1. The liability for which indemnity is sought must be caused directly by the employment. Chance injuries incurred while engaged in the employment but not a natural consequence of it, are not recoverable.<sup>12</sup>

2. The employee is not entitled to indemnity from injuries which were assumed by him as part of the risks of the employment. These result from the character of the employment and if the risk in question was or should have been known by the employee, it is assumed by him. It is on this principle that employees have not been allowed recovery for accidental injuries received by them in course of their employment in the absence of negligence on the part of the employer.<sup>13</sup>

3. Where the injury or liability of the employee occurred in the performance of an act which was known to be, or should have been known to be illegal, he cannot recover from the employer;<sup>14</sup> but the reason for denying recovery is the moral

*v. Allen*, 149 U. S. 481, 37 L. Ed. 819, 13 Sup. Ct. 950; *Clifton v. Ross*, 60 Ark. 97, 28 S. W. 1085; *Perin v. Parker*, 126 Ill. 201, 18 N. E. 747, 2 L. R. A. 336; *Arnold v. Arnold*, 83 Kans. 539, 112 Pac. 163; *Greene v. Goddard*, 9 Met. 212; *Blazo v. Gill*, 143 N. Y. 232, 38 N. E. 101.

<sup>10</sup> *Hurst v. Holding*, 3 Taunt. 32; *Ellis v. Pond*, [1898] 1 Q. B. 426; *Veltum v. Koehler*, 85 Minn. 125, 88 N. W. 432.

<sup>11</sup> *Frixione v. Tagliaferro*, 10 Moo. P. C. 175; *Dugdale v. Lovering*, L. R. 10 C. P. 196; *Moore v. Appleton*, 26 Ala. 633, 34 Ala. 147, 73 Am. Dec. 448; *Denney v. Wheelwright*, 60 Miss. 733; *Henderson v. Eckern*, 115 Minn. 410, 132 N. W. 715, Ann. Cas. 1912 D. 989; *Brown v. Mechanics*, etc., Bank, 43 N. Y. App. Div. 173, 59 N. Y. S. 354.

<sup>12</sup> *Halbronn v. International Horse Agency*, [1903] 1 K. B. 270.

<sup>13</sup> *Priestly v. Fowler*, 3 M. & W. 1; *Clarke v. Holmes*, 7 H. & N. 937; *Texas & Pacific R. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Farwell v. Boston & Worcester R.*, 4 Met. 49, 38 Am. Dec. 339; *Coyle v. Griffing Iron Co.*, 63 N. J. L. 609, 44 Atl. 665, 47 L. R. A. 147; *Sweeney v. Berlin, etc., Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631.

<sup>14</sup> There is ordinarily no contribution or indemnity in the case of joint wrongdoers. 1 *Cooley on Torts* (3d Ed.), 254; *Burlee v. Hodge*, 211 Mass. 156, 97 N. E. 920, Ann. Cas. 1913 B. 381; *Longworth v. Stevens* (Tex. Civ. App.), 145 S. W. 257. In the leading case of *Merryweather v.*

blameworthiness of the plaintiff,<sup>15</sup> and where that does not exist recovery may be allowed. Just as an employer who on the doctrine of *respondeat superior* has been held liable for a tort, in fact due to the employee's negligence, may recover over against the employee,<sup>16</sup> though the person injured by the tort might have held either or both the employer and employee liable, so generally where the employee has been morally blameless, though technically committing a tort, the courts have been disposed to protect him. Therefore, in any case where he acted in the belief that he was not committing an illegal act or believed that he was acting in accordance with a *bona fide* claim of right on the part of his employer, he may recover.<sup>17</sup>

Nixon, 1 T. R. 186, where the court held a wrongdoer could not sue another for contribution, Lord Kenyon said: "This decision would not affect cases of indemnity where one man employed another to do acts not unlawful in themselves for the purpose of asserting a right." As to the extent of this exception, see *infra*, § 1631, and *Hobbs v. Hurley*, 117 Me. 449, 104 Atl. 815, and cases cited. Where, however, the employee does an act which is apparently illegal, the right to indemnity is excluded. *Toplis v. Grane*, 5 Bing. (N. C.) 636; *Dugdale v. Lovering*, L. R. 10 C. P. 196, 200, 201. Even though there is an express promise to indemnify. *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376.

<sup>15</sup> See *infra*, § 1630.

<sup>16</sup> *Georgia, etc., R. v. Jossey*, 105 Ga. 271, 31 N. E. 179.

<sup>17</sup> The principle is chiefly illustrated by cases where an officer directed to seize property claimed by one employing him has been held entitled to indemnity from liability to a third person to whom the property belonged. In most of these cases it is true that there was an express promise of indemnity, but on the question of illegal-

ity this seems immaterial. *Battersey's Case*, Winch, 48; *Arundel v. Gardiner*, Cro. Jac. 652; *Humphrys v. Pratt*, 5 Bligh (N. S.), 154; *Collins v. Evans*, 5 Q. B. 820, 830; *Grimes v. Taylor*, 93 Ill. App. 494; *Crossman v. Owen*, 62 Me. 528, and in *Humphrys v. Pratt* and perhaps in *Grimes v. Taylor*, there was no express promise. See also *Long v. Neville*, 36 Cal. 455, 95 Am. Dec. 199; *Tarr v. Northy*, 17 Me. 113, 35 Am. Dec. 232; *Howard v. Clark*, 43 Mo. 344; *Commonwealth v. Vandyke*, 57 Pa. 34. Illustrations of a different sort of the employee's right to indemnity for performing an act actually but not apparently illegal when performed at the employer's request are found in *Howe v. Buffalo, etc., R. Co.*, 37 N. Y. 297; *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376. In Calif. Civ. Code, § 1969, it is provided that the employer is bound to indemnify even though the act directed is unlawful unless the employee at the time of obeying the directions believed them to be unlawful. This provision is copied in N. Dak. Comp. L. (1913), § 6106, and in S. Dak. Civ. Code, § 4941. See also *infra*, §§ 1631, 1751.

### § 1027. Notice of intent to terminate contract of employment.

The termination of a contract of employment is subject to the same rules which govern the discharge of other contracts. Sufficient illustrations have been given in the previous sections of discharge for cause by the employer and cessation of service for cause by the employee. If the contract is for a fixed term whether made so by express words or by implication,<sup>18</sup> the contract expires with the term. No stipulation is implied that in the absence of notice to the contrary the contract will be renewed for another term.<sup>19</sup> Doubtless, however, a usage to that effect would be efficacious. The validity of a usage which permits a party to a contract of employment to cut short the agreed term by giving notice of a certain length has been established in England,<sup>20</sup> and though in Maryland at least such a usage or custom has been declared invalid because inconsistent with the contract,<sup>21</sup> there seems no necessary inconsistency.<sup>22</sup> Where the contract is not for a fixed term, and is, therefore, terminable at will, though such notice as the nature of the contract made reasonable might be necessary, there seems no general principle analogous to that in the law of tenancies at will requiring notice of a certain length of time.<sup>23</sup> Usage if general or known to the parties would clearly be effective to fix

<sup>18</sup> See *supra*, § 39.

<sup>19</sup> *Shortt v. Laery*, 11 N. Zealand L. R. 17; *Cook v. Sydney, etc., Bank*, 3 N. S. Wales L. R. 273.

<sup>20</sup> By custom in England a "contract between the master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages." *Turner v. Mason*, 14 M. & W. 112, per Parke, B. See also *Foxall v. International, etc., Co.*, 16 L. T. (N. S.) 637. And also by custom in England, either party to a contract of domestic service may terminate the contract at the end of the first month by a notice given not less than two weeks before that time. *George v. Davies*, [1911] 2 K. B. 445. No such customs generally exist in the United

States. *Larkin v. Hecksher*, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137.

<sup>21</sup> *Baltimore Base Ball Club v. Pickett*, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304.

<sup>22</sup> In *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56, 59, the validity of such a usage is assumed without discussion. See further, *supra*, §§ 652, 654.

<sup>23</sup> See *Harper v. Haasard*, 113 Mass. 187; *Christensen v. Pacific Coast Borax Co.*, 26 Ore. 302, 38 Pac. 127, and cases cited *supra*, § 39, of contracts of service terminable at will. In *Payzu v. Hannaford*, [1918] 2 K. B. 348, it was held that under a hiring with weekly payments there was an implied term in the contract that reasonable notice should be given of an intent to terminate.

the notice requisite.<sup>24</sup> The contract itself may contain provisions stating that notice of a certain length is necessary or sufficient to determine a contract, and if so these provisions are controlling.<sup>25</sup> A general rule of the employer in regard to notice, of which the employee has knowledge when he enters upon his employment, forms part of the contract.<sup>26</sup>

### § 1028. Compensation.

If the contract between employer and employee specifies the compensation to be paid, the employee is entitled thereto after performing the service, or at any other time or times which may be agreed upon.<sup>27</sup> If no compensation was fixed it becomes a question of fact whether the employment was requested as a favor or as a matter of business. In the latter case a reasonable compensation is the measure of the employee's right.<sup>28</sup>

So far as concerns the liability of the employer for a breach of the duty to pay the agreed compensation where the employee is not in default, it is enough to say here that it involves merely an application of the general principles of the law of damages for breach of contract.<sup>29</sup> Where the employee is in default, several cases must be distinguished. (1) If the default is so slight as not to justify discharge, or if though sufficiently serious to justify discharge, the employer with knowledge of the facts nevertheless continues the employment, the employee is entitled to the agreed compensation, and the employer must seek redress by cross action, counterclaim or recoupment as local procedure may dictate.<sup>30</sup>

<sup>24</sup> See *Grundon v. Master*, 1 T. L. Rep. 205 (commercial traveller); *Fox-Bourne v. Vernon*, 10 T. L. R. 647 (editor); *Lamberton v. Vancouver, etc., Co.*, 11 Brit. Col. 67 (restaurant manager).

<sup>25</sup> See *Reid v. Explosives Co.*, 19 Q. B. D. 264; *McKean v. Cowley*, 7 L. T. (N. S.) 828; *White Sewing Machine Co. v. Shaddock*, 79 Ark. 220, 95 S. W. 143; *Derry v. Board of Education*, 102 Mich. 631, 61 N. W. 61; *DeVere v. Gilmore*, 25 N. Y. Misc. 306,

54 N. Y. S. 587; *Leslie v. Robie*, 84 N. Y. S. 289; *Johnson v. Pacific Bank, etc., Co.*, 59 Wash. 58.

<sup>26</sup> *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, 48 S. E. 177; *Pottsville Iron & Steel Co. v. Good*, 116 Pa. 335, 9 Atl. 497, 2 Am. St. Rep. 614.

<sup>27</sup> See *supra*, §§ 830, 862.

<sup>28</sup> See *supra*, § 146.

<sup>29</sup> See *infra*, §§ 1358 *et seq.*

<sup>30</sup> *Veasey v. Carson*, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241; *Matthews v. Industrial Lumber Co.*,

(2) If the breach of duty is sufficiently serious to justify discharge, and the employee is discharged there can be no recovery of compensation under the contract if it is indivisible;<sup>31</sup> and even though it is divisible, there can be no recovery on the contract for any portion of a division which owing to the fault of the employee has not been completed.<sup>32</sup> Whether the employee can recover on a *quantum meruit* for the value of services, when his own fault precludes recovery on the contract, should depend on the general question whether any party who has made a material breach of his contract may recover on a quasi-contract for benefit which he has given the other party.<sup>33</sup>

(3) If the contract is divisible, however, the right of the employee to recover the amount for any division of the contract completed at the time of his discharge is unaffected by the question whether there was cause for the discharge,<sup>34</sup> though it may be important in deciding the employer's right of recoupment or counterclaim.<sup>35</sup> Non-payment of an instalment of compensation when it is due, like non-payment of an instalment of money under any divisible contract,<sup>36</sup> will soon become a material breach.<sup>37</sup> It is a mistake, however,

91 S. Car. 568, 75 S. E. 170, 45 L. R. A. (N. S.) 644, Ann. Cas. 1914 A. 45; *Macnamara v. Martin*, 7 Comm. L. R. (Austr.) 699.

<sup>31</sup> *Boston, etc., Ice Co. v. Ansell*, 39 Ch. D. 339, 364; *Latham v. Barwick*, 87 Ark. 328, 330, 113 S. W. 646; *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200; *Stark v. Parker*, 2 Pick. 267, 13 Am. Dec. 425; *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524; *Walsh v. New York, etc., Co.*, 88 N. Y. App. D. 477, 85 N. Y. S. 83; *Pullen v. Green*, 75 N. C. 215; *Mudgett v. Texas, etc., Mfg. Co.* (Tex. Civ. App.), 61 S. W. 149.

<sup>32</sup> *Ridgeway v. Hungerford Market Co.*, 3 A. & E. 171; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581; *Beach v. Mullin*, 34 N. J. L. 343; and see cases in the preceding note.

<sup>33</sup> See *infra*, § 1477.

<sup>34</sup> *Button v. Thompson*, L. R. 4 C. P. 330; *Sherley v. Sherley*, 118 Md. 1, 84 Atl. 160; *Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; *Robinson v. Sanders*, 24 Miss. 391; *Maratta v. Heer Dry Goods Co.*, 190 Mo. App. 420, 177 S. W. 718; *Walker v. John Hancock Mut. L. Ins. Co.*, 80 N. J. L. 342, 345, 79 Atl. 354, 356, 35 L. R. A. (N. S.) 153, Ann. Cas. 1912 A. 526; *Tipton v. Feitner*, 20 N. Y. 423; *Walsh v. New York, etc., Co.*, 88 N. Y. App. Div. 477, 85 N. Y. S. 83; *Cristall v. Gerst*, (Supr. C. App. Term) 169 N. Y. S. 64; *Peniston v. John Y. Huber Co.*, 196 Pa. 580, 46 Atl. 934.

<sup>35</sup> See *infra*, § 1350.

<sup>36</sup> See *supra*, § 869.

<sup>37</sup> *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894; *Bowdish v. Briggs*, 5 N. Y. App. Div. 592, 594, 39 N. Y. S. 371; *Tichenor v. Bruckheimer*, 40 N. Y.



to suppose that any breach of duty whatever by the employer, whether to give compensation or to fulfil the other duties of his position, necessarily gives ground for immediate abandonment of his services by the employee.<sup>38</sup> Here, as always in bilateral contracts not expressly conditional, the test of materiality must be applied.<sup>39</sup> An added severity of the law if the employment is of a fiduciary nature is referred to in other sections.<sup>40</sup>

### § 1029. Attorney and client.

It has been decided by the New York Court of Appeals,<sup>41</sup> that a different rule prevails between attorney and client from that ordinarily applicable to employer and employee—that the client may break a contract to employ an attorney for a fixed service without other liability than to pay for services previously rendered. Such a rule has been justly criticised.<sup>42</sup> An attorney is bound by the contract both as to his services and the compensation for them.<sup>43</sup> It is a fundamental principle of contracts that both parties must be bound by the agreement. To this rule there is the notable exception of voidable promises.<sup>44</sup> The decision in question would make the contracts of attorney and client voidable at the option of the client. It is doubtful whether policy demands the extension of such an anomaly. The attorney has no peculiar advantage in the formation of the agreement, for the client, unlike the infant, is presumably competent to contract; the fiduciary relation arises afterward. On the other hand, such a right would enable the client unjustifiably to deprive the attorney entirely of the benefits of the contract, though the services were substantially complete. A client may dissolve his relationship with the attorney at any

Misc. 194, 81 N. Y. S. 653; *LeCoursier v. Russell*, 82 Wis. 265, 52 N. W. 176. See also *Dunn v. Crichfield*, 214 Ill. 292, 73 N. E. 386.

<sup>38</sup> *Reg. v. Wilton*, 13 Vict. L. R. 710, 711. See also *Dockham v. Smith*, 113 Mass. 320, 18 Am. Rep. 495; *Ulrich v. Hower*, 156 Pa. 414, 27 Atl. 243.

<sup>39</sup> See *supra*, §§ 841 *et seq.*, 866.

<sup>40</sup> *Supra*, § 1022, *infra*, § 1477, *ad fin.*

<sup>41</sup> *Martin v. Camp*, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917 F. 402.

<sup>42</sup> 30 Harv. L. Rev. 185.

<sup>43</sup> *Houghton v. Clarke*, 80 Cal. 417, 22 Pac. 288. See *Tenney v. Berger*, 93 N. Y. 524, 529, 45 Am. Rep. 263.

<sup>44</sup> See *supra*, § 105.

time and without cause.<sup>45</sup> This would seem to give him ample protection, without also freeing him from liability for unjustifiably doing so in violation of his contract. It follows that the attorney should be allowed to recover for breach of the contract. The weight of authority is to this effect, and opposed to the decision of the New York court.<sup>46</sup> The scope of that decision is expressly limited to an attorney employed for a single litigation, but it seems difficult to distinguish such a case from any other contract between attorney and client.

Before the relationship of attorney and client is entered into the contract for compensation stands upon the same footing as similar contracts between other persons, but after the relation has once arisen, the attorney is subject to the duties of a fiduciary, and the fairness of a contract then made will be carefully scrutinized.<sup>46a</sup>

#### § 1030. Compensation by the piece or by commission.

Where an employee's contract entitles him to payment not according to the time which he has worked, but according to his accomplishment, the same question may arise as where he is to be paid by time, namely, is the contract divisible, entitling an employee even though he has left his employment without cause or been discharged from it for good reason, to recover for what he has done? It may be the true construction of such a contract that the contract is entire and no compensation is earned until the full term of employment has been completed, the piece work then furnishing the rate. The usages of business furnish the best guide for interpreting such contracts.<sup>47</sup>

In the common case of a real estate agent or broker, the

<sup>45</sup> *In re Dunn*, 205 N. Y. 398, 98 N. E. 914; *Lynch v. Lynch*, 99 Ill. App. 454; *Delaney v. Husband*, 64 N. J. L. 275, 45 Atl. 265.

<sup>46</sup> *Maynard v. Reynolds*, 251 Fed. 784, 164 C. C. A. 18, cert. denied, 248 U. S. 578, 39 S. Ct. 19; *Bartlett v. Odd-Fellows' Sav. Bk.*, 79 Cal. 218, 21 Pac. 743; *Scheinesohn v. Lemonek*, 84 Oh. St. 424, 95 N. E. 913, Ann. Cas.

1912 C. 737; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060.

<sup>46a</sup> See *infra*, § 1627.

<sup>47</sup> See *Boston, etc., Ice Co. v. Ansell*, 39 Ch. D. 339, 360, 366; *Thayer v. Wadsworth*, 19 Pick. 349; *M'Millan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Goldstein v. White*, 16 N. Y. S. 860.

ordinary business understanding, and therefore the ordinary rule of law, is that the agent becomes entitled to his commission when he has procured for his client one who is able and ready and willing to contract with the client on the terms which the latter has stated to his agent.<sup>45</sup> But whatever the custom may be in the absence of express agreement, it may be modified by the parties as they see fit, either by making the commission conditional on an actual sale,<sup>46</sup> or by en-

<sup>45</sup> *McGavock v. Woodlief*, 20 How. 221, 15 L. Ed. 884; *Payseno v. Swensen*, 178 Fed. 999; *Richardson v. Olanthe Milling &c. Co.*, 167 Ala. 411, 52 So. 659; *Poston v. Hall*, 97 Ark. 23, 132 S. W. 1001; *Oullahan v. Baldwin*, 100 Cal. 648, 35 Pac. 310; *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; *Chaffee v. Widman*, 48 Colo. 34, 108 Pac. 995, 139 Am. St. Rep. 220; *Home Banking Co. v. Baum*, 85 Conn. 383, 82 Atl. 970; *Butler v. Ouwelant*, 90 Conn. 434, 97 Atl. 310; *Ritch v. Robertson* (Conn. 1919), 106 Atl. 509; *Carter v. Owens*, 58 Fla. 204, 50 So. 641, 25 L. R. A. (N. S.) 736; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Oliver v. Sattler*, 233 Ill. 536, 84 N. E. 652; *Hersher v. Wells*, 103 Ill. App. 418 (*cf.* *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162; *Fox v. Ryan*, 240 Ill. 391, 88 N. E. 974); *Fischer v. Bell*, 91 Ind. 243; *Manker v. Tough*, 79 Kans. 46, 98 Pac. 792, 19 L. R. A. (N. S.) 675, 17 Ann. Cas. 208; *Mitchell v. Weddington* (Ky.), 122 S. W. 802; *Smith v. Lawrence*, 98 Me. 92, 56 Atl. 455; *Livesy v. Miller*, 61 Md. 336; *Willard v. Wright*, 203 Mass. 406, 89 N. E. 559; *Goodnough v. Kinney*, 205 Mass. 203, 91 N. E. 295; *Johnstone v. Cochran*, 231 Mass. 472, 121 N. E. 529; *Wood v. Smith*, 162 Mich. 334, 127 N. W. 277; *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426; *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683; *Slayback v. Wetzell*, 146 Mo. App. 171, 123 S. W. 982;

*Hallstead v. Perrigo*, 87 Neb. 128, 126 N. W. 1078; *Parker v. Estabrook*, 68 N. H. 349, 44 Atl. 484; *Hinds v. Henry*, 36 N. J. L. 328; *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790; *Backer v. Ratkowsky*, 137 N. Y. App. Div. 559, 122 N. Y. S. 225 (see also *Gilder v. Davis*, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398; *Colvin v. Post Mtg. & Land Co.*, 225 N. Y. 510, 122 N. E. 454); *Mallonee v. Young*, 119 N. C. 549, 26 S. E. 141; *Ward v. McQueen*, 13 N. Dak. 153, 100 N. W. 253; *Pfanz v. Humburg*, 82 Ohio 1, 12, 91 N. E. 863, 29 L. R. A. (N. S.) 533; *Grindstaff v. Merchants' &c. Trust Co.*, 61 Oreg. 310, 122 Pac. 46; *Turner v. Baker*, 225 Pa. 359, 74 Atl. 172; *Butler v. Baker*, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. Rep. 897; *Minder & J. Land Co. v. Brusteun*, 24 S. Dak. 537, 124 N. W. 723; *Woodall v. Foster*, 91 Tenn. 195, 18 S. W. 241; *Hege, Hachez & Phillips Co. v. Hessel*, 57 Wash. 499, 107 Pac. 375; *Hugill v. Weekley*, 64 W. Va. 210, 61 S. E. 360, 15 L. R. A. (N. S.) 1262; *McCabe v. Jones*, 141 Wis. 540, 124 N. W. 486. A few cases require that the broker shall have obtained a written offer or contract from the person whom he procures for his customer. *Gilliland v. Jaynes*, 36 Okla. 563, 129 Pac. 8, 46 L. R. A. (N. S.) 129; *Bolton v. Coburn*, 78 Neb. 731, 111 N. W. 780.

<sup>46</sup> *McDermott v. Mahoney*, 139 Ia. 292, 302, 115 N. W. 32, 116 N. W. 788; *Stoutenburgh v. Evans*, 142 Ia. 239, 120 N. W. 59; *Migneault v. Gunther*,

titling the broker in consideration of his efforts to a commission whether the client himself procures the person with whom he deals or the broker procures him.<sup>50</sup> It is a common method of compensating the agents of life insurance companies to agree to give them a certain percentage of the first premium, and thereafter to give them a smaller percentage of renewal premiums. Under such a contract, has an agent who has induced a customer to take out a policy thereby acquired, irrespective of what may happen thereafter, a right to a percentage not only of the first premium but of the renewal premiums? The weight of authority sustains the view that the percentage of renewal premiums is not simply payment for securing the insurance but compensation for other services in the prosecution and preservation of the company's business; and, accordingly, if the agent is discharged for cause, the company is under no further liability in respect to the renewal premiums;<sup>51</sup> and the same doctrine has been applied where the death of the agent terminated the contract.<sup>52</sup> If, however, the discharge was wrongful, the agent is entitled

171 Ill. App. 311; *Pfans v. Humburg*, 82 Ohio, 1, 91 N. E. 863, 29 L. R. A. (N. S.) 533.

<sup>50</sup> In *Stevenson Co. v. Oppenheimer*, 91 N. J. L. 479, 104 Atl. 88, the court said: "While the general rule is that a broker to earn his commissions must be the procuring cause of the sale, the qualification has been imposed upon the rule by repeated adjudications in this State that the parties may by special agreement so limit the operation of the rule as to make its application depend upon the happening of some stated certain event. *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Hinds v. Henry*, 36 N. J. L. 328; *Payne v. Twitchell*, 81 N. J. L. 193, 81 Atl. 350; *Dresser v. Gilbert*, 81 N. J. L. 358, 79 Atl. 1043. The last case cited presents an instance where the owner contracted to pay the stipulated commission to the agent upon a sale of the property 'by him, me, or any other person,' and this court held upon a sale of the property

by the owner himself that the contingency presented by the contract thereby arose, and that the agent was entitled to his commission."

<sup>51</sup> *Phoenix Mutual Life Ins. Co. v. Holloway*, 51 Conn. 311, 50 Am. Rep. 20; *Jacobson v. Connecticut Mutual Life Ins. Co.*, 61 Minn. 330, 63 N. W. 740; *Walker v. John Hancock Mut. L. Ins. Co.*, 80 N. J. L. 342, 79 Atl. 354, 35 L. R. A. (N. S.) 153; *Insurance Company v. Williams*, 91 N. C. 69. See also *Frankel v. Michigan Mutual Life Ins. Co.*, 158 Ind. 304, 62 N. E. 703; *King v. Raleigh*, 100 Mo. App. 1, 70 S. W. 251; *Ballard v. Travelers' Ins. Co.*, 119 N. C. 187, 25 S. E. 956. Contrary decisions are *Hercules Mutual Life Assur. Soc. v. Brinker*, 77 N. Y. 435; *Hale v. Brooklyn Life Ins. Co.*, 120 N. Y. 294, 24 N. E. 317.

<sup>52</sup> *Mills v. Union Central Life Ins. Co.*, 77 Miss. 327, 28 So. 954, 78 Am. St. Rep. 522.

to damages for the refusal to allow him to earn the renewal premiums.<sup>53</sup>

### § 1031. Contracts to marry.

Though marriage itself contains the elements of a contract, the rights and remedies of a married couple are governed by laws based on public policy irrespective of the intent of the parties or of the general rules of contracts.<sup>54</sup> The subject, therefore, will not here be considered; but executory mutual promises to marry are subject in the main to the principles governing other bilateral contracts, though the nature of the contract to marry is such that ordinary principles find special and peculiar applications. In the first place, a contract to marry involves implied undertakings as to the conduct of the parties in the meanwhile. Though it is fanciful to conceive of parties to an ordinary executory contract as agreeing to occupy a certain status or relation to one another until the time for performance, it is an obvious implication of fact from mutual promises to marry.<sup>55</sup> Therefore, during the engagement the parties are bound to certain proprieties of behavior. Not only unchastity,<sup>56</sup> but indecent conduct,<sup>57</sup> and doubtless the commission of a serious crime will justify breaking the engagement.<sup>58</sup> Lack of chastity, prior to the engagement if unknown to the other party also justifies a breach of the engagement if action is taken promptly

<sup>53</sup> *Wells v. National Life Assoc.*, 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33.

<sup>54</sup> See *Wiley v. Wiley*, (Ind. App. 1919), 123 N. E. 252; *Gatto v. Gatto*, (N. H. 1919), 106 Atl. 493, and cases cited.

<sup>55</sup> See *infra*, § 1320.

<sup>56</sup> *Colburn v. Marble*, 196 Mass. 376, 381, 82 N. E. 28; *Sheahan v. Barry*, 27 Mich. 217, 222; *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642, 643, Ann. Cas. 1912 D. 960; *Kelley v. Highfield*, 15 Oreg. 277, 14 Pac. 744; *Grant v. Cornock*, 16 Ont. App. 532. Of course illicit intercourse with the defendant is no defence. *Dunn v.*

*Trout*, 87 Ill. App. 432; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422.

<sup>57</sup> In *O'Neill v. Beland*, 133 Ill. App. 594, it was held error to refuse to instruct the jury that if the plaintiff while engaged to the defendant "Carried on an immodest, impure and lewd correspondence by letter with a married man," she could not recover.

<sup>58</sup> *Gross v. Hochstim*, 72 N. Y. Misc. 343, 130 N. Y. S. 315. In *Grant v. Cornock*, 16 Ont. App. 532, the fact that the woman was in the habit of swearing and using coarse, obscene and profane language was held no defence.

after discovery of the facts.<sup>50</sup> Though the cases with one exception involve the woman's lack of chastity, it is said that the law "is in this respect impartial between the sexes."<sup>51</sup> The decisions thus far have not much admitted as a defence misconduct other than a lack of chastity, when occurring prior to the engagement. Neither acts of gross immodesty,<sup>52</sup> nor the fact that the plaintiff "has in some respects violated the criminal law" have been held a defence.<sup>53</sup> So the possession of a strain of negro blood,<sup>54</sup> or of a disreputable brother,<sup>55</sup> or mother,<sup>56</sup> or of vulgar manners and a habit of swearing<sup>56</sup> is no excuse. There must, however, be some limit to the right of the possessor of a dirty past to inflict it upon an ignorant partner. A former professional burglar

<sup>50</sup> *Young v. Murphy*, 3 Bing. N. C. 54; *Beach v. Merrick*, 1 C. & F. 463; *Irving v. Greenwood*, 1 C. & P. 350; *Espy v. Jones*, 37 Ala. 379; *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386; *La Porte v. Wallace*, 89 Ill. App. 517; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422; *Williams v. Fahn*, 119 Ia. 746, 94 N. W. 252; *Edmonds v. Hughes*, 115 Ky. 561; 74 S. W. 283; *Snowman v. Wardwell*, 32 Me. 275; *Garmon v. Henderson*, 114 Me. 75, 85, 95 Atl. 409, 115 Me. 422, 99 Atl. 177; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242; *Markham v. Herrick*, 82 Mo. App. 327; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875; *Budd v. Crea*, 6 N. J. L. 370; *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642; *Goodal v. Thurman*, 1 Head, 209; *Foster v. Hanchett*, 68 Vt. 319, 35 Atl. 316, 54 Am. St. Rep. 886.

<sup>51</sup> *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642, 643. The court adds: "In *Baddeley v. Mortlock*, 1 Holt, 151, an action for breach of promise of marriage, the woman was the defendant and it was held, 'If a woman improvidently promise to marry a man, who turns out upon inquiry to be of bad character, she is not bound to perform her promise.'" It may be ob-

served that this authority hardly supports the position that a single slip on the part of the man prior to the engagement would justify a breach of the engagement, as it undoubtedly would justify a breach if the situation of the parties were reversed.

<sup>52</sup> In *Colburn v. Marble*, 196 Mass. 376, at p. 381, 82 N. E. 28, 124 Am. St. Rep. 561, the court says: "Conduct of this kind prior to the engagement never has been held to justify a breach of promise." It has been sometimes held that evidence of this sort, though not an absolute bar to recovery, is admissible in mitigation of damages, but the criticism of such decisions in *Colburn v. Marble*, *supra*, seems sound.

<sup>53</sup> *Colburn v. Marble*, 196 Mass. 376, 381, 82 N. E. 28, 124 Am. St. Rep. 561; *Berry v. Bakeman*, 44 Me. 164.

<sup>54</sup> *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373.

<sup>55</sup> *Sherman v. Rawson*, 102 Mass. 395.

<sup>56</sup> *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

<sup>57</sup> *Berry v. Bakeman*, 44 Me. 164; *Grant v. Cornock*, 16 Ont. App. 532.

or one guilty of other serious crimes surely cannot maintain an action against one who in ignorance of his past has promised to marry him, and who refuses to do so on discovering the facts.<sup>67</sup> If a man had shown himself prior to the engagement a man of brutal and violent temper, who had struck and abused women of his family, might not the woman who had accepted him ignorantly be excused from keeping her promise though she could not prove that he had struck anybody since the engagement,<sup>68</sup> and had made no representations to her that he had the disposition of a lamb?<sup>69</sup> Though the parties to such a contract cannot be held by mere implication to warrant much, they must each be held to warrant the minimum that the other could reasonably expect. In the cases it is generally assumed that the defendant must make out a case of fraud and that mere silence will not constitute fraud, though concealment or a statement so partial as to be deceptive will;<sup>70</sup> but there seems no reason why the parties should not be held as warrantors. The analogy of the law of sales, bailments and of master and servant supports this. Nor should the warranty be confined to chastity. It may well be said generally that whatever misconduct in the party who brings the action tends necessarily to destroy the confidence essential to the marriage relation, may properly absolve the other party from his obligation and be a defence, if it was unknown to him when the contract was made, or occurred subsequently, and if when made known to him he refuses to fulfil the promise.<sup>71</sup> Failure to break an engagement

<sup>67</sup> In *Gross v. Hochstim*, 72 N. Y. Misc. 343, 130 N. Y. S. 315 (an action by the man against the woman), the court held an allegation that the plaintiff had obtained money upon the false statement that it was for his employers, imputed "dishonesty to the plaintiff of so grave a character that it would in my judgment justify the defendant in her refusal to marry the plaintiff." It does not appear in the report whether the dishonesty occurred before or after the engagement. Apparently the court thought this point immaterial.

<sup>68</sup> See *Leeds v. Cook*, 4 Esp. 256.

<sup>69</sup> As to the right to annul actual marriage because of concealed facts, see *Lyon v. Lyon*, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996; *Allen v. Allen*, 85 N. J. Eq. 55, 95 Atl. 363; *Sobol v. Sobol*, 88 N. Y. Misc. 277, 150 N. Y. S. 248.

<sup>70</sup> See cases in this section *passim* and especially *Van Houten v. Morse*, 162 Mass. 142, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373.

<sup>71</sup> *Berry v. Bakeman*, 44 Me. 164, 166.

promptly on discovery of facts justifying that course, is an election to continue the engagement.<sup>72</sup> The effect of physical incapacity or ill health on a contract to marry is elsewhere considered.<sup>73</sup>

<sup>72</sup> See cases in this section *passim*.

<sup>73</sup> See *infra*, § 1943.



## CHAPTER XXXI

### CONTRACTS OF BAILMENT AND OF INNKEEPERS

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**§ 1032. Definition of bailment.**

A bailment may be defined as the rightful possession of goods by one who is not the owner. Rarely the situation may arise (as by finding) without the volition of the owner. In such a case the law of contracts does not govern the rights of the parties; but in most bailments the goods have either been delivered by the bailor to the bailee, or have been retained by the bailee (as where a seller continues in possession) under some agreement expressed or implied in fact. Even in such cases the mutual rights of the parties are often, if not usually, so inadequately fixed by their agreement, that rules of law not based on the agreement though not inconsistent with it must be called upon to supply the deficiency.<sup>1</sup> In the main, however, the mutual rights of the bailee and bailor may be said to be governed by agreement. But the rights of either bailor or bailee in respect to the bailed property against third persons depend upon the law of property, and are not within the scope of this treatise.

Though possession of real property may be delivered by the owner to another, the term bailment is not applied to such a transaction. The law of real property has preserved its separate rules.

**§ 1033. Kinds of bailment.**

Lord Holt, borrowing his terminology somewhat from the Roman Law, divided bailments into six classes,<sup>2</sup>

1. *Depositum*, a gratuitous bailment of goods to be kept for the bailor.

2. *Commodatum*, a bailment of goods to be used by the bailee without charge.

3. *Locatio rei*, a bailment for hire paid to the bailor of goods to be used by the bailee.

4. *Vadium*, a bailment to secure a debt; a pledge.

5. *Locatio operis faciendi*, a bailment for reward paid to the bailee where goods are to be kept, or carried, or have something done to them by him.

<sup>1</sup> For a discussion of how far such rules may be considered, part of the contract, see *supra*, §§ 22a, 615.

<sup>2</sup> *Coggs v. Bernard*, 2 Lord Raym. 909.

6. *Mandatum*, a bailment for the gratuitous carriage of the goods or service in regard to them.

The importance of consideration in the common law makes a more practical division that of Schouler: <sup>3</sup>

1. Gratuitous bailments for the bailor's sole benefit.
2. Gratuitous bailments for the bailee's sole benefit.
3. Bailments for mutual benefit.
4. Bailments to which the law, for reasons of policy, attaches exceptional obligations.

**§ 1034. Mutual rights and duties of bailor and bailee.**

Until the acquisition of possession of the property by the bailee though there may be a contract for a bailment, there is no actual bailment. After the bailee has acquired possession, the bailor's possible duties are not likely to go beyond an obligation to pay the bailee for his services and expenses in regard to the goods, and to take the goods back in due season and terminate the bailment, and in the case of a bailment for hire paid by the bailee, an implied warranty of the character of the goods. The bailee's duties, however, may be more varied and though the extent of his obligation may be enlarged or diminished by agreement, in the absence of such agreement the law fixes the standard of care which he must exercise in the performance of the functions which he has undertaken. These different standards may be included in consideration of the subject, for though they generally fall appropriately rather in the law of torts than in that of contracts,<sup>4</sup> the rights and obligations of the parties under a contract of bailment may include by implication rights and duties imposed upon the bailee by law irrespective of agreement, as well as those voluntarily undertaken.

**§ 1035. The bailee's obligation to redeliver.**

It is usual to add as part of the definition of bailment that the bailee must be under a duty to redeliver the goods, but all that is essential is contained in the definition in the previous section, for one who has the right to permanent possession is necessarily the owner; and since one entitled to

<sup>3</sup> Bailments and Carriers (1905), 4.

<sup>4</sup> See *supra*, § 138.

temporary possession only is under a duty, either present or future, to surrender the goods or their proceeds on demand or to seek the owner and deliver them to him, he is a bailee. Sir William Jones, in his work on Bailments,<sup>5</sup> says: "It may also be proper to mention the distinction between an obligation to restore the specific things, and a power or necessity of returning others equal in value. In the first case it is a regular bailment; in the second it becomes a debt." This statement, in the same or slightly altered form, has been often quoted as expressing the correct doctrine.<sup>6</sup> A little consideration will show that the statement cannot be literally accepted. Not only is it true that goods may be bailed under an agreement to return not the goods *in specie* but their product, as where milk is to be made into cheese or butter, or apples into cider;<sup>7</sup> but if A. transfers the possession of A.'s horse to B. as A.'s agent, instructing B. to take the horse to town and receive in exchange therefor a horse from C., which is to be brought back to A., it is clear that B. is a bailee.<sup>8</sup> It may be urged that while B. has A.'s horse in his possession, A. may at any time revoke B.'s authority and reclaim the horse originally delivered to B. and that, therefore, B. is within the definition of Sir William Jones, since he is under an obligation to restore the specific thing given him. This is true, but the fact that the bargain does not contemplate the return of the specified thing delivered to the agent is likely to lead and has led courts to conceive that under Sir William Jones' definition the transaction is not a bailment. Moreover, it may be a part of the bargain between A. and B. that B. shall derive a profit for making the exchange suggested and B. may have made some advance upon the property, and in that case B.'s agency, if revocable at all, cannot be revoked without repaying him any advance he may have

<sup>5</sup> 2d ed., p. 102.

<sup>6</sup> Brown, Bailments, 3; Benjamin, Sales; 2 Kent's Comm. 589; South Australian Ins. Co. v. Randell, L. R. 3 P. C. 101; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309. See the criticism in Norwegian

Plow Co. v. Clark, 102 Iowa, 31, 36, 70 N. W. 808.

<sup>7</sup> See Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215.

<sup>8</sup> The bailment of grain in elevators where it is mixed with other grain involves the application of the same principle. See Williston, Sales, § 154.

made and profits he would have earned. Yet it is clear that B. would be still a bailee of A.'s goods, not a purchaser of them. Where goods are consigned for sale, it is always the hope, and generally the expectation, that the goods consigned will be sold by the consignee and money instead of the goods to be returned to the owner. Nevertheless it is clear that the consignee is properly to be described as a bailee if his hold is for the consignor and the sale is made by him as agent for the consignor. This indeed is the typical case of a fact bailment. In such a case money received by the consignee or fact for the goods is received under an agency or trust in favor of the consignor,<sup>9</sup> and the duties of the consignee in regard to keeping his principal's funds separate from his own are governed by the general rules of the law of agencies and trusts which forbid an agent or trustee to mingle his own money with that of his principal or beneficiary, and forbid him to substitute the relation of debtor and creditor for that of principal and agent or of trustee and *cestui que* of trust.<sup>10</sup>

### § 1036. How far a bailee can deny his bailor's title.

It is generally stated that a bailee cannot deny his bailor's title; but the maxim is too broadly stated in the early cases and has sometimes been repeated in recent times without qualifications that are necessary.<sup>11</sup> It is true that the bailee cannot set up title in himself, unless it has been acquired directly or indirectly from a transfer made by the bailor subsequent to the bailment. Acceptance of the bailment

<sup>9</sup> *Richardson Mfg. Co. v. Brooks*, 95 Me. 146, 49 Atl. 672.

<sup>10</sup> In *B. Sturtevant Co. v. Cumberland*, 106 Md. 587, 68 Atl. 351, 353, the court more accurately than Sir William Jones says: "The identical thing is to be restored or its proceeds after sale." And see *Sturm v. Boker*, 150 U. S. 312, 329, 37 L. Ed. 1093, 14 Sup. Ct. Rep. 99; *Ellet-Kendall Shoe Co. v. Martin*, 222 Fed. 851, 138 C. C. A. 277; *Holbert v. Keller*, 161 Ia. 723, 142 N. W. 962. But even this definition does not cover a consignment with

an option on the part of the bailee to become merely a debtor for a fixed amount on sale of the goods or on another contingency; yet until the contingency happens there is a bailment. See *Collyer v. Krakauer*, 129 N. Y. App. Div. 797, 107 N. Y. S. 739; *American Car Co. v. Altoona R. Co.*, 218 Pa. 519, 67 Atl. 838; *State v. Howell*, 3 Boyce (Del.), 387, 84 Atl. 871.

<sup>11</sup> See *Jensen v. Eagle Ore Co.*, 47 Colo. 306, 107 Pac. 259, 33 L. R. A. (N. S.) 681, and note.

precludes the bailee from doing more than this.<sup>12</sup> Nor can he set up in an action at law the title of a third person without authority of the latter. For could he do this successfully he might do so merely for the purpose of defeating the bailor's claim, in order that he himself might retain the goods, not as agent for the true owner, but for his own benefit.<sup>13</sup>

Unquestionably delivery or attornment to the true owner, after a demand, excuses the bailor from liability for refusal to redeliver to the bailee.<sup>14</sup> It is sometimes said that the bailee should never volunteer a dispute of his bailor's title, but this statement is not wholly correct. If a bailee knows goods are stolen, or that the bailor is acting adversely to a clearly valid right, even though the true owner has as yet made no demand for them, the bailee will be liable to him for conversion if delivery is made to the bailor.<sup>15</sup> In case,

<sup>12</sup> *Simpson v. Wrenn*, 50 Ill. 222, 99 Am. Dec. 511; *Agnew v. Baker*, 205 Ill. App. 56; *Shellhouse v. Field*, 49 Ind. App. 659, 97 N. E. 940; *Thompson v. Williams*, 30 Kans. 114, 1 Pac. 47; *Osgood v. Nichols*, 5 Gray, 420; *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229; *Hampton v. Swisher*, 4 N. J. L. 73. But see *Valentine v. Long Island R. Co.*, 187 N. Y. 121, 79 N. E. 849. See the provisions of the Uniform Warehouse Receipts Act, *infra*, § 1054.

<sup>13</sup> *Stonard v. Dunkin*, 2 Campb. 344; *Holl v. Griffin*, 10 Bing. 246; *Betteley v. Reed*, 4 Q. B. 511; *Bondy v. American Transfer Co.*, 15 Cal. App. 746, 115 Pac. 965; *Moses v. Taylor*, 6 Mackey, 255; *Sinclair v. Murphy*, 14 Mich. 392; *Sherwood v. Neal*, 41 Mo. App. 416; *Aubery v. Fiske*, 36 N. Y. 47; *Colbath v. Hoefer*, 43 Or. 366, 73 Pac. 10; *Street v. Farmers' Elevator Co.*, 33 So. Dak. 601, 146 N. W. 1077; *McCafferty v. Brady*, 19 W. N. C. 553, 9 Atl. 37; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145; *Tancil v. Seaton*, 28 Gratt. 601, 606, 26 Am. Rep. 380. The principle was held inapplicable where the bailor's defect in title was

due to an assignment subsequent to the bailment. *Roberts v. Noyes*, 76 Me. 590.

<sup>14</sup> *Biddle v. Bond*, 6 B. & S. 225; *Finlay v. Liverpool, etc.*, S. S. Co., 23 L. T. (N. S.) 251; *The Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Atchison & Co. v. International & Co.*, 247 Fed. 265, 267, 159 C. C. A. 359; *Davis v. Donohoe-Kelly Banking Co.*, 152 Cal. 282, 92 Pac. 639; *Mullins v. Chickering*, 110 N. Y. 513, 18 N. E. 377, 1 L. R. A. 463.

<sup>15</sup> *Towne v. St. Anthony Elev. Co.*, 8 N. Dak. 200, 77 N. W. 608. In this case the issue of documents of title to a bailor who, as the bailee knew, had no title, was held to be a conversion. See also *Nelson v. Iverson*, 17 Ala. 216; *Steele v. Marsicano*, 102 Cal. 666, 669, 36 Pac. 920; *Varney v. Curtis*, 213 Mass. 309, 100 N. E. 650, L. R. A. 1916 A. 629, Ann. Cas. 1914 A. 340. The law has probably been otherwise. *Biddle v. Bond*, 6 B. & S. 225, 233; *Hill v. Hayes*, 38 Conn. 532; *Loring v. Mulcahey*, 3 Allen, 575. But the earlier authorities were doubtless based on the difficulty of giving the bailee a proper defence. If, how-

## § 1037 CONTRACTS OF BAILMENT AND OF INNKEEPER

therefore, that the bailee knows of an adverse claim deliver to the bailor at his peril. The bailee must, for protection, choose one of two courses. First, he may himself of the validity of one of the two claims and authority from the owner of the claim to refuse deliver all other claimants. In such a case he may plead at law action by any but the rightful owner the title of the If this title can be proved, a perfect defense is established. Second, if no actual adverse claim has been made, the bailee knows of the existence of an adverse right, or the bailee cannot determine which of two claimants has the title, and neither claimant will give a bond indemnify the bailee from all damage caused by delivering to him the only course open to the bailee is to file a bill of interpleader against the several possible owners, praying a temporary injunction against actions against himself until the ownership of the goods is determined.<sup>17</sup> It may be that a bailee who redelivers the goods to the bailor, or at his order, in ignorance of his lack of title, is protected against subsequent claims of the rightful owner.<sup>18</sup>

### § 1037. Exceptional rule governing carriers suggested.

In at least two decisions,<sup>19</sup> it has been held that a carrier, ever, he is allowed to interplead the several possible owners of the goods, and, if he knows of an adverse claimant, he should certainly be compelled to do so if he knows of their existence. See *infra*, §§ 1048, 1049, 1054.

<sup>17</sup> *Thorne v. Tilbury*, 3 H. & N. 534; *Biddle v. Bond*, 6 B. & S. 225; *Ross v. Edwards*, 73 L. T. 100; *European, etc., Mail Co. v. Royal Mail Co.*, 30 L. J. C. P. 247; *Rogers v. Lambert*, [1891] 1 Q. B. 318; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045.

<sup>18</sup> *Hatfield v. McWhorter*, 40 Ga. 269; *Lawson v. Terminal Warehouse Co.*, 70 Hun, 281; *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511; *Bechtel v. Shaefer*, 117 Pa. St. 555, 11 Atl. 889; *De Zouche v. Garrison*, 140 Pa. St. 430, 21 Atl. 450. It is true that the right to bring such a bill of inter-

pleader has been denied (*Craig v. Thornton*, 2 Mylne & C. 100), but that case has been criticised, and the Common Law Procedure Act of 1852, § 12, has been held to overrule it (*Attenborough v. The London Dock Co.*, 3 C. P. D. 450). In this country, either by virtue of the Act or otherwise, interpleader would seem to be generally allowed. See also *infra*, cited in this section, *passim*.

<sup>19</sup> *Nelson v. Iverson*, 17 Ala. 209; *Powell v. Robinson*, 76 Ala. 209; *Dickson v. Chaffe*, 34 La. Ann. 246, 3 Am. St. Rep. 531; *Schulz v. Bailments* (1905), § 44, note.

<sup>20</sup> In *Switzler v. Northern Pacific Co.*, 45 Wash. 221, 225, 88 Pac. 12 L. R. A. (N. S.) 254, 122 Ar.

though notified of a title adverse to that of the consignee, may nevertheless, without liability, deliver to the latter. In support of the contention the courts rendering one of these decisions said:<sup>20</sup> "It seems to us that the whole case turns upon the question whether a carrier, resting under very stringent obligations to his bailor, is bound to assume the burden, where a third person makes a demand upon him for goods entrusted to him for transportation, not enforced by legal process, of showing, not only that such third person is a rightful owner, but is also entitled to the immediate possession of the goods. It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods, and has a right to assume that the person from whom he received possession of the goods was such rightful owner, possession of personal property being evidence of title." The weight of authority, however, supports the conclusions of the preceding section, holding that the carrier is liable if after notice it delivers to a consignee goods to which a third person is entitled.<sup>21</sup>

**§ 1038. A bailment without reward for the care of the bailor's goods.**

A bailee who undertakes the care of goods without reward is liable for injuries to them caused by his gross negligence. Though fault may be found with classifying degrees of negli-

Rep. 892, action was brought for damages because the defendant had delivered to the consignee horses which the plaintiff asserted were obtained from him fraudulently by the shipper. To similar effect is *Kohn v. Richmond &c. R. Co.*, 37 S. Car. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. 726.

<sup>20</sup> *Kohn v. Richmond, etc., R. Co.*, 37 S. Car. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. 726.

<sup>21</sup> *Greenway v. Fisher*, 1 C. & P. 190, 192; *Nashville, etc., R. Co. v. Walley*,

147 Ala. 697, 41 So. 134; *Georgia R., etc., Co. v. Haas*, 127 Ga. 187, 56 S. E. 313, 119 Am. St. Rep. 327; *Atchison, etc., R. Co. v. Jordon Stock-Food Co.*, 67 Kans. 86, 72 Pac. 533; *Shellenberg v. Fremont, etc., R. Co.*, 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561; *Bassett v. Spofford*, 2 Daly, 432, *affd.* 45 N. Y. 387, 6 Am. Rep. 101; *Wells v. American Express Co.*, 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695. See the provisions of the *Pomerene Act, infra*, § 1122.



gence or of care and the suggestion made that after all what is required in each case is such care as is reasonable under the circumstances, greater care being reasonable where the bailment is for the benefit of the bailee or where he receives compensation than in other cases; yet the other mode of expression is established, and exceptional care and gross carelessness have a real meaning in fact, though their boundaries may not be susceptible of exact definition.<sup>22</sup> Not only are mutual promises to create a gratuitous bailment in the future unsupported by sufficient consideration,<sup>23</sup> but even after the goods have actually been delivered to the bailee, on principle, a gratuitous bailment rarely involves a contract on the part of the bailee. The delivery of the goods to a bailee who is to keep them without compensation and without using them, though a legal detriment to the bailor, is not requested by the bailee as the consideration for a promise,<sup>24</sup> even if he makes one. On the other hand, a promise by the bailor may naturally be supported by the bailee's acts in the care of the goods; but if the bailor promises the bailee something in return for the latter's care of the goods, the bailment ceases to be gratuitous. Unless a true contract can be made out, the bailee should be liable only to the extent which the law of property and of torts dictate. A promise by the bailee to exercise a higher degree of care or to return the goods safely, is not supported by consideration;<sup>25</sup> though conversely the bailor by assent to a particular method of keeping, or otherwise, may diminish the bailee's normal obliga-

<sup>22</sup> *Coggs v. Bernard*, *Ld. Raym.* 909; *Doorman v. Jenkins*, 2 A. & E. 256; *Giblin v. McMullen*, *L. R.* 2 P. C. 317; *Ultzen v. Nichols*, [1894] 1 Q. B. 92; *Tracy v. Wood*, 3 Mason, 132; *Bronnenburg v. Charman*, 80 Ind. 475; *Davis v. Gay*, 141 Mass. 531, 6 N. E. 549; *Gerrish v. Savings Bank*, 138 Mich. 46, 100 N. W. 1000; *Davis v. Tribune Printing Co.*, 70 Minn. 95, 72 N. W. 808; *Caldwell v. Hall*, 60 Miss. 330, 45 Am. Rep. 410; *Burk v. Dempster*, 34 Neb. 426, 51 N. W. 976; *Hibernia B'g. Assoc. v. McGrath*, 154 Pa. 296, 26 Atl. 377, 35 Am. St. Rep. 828;

*Spooner v. Mattoon*, 40 Vt. 300, 94 Am. Dec. 395. See also *Matthews v. Carolina &c. Ry.*, 175 N. C. 35, 94 S. E. 714. Cf. *Dinsmore v. Abbott*, 89 Me. 373, 36 Atl. 621. The degree of care is sometimes further measured by the degree of care that a person would exercise towards his own property in similar circumstances. *Rubin v. Huhn*, 229 Mass. 126, 118 N. E. 290.

<sup>23</sup> See *Elsee v. Gatward*, 5 T. R. 143.

<sup>24</sup> See *supra*, § 138.

<sup>25</sup> But see 1 Smith's L. C. (12th Eng. ed.) 215; *Schouler, Bailments* (1905), § 36.

tion. If an emergency arises a gratuitous bailee is bound to take such steps of ordinary prudence for the preservation of the property as the emergency may require, and to this end is authorized to incur expense and make contracts with third persons on behalf of the bailor.<sup>26</sup>

It has been assumed in this section that the depositary consented to become such. If goods are thrust into the possession of the depositary without his request it has been said that he is under "no duty of any sort or kind."<sup>27</sup> The question is not one of contracts, but the comment of the learned editor of *Smith's Leading Cases*<sup>28</sup> seems justified.

<sup>26</sup> In *Harter v. Blanchard*, 64 Barb. 617, 618, the court in speaking of a gratuitous bailment of a horse which broke his leg, said: "When the horse broke his leg, the owner—the defendant—being at a distance, the said Tanner was doubtless bound, in the exercise of ordinary care, to provide for his keeping, care and cure, as he would if the horse had been his own, and would have been guilty of gross neglect if he had omitted to make such provision. This contract with the plaintiff was a proper and reasonable one, under the circumstances. This is not questioned. The plaintiff, as I gather from the evidence, was a farrier, and a fit and proper person, and had proper accommodations for the charge of said horse. As a bailee in possession of the horse, the said Tanner had an implied authority to contract in behalf of the defendant for such care and keeping of horse. He could no longer be pastured, and an exigency had arisen, when, to preserve his life and restore, if possible, his broken leg, such an arrangement as Tanner made with the plaintiff, became necessary; and I have no doubt he had full authority to bind the defendant by the contract then made, until at least, the defendant could be informed of the accident to his horse, and could have time and opportunity to make other provision for his custody, care and keeping. The

defendant, it appears, was soon apprised of the accident to his horse, and that the same was in the possession of the plaintiff for care and keeping, and did not disaffirm such contract, or make other provision for the charge and custody of such horse.

"It springs from the very relation of bailor and bailee that the latter necessarily has authority to contract for and bind the bailor, in such cases, for the preservation and care of the property in his possession, and particularly with live animals injured as in this case, as much so as the master of a vessel has power to bind the owner for repairs arising from injury or casualty at sea. Contracts so made are clearly binding upon the principal or bailee. (*Story on Bailm.*, §§ 198, 199, 1 Pothier 167.) And this is so, even though the bailee may also be liable in such case upon a particular contract."

<sup>27</sup> *Howard v. Harris*, Cab. & E. 253. The manuscript of a play sent to the defendant without his request had been lost. The court held that there was no case to go to the jury. See also *Lethbridge v. Phillips*, 2 Stark. 544; *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 197, 33 N. E. 495; *Wheeler v. Klaholt*, 178 Mass. 141, 59 N. E. 756.

<sup>28</sup> (12th Eng. ed.), p. 216.

"This must, it is submitted, to some extent depend upon circumstances." <sup>29</sup>

**§ 1039. A gratuitous loan for use by the bailee.**

A loan for the bailee's use without hire is the converse of the case considered in the preceding section. Here as in that case there is likely to be no true contract. It is logically a detriment to the bailee to take the goods into his possession, though he desires to use them, that is, it is doing something he was not legally bound to do; <sup>30</sup> and it is obviously a detriment to the bailor to give up possession. There is therefore the possibility of a contract if the parties bargained for an exchange, <sup>31</sup> but generally this will not occur. Even express statements by the bailor in regard to the use which the bailee may make of the goods logically should take effect as conditions qualifying the bailee's right of user rather than as contracts, unless assent by the bailee to the promises involves some undertaking of advantage to the bailor which he is seeking by entering into the bailment, other than the mere preservation of the goods; and in that event, the case is not properly a gratuitous loan. While the promises of the bailee may at least take effect as conditions, promises of the bailor, being unsupported by any consideration (for the acceptance of a beneficial bailment by the bailee can rarely be considered such) can have no binding force. Therefore not only is an executory agreement to make a gratuitous loan invalid, but if such a loan is made for a definite period the bailor at any time may break his promise and demand back his property. <sup>32</sup> It seems, however, that a demand would be requisite before an action could be brought prior to the end of the agreed period of the loan, <sup>33</sup> though after that time an action would

<sup>29</sup> The owner of land may drive trespassing cattle from his premises into the highway. *Stevens v. Curtis*, 18 Pick. 227; *Wilson v. McLaughlin*, 107 Mass. 587, but he may not then drive them to a distance. *Gilson v. Fisk*, 8 N. H. 404. Where the continuance of possession involves no great burden, and the discontinuance

of it involves the almost certain loss or destruction of valuable property, it may be doubted whether the bailee would be wholly free from duty.

<sup>30</sup> See *supra*, § 102 a.

<sup>31</sup> See *supra*, § 112.

<sup>32</sup> Story, *Bailments*, § 258.

<sup>33</sup> *Clapp v. Nelson*, 12 Tex. 370, 373, 62 Am. Dec. 530.

lie without a demand.<sup>34</sup> The gratuitous borrower is held to a high degree of care in regard to the goods, and is liable for loss caused even by slight negligence;<sup>35</sup> but he is not an insurer, and injury by the act of a stranger without negligence on the part of the bailee will not make him liable.<sup>36</sup> Unless otherwise clearly indicated the bailee's right to use the goods is personal to himself and cannot be conferred upon another.<sup>37</sup>

#### § 1040. Bailments for mutual benefit.

Where the parties to an executory or executed agreement for bailment contemplate a mutual benefit, there is unquestionably a contract. If the property has not actually been delivered the contract is bilateral. Where the property has been delivered also, the contract may be partly bilateral; but if the delivery of the goods fulfils the entire obligation of the bailor, the contract is unilateral; and so if payment of storage on the part of the bailor fulfils his obligation, the contract created by the bailment is unilateral. Bailments for mutual benefit may be divided into several classes:

- (1) Where the bailee hires the use of the property.
- (2) Where the bailor hires the bailee to store the property.
- (3) Where the bailor employs the bailee to do some work upon the property.
- (4) Where the bailor employs the bailee to carry the property.
- (5) Where the property is bailed as a pledge or security for a debt or other obligation.
- (6) Where the bailee is to act as factor or agent for the bailor in the sale of the property.<sup>38</sup>

<sup>34</sup> *Clapp v. Nelson*, 12 Tex. 370, 62 Am. Dec. 530.

<sup>35</sup> *Coggs v. Bernard*, 2 Lord Ray. 909, 915; *Apczynski v. Butkiewicz*, 140 Ill. App. 375; *Edwards v. Prust*, 201 Ill. App. 399; *Parker v. Dietz*, 203 Ill. App. 120; *Beller v. Schultz*, 44 Mich. 529, 7 N. W. 225, 38 Am. Rep. 280; *Mitchell v. Violette* (Mo. App. 1918), 203 S. W. 218.

<sup>36</sup> *The Wrinkfield*, [1902] Prob. 42.

<sup>37</sup> *Bringloe v. Morrice*, 3 Salk. 271,

s. c. 1 Mod. 210; *Wilcox v. Hogan*, 5 Ind. 546; *Scranton v. Baxter*, 4 Sandf. 5. Cf. *Camoy's v. Scurr*, 9 Car. & P. 383.

<sup>38</sup> In *Perera v. Panama-Pacific Internat. Exhibition* (Cal.), 175 Pac. 454, the plaintiff intrusted jewelry for exhibition with power to sell on commission. The bailment was held to be for mutual benefit and though the bailee was not an insurer against theft, it was bound to exercise ordinary care.

§ 1041. Lending for hire.

Lord Holt said <sup>39</sup> that a bailee who h to "the utmost care." This statemen as putting one who pays for the use of duty as a gratuitous borrower and it is rule that a hirer is bound only to ordinary Where, however, the hirer uses the bail poses other than those for which it w himself to another standard of liability the contract of bailment and therefore all the consequences of such violation not due to carelessness. Therefore, one for a specific journey or purpose is liable even from inevitable accident if he uses t purpose or journey. It is generally said there is a conversion.<sup>41</sup> But, though using in a different manner from that which w amount to a conversion if the unauthor with intent to convert and to destroy or interest,<sup>42</sup> it seems ordinarily more in a to base the liability of the bailee on an either contractual or imposed by law irres intention.<sup>43</sup> If the property is totally de

<sup>39</sup> *Coggs v. Bernard*, 2 Ld. Ray. 909.

<sup>40</sup> *Sanderson v. Collins*, [1904] 1 K. B. 628, 630; *Fain v. Wilkerson*, 22 Ga. App. 193, 95 S. E. 752; *United Tel. Company v. Cleveland*, 44 Kans. 167, 24 Pac. 49; *Eastman v. Sanborn*, 3 Allen, 594, 81 Am. Dec. 677; *Buis v. Cook*, 60 Mo. 391; *Wentworth v. McDuffie*, 48 N. H. 402; *Buchanan v. Smith*, 10 Hun, 474; *Rowland v. Jones*, 73 N. C. 52; *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519.

<sup>41</sup> *Bryant v. Wardell*, 2 Exch. 479; *Carlidge v. Sloan*, 124 Ala. 596, 26 So. 918; *Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 576; *Fail v. McArthur*, 31 Ala. 26, 32; *Morton v. Gloster*, 46 Me. 520; *Wheelock v. Wheelwright*, 5 Mass. 104; *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310; *Wentworth*

*v. McDuffie*, Bennett, 46 N. H. 10; *v. Smith*, 10 Vt. 10; *v. Branch*, 1 Skinner, 16 Vt. 500; *Towne v. Am. Dec. 85* 688, 28 Am. Dec. 688, 28 Am. Dec. 688.

<sup>42</sup> *Harvey v. See also Car* 676, 55 S. E. 676, 55 S. E. 676.

<sup>43</sup> *See Hool Palmer v. M* 68 Atl. 369, 125 Am. St. 17 B. Mon. 15 Gray, 306 454; *McCurc Minn. 326, 1 Raritan, etc.*

unauthorized use, the result of the two theories is the same, but if the property is only partially damaged, or indeed not damaged at all, one who holds the bailee a converter would be obliged to admit the bailor's right to recover the full value of the property,—an undesirable result, especially if the misuse of the property was made without any wilful purpose of violating the terms of the bailment. Furthermore, if the property is used in an unauthorized way but is not injured during the unauthorized use, a subsequent injury while the property is being used within the limits of the contract will not make the bailor liable unless the unauthorized use in some way contributed to the later injury.<sup>44</sup> It may also be supposed that an injury or destruction of the property which takes place during an excessive use of it would have occurred had there been no excessive use. In that case too the bailee should not be liable,<sup>45</sup> but the burden is upon the bailee to show that the injury would have occurred had there been no improper use of the property.<sup>46</sup> An attempt to sell, pledge or otherwise appropriate the property operates as a termination of a bailment, even if made for a fixed period, and the bailor may recover in trover either from the bailee,<sup>47</sup> or from any one into whose hands the property may come.<sup>48</sup>

One who lets property for hire may reasonably be subjected to the same implied warranties as one who sells goods. Therefore the bailor is liable if he knowingly furnishes property unsuitable for the purpose for which it is hired.<sup>49</sup> Analogy with the law of sales justifies the further statement that if the hirer reasonably relied on the bailor's superior skill or

457, 468; *Lane v. Cameron*, 38 Wis. 603.

<sup>44</sup> *Farkas v. Powell*, 86 Ga. 800, 13 S. E. 200, 12 L. R. A. 397; *Doolittle v. Shaw*, 92 Ia. 348, 60 N. W. 621, 26 L. R. A. 366, 54 Am. St. Rep. 562.

<sup>45</sup> *Harvey v. Epes*, 12 Gratt. 153; *Carney v. Rease*, 60 W. Va. 676, 55 S. E. 729; *Story, Bailments*, § 413, a.

<sup>46</sup> *Harvey v. Epes*, 12 Gratt. 153. See also *Collins v. Bennett*, 46 N. Y. 490.

<sup>47</sup> *Chinery v. Viall*, 5 H. & N. 288;

*Johnston v. Willey*, 46 N. H. 75; *Dunham v. Lee*, 24 Vt. 432.

<sup>48</sup> *Cooper v. Willomatt*, 1 C. B. 672. Property which is negotiable is an exception to this rule, and in certain cases where the bailor has allowed the bailee to appear to the world as owner a *bona fide* purchaser is protected.

<sup>49</sup> *Fowler v. Lock*, L. R. 7 C. P. 272; *Horne v. Meakin*, 115 Mass. 326; *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 690.

knowledge in furnishing suitable property, the latter would be liable even though in fact ignorant of the defects in the goods which he furnished.<sup>50</sup> It seems probable also that the bailor impliedly warrants that he has the title to the property or such other interest in it as gives him the right to make the bailment. The duties of the hirer are to return the bailed property in good condition unless injured without his fault, and to pay the agreed compensation. Limitations of these duties may be fixed by the terms of the contract, or by custom, but in the absence of agreement, express or implied, to the contrary it is the duty of the hirer to return the property without waiting for demand by the bailor, and, in the absence of agreement for a fixed compensation, to pay a reasonable hire.

#### § 1042. Pledge.

A pledge is a bailment to secure the performance of some debt or obligation due to the pledgee, though not necessarily owing by the pledgor, since the pledge may be made to secure the performance of an obligation of a third person. The word is frequently used loosely to express forms of security not strictly pledges. Possession of tangible property is essential to a true pledge, and it is only where the law recognizes that delivery of a tangible symbol involves in legal effect a transfer of possession to the property symbolized, that a pledge is possible by any other means than transferring actual possession of the property pledged. Formal documents like bonds or negotiable paper<sup>51</sup> are regarded by the common law as not merely evidence of intangible obligations but as themselves the obligations, and therefore may be pledged; though if the ownership of negotiable paper is properly transferred to a creditor as security, the transaction is more properly called a mortgage. Likewise stock certificates,<sup>52</sup> a savings

<sup>50</sup> *Famous Players' Film Co. v. Salomon*, (N. H. 1919), 106 Atl. 282.

<sup>51</sup> *Donald v. Suckling*, L. R. 1 Q. B. 585 (debentures); *Goodwin v. Robarts*, A. C. 476 (negotiable script); *Talty v. Freedman's Sav. & Trust Co.*, 93 U. S. 321, 23 L. Ed. 886 (non-negotiable

certificate of indebtedness); *White v. Peters*, 14 Minn. 27 (overdue negotiable note); *Strong v. National, etc., Assoc.*, 45 N. Y. 718 (bonds).

<sup>52</sup> *Halliday v. Holgate*, L. R. 3 Exch. 299; *Worthington v. Tormey*, 34 Md. 182; *Wehrle v. Mercantile Nat. Bank*,

bank book,<sup>53</sup> a policy of life insurance<sup>54</sup> or of insurance of property,<sup>55</sup> may be pledged. In these cases the bailment of the paper is in legal effect the pledge of the intangible right which the paper represents.<sup>56</sup> So the deposit for security of negotiable warehouse receipts and bills of lading may be a pledge of the goods represented by these documents, since the possession of the documents controls the possession of the goods.<sup>57</sup> On the other hand a deposit of bills of lading or warehouse receipts which do not run to order is not properly a pledge of the goods to which they relate because the possession of the goods may be obtained without possession of the documents.<sup>58</sup> Title deeds to real estate may be pledged and equity may attach to such a pledge the incidents of security on the land to which the deeds relate.<sup>59</sup> As between the parties, and against any one who is not a purchaser for value, the agreement of the parties will be effectuated, but the land is not pledged, for the possession of the deeds does not control the possession of the land. To speak of pledging a chose in action which is not represented by a tangible document delivered to the pledgee as is not infrequently done,<sup>60</sup> is also inaccurate. Such choses in action may of course be assigned for security, but it is not technically exact to speak of them as being pledged. Unless the property to be pledged is already in the creditor's possession,<sup>61</sup> it must be delivered before a pledge can arise. The mere agreement to pledge is insufficient without delivery. It is true that if money has been advanced on the faith of the promise to pledge, equity

221 Mass. 585, 109 N. E. 367; *Pinkerton v. Railroad*, 42 N. H. 424.

<sup>53</sup> *Boynton v. Payrow*, 67 Me. 587.

<sup>54</sup> *Bruce v. Garden*, L. R. 5 Ch. 32; *West v. Carolina Life Ins. Co.*, 31 Ark. 476; *Hakes v. Myrick*, 69 Ia. 189, 28 N. W. 575; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650.

<sup>55</sup> *Latham v. Chartered Bank of India*, L. R. 17 Eq. 205; *Merrifield v. Baker*, 9 Allen, 29.

<sup>56</sup> See further, *supra*, § 439.

<sup>57</sup> See Williston, Sales, §§ 406 *et seq.*

If the goods are made deliverable to the creditor's order either on its face or by indorsement, there is a mortgage rather than a pledge. *Ibid.*; *Cochrane v. First State Bank*, 198 Mo. App. 619, 625, 201 S. W. 572.

<sup>58</sup> *Ibid.*

<sup>59</sup> *In re Kerr's Policy*, 8 Eq. 331; *English v. McElroy*, 62 Ga. 413.

<sup>60</sup> *E. g.*, *Schouler, Bailments*, [1905] p. 76 *n.* citing cases. *Ringling v. Smith River Development Co.*, 48 Mont. 467, 138 Pac. 1098.

<sup>61</sup> *Harp v. Hamilton* (Tex. Civ. App.), 177 S. W. 565.



may specifically enforce this contract or may treat the agreement as creating an equitable pledge, but no legal pledge is created,<sup>62</sup> and the distinction is important. Therefore to speak of a pledge of property not in existence is inadmissible.<sup>63</sup>

§ 1043. Enforcement of the pledgee's claim.

The pledgee may sue for the debt for which the pledge is security without resorting to the pledged property; and though payment or other satisfaction of the particular debt or debts which the pledge was given to secure will terminate the pledgee's right of possession,<sup>64</sup> as will a tender of the debt,<sup>65</sup> it is not necessary in order to enable the pledgee to maintain an action for the debt for him to make a tender of the pledged property. Though surrender of the pledge should be concurrent with the payment of the debt and though a tender by the debtor of the amount which he owes is valid when conditional on the return of the pledge,<sup>66</sup> strict concurrent conditions are not implied since the debt is due not in return for the pledged property but in return

<sup>62</sup> See Williston, *Cas. Bkcy.* (2d ed.) 314, 315 n., 19 Harv. L. Rev. 557.

<sup>63</sup> Schouler, *Bailments* (1905), § 143 a, says that such interests "if capable of sale, must be capable of pledge or mortgage." If capable of sale they must doubtless be capable of mortgage, but not necessarily of pledge. Title to property may be transferred without delivery, but a pledge without delivery is impossible. As to the possibility of transferring title either by sale or by mortgage to property not *in esse*, see 19 Harv. L. Rev. 557.

<sup>64</sup> *Mayo v. Avery*, 18 Cal. 309; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867; *Compton v. Jones*, 65 Ind. 117; *Robinson v. Hurley*, 11 Ia. 410, 49 Am. Dec. 497; *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Ward v. Ward*, 37 Mich. 253; *A. H. Averill Machine Co. v. Bain*, 50 Mont. 512, 148 Pac. 334; *Bank of Rutland v.*

*Woodruff*, 34 Vt. 89. See also *Fourth Nat. Bank v. Stahlman*, 132 Tenn. 367, 178 S. W. 942, 1916 A. L. R. A. 568.

<sup>65</sup> *Ratchiff v. Davis*, Cro. Jac. 244; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Mitchell v. Roberts*, 17 Fed. 776; *Latta v. Tutton*, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189. A technical tender is requisite. A mere notification of readiness and willingness is not enough. *Talty v. Freedman's Sav. & Trust Co.*, 93 U. S. 321, 325, 23 L. Ed. 886; *Payne v. Power*, 140 Ga. 759, 79 S. E. 771; *Lewis v. Mott*, 36 N. Y. 395; and to enable the pledgor to maintain replevin the tender must be kept good. *Wilkins v. Redding*, 70 Neb. 182, 97 N. W. 238; *Meisel v. Merchants' Nat. Bank*, 85 N. J. L. 253, 88 Atl. 1067.

<sup>66</sup> *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Schlesinger v. Wise*, 106 N. Y. App. D. 587, 94 N. Y. S. 718.

for money lent or other consideration which has been received by the pledgor; and the creditor may therefore sue for the debt without first tendering the security.<sup>67</sup>

Though the pledgor is entitled to sell the pledged property without application to a court, equity will aid him in the enforcement of his right in the security if desired.<sup>68</sup> If the pledgee sells without order of court he must give reasonable notice to the pledgor of his intent to sell, and of the time and place of sale,<sup>69</sup> unless the contract of pledge otherwise provides.<sup>70</sup> Frequently statutes have protected the pledgee by requiring stricter formalities than those established by the common law.<sup>71</sup>

#### § 1044. Rights and duties of pledgor and pledgee.

It is generally said that a pledgee acquires a special property in the pledge, but this expression seems used merely to account for the fact that a pledgee may sell the pledged property if the pledgor makes default in the payment of the debt.<sup>72</sup> It has always troubled the English Court to admit the power of one who neither owns property, nor is specially authorized to sell by the owner, to transfer title to a third person. But since an unpaid vendor of chattels after title has passed may resell them if the vendee is in default in payment of the price, though he is customarily spoken of as having merely a lien, and certainly has no ownership of the goods,<sup>73</sup> there seems no reason why one should hesitate to say that a pledgee has merely possession of the goods coupled with a power to sell them on default by the pledgor.<sup>74</sup>

<sup>67</sup> *Lawton v. Newland*, 2 Stark. 72; *Scott v. Parker*, 1 Q. B. 809; *Sonoma Valley Bank v. Hill*, 59 Cal. 107, 110; *Foster v. Purdy*, 5 Met. 442; *Donald v. Wyckoff*, 49 N. J. L. 48, 7 Atl. 672; *Spencer v. Drake*, 84 N. Y. App. D. 272, 82 N. Y. S. 573; *Security Title & Trust Co. v. Stewart*, 154 N. Y. App. D. 434, 437, 139 N. Y. S. 74; *First Nat. Bank v. Gidden*, 175 N. Y. App. D. 563, 162 N. Y. S. 317; *Bank of Rutland v. Woodruff*, 34 Vt. 89. See also *Wagner v. Kohn*, 225 Fed. 718, 721, 140 C. C. A. 592.

<sup>68</sup> *Jones, Pledges*, §§ 640 *et seq.*

<sup>69</sup> *Id.*, § 607.

<sup>70</sup> *Id.*, § 631 b.

<sup>71</sup> *Id.*, §§ 616 *et seq.*

<sup>72</sup> *Pothonier v. Dawson*, Holt. 395; *Lockwood v. Ewer*, 9 Mod. 278; *Martin v. Read*, 11 C. B. 730; *France v. Clark*, 26 Ch. D. 257; *Thwing v. Clifford*, 136 Mass. 482; *Lewis v. Mott*, 36 N. Y. 395; *King & Co. v. Texas Banking & Ins. Co.*, 58 Tex. 669; *Ainsworth v. Bowen*, 9 Wis. 348.

<sup>73</sup> See *Williston, Sales*, § 543.

<sup>74</sup> In *Halliday v. Holgate*, L. R. 3

Unless forbidden by special contract the pledgor during the continuance of the contract of pledge may sell the pledged property subject to the pledgee's right, and the purchaser from the pledgor will be entitled to acquire the pledged property on paying the debt,<sup>75</sup> and can otherwise hold the pledgee to the performance of his duties. Similarly the pledgee may assign, either by way of absolute sale or to secure his own debt, the claim which the pledge secures and the assignment will carry with it as an incident the right to the pledge.<sup>76</sup> Even a wrongful sale of the pledged property by the pledgee, though it will not give even a *bona fide* purchaser title to the property,<sup>77</sup> will give the purchaser all the rights which the pledgor had prior to the sale.<sup>78</sup> But without express authority the pledgee has no right to separate by a sale or a repledging the pledged property from the debt for which it was pledged.<sup>79</sup> If the pledgee sells the property when the pledgor is not in default or repledges it for a greater amount than the original obligation, it is a wrong; but the pledgee or the purchaser from him is entitled to the benefit of the debt actually due from the pledgor in any suit brought by him to redress the wrong.<sup>80</sup> A pledgor impliedly warrants that he has such

Exch. 299, Willes, J., said: "There are three kinds of security: the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz., a pledge, where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest." See also *Minge v. Clark*, 193 Ala. 447, 69 So. 421.

<sup>75</sup> *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; *Faulkner v. Hill*, 104 Mass. 188; *Brown v. Hotel Ass'n*

of Omaha, 63 Neb. 181, 88 N. W. 175; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540.

<sup>76</sup> *Cumming v. McDade*, 118 Ga. 612, 614, 45 S. E. 479; *Belden v. Perkins*, 78 Ill. 449; *Jarvis v. Rogers*, 15 Mass. 389; *Proctor v. Whitcomb*, 137 Mass. 303; *Lewis v. Mott*, 36 N. Y. 395.

<sup>77</sup> *Talty v. Freedman's Sav. & Trust Co.*, 93 U. S. 321, 324, 23 L. Ed. 886. Unless the pledgor has given such indicia of title to the pledgee as to estop himself. *Williams v. Ashe*, 111 Calif. 180, 43 Pac. 595.

<sup>78</sup> *Talty v. Freedman's Sav. & Trust Co.*, 93 U. S. 321, 23 L. Ed. 886.

<sup>79</sup> *Commonwealth v. Althause*, 207 Mass. 32; *Warfield v. Adams*, 215 Mass. 506, 102 N. E. 706. See also *Haber v. Brown*, 101 Cal. 445, 35 Pac. 1035.

<sup>80</sup> *Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3

title as justifies him in pledging the goods,<sup>81</sup> and if a pledgor having no title at the time the pledge was made subsequently acquires title, he is estopped to set it up.<sup>82</sup> As in the case of other bailments for mutual benefit the pledgee is bound to use ordinary or reasonable diligence in care of the pledge;<sup>83</sup> and, therefore, if unmatured indorsed negotiable paper is held as collateral, the creditor must make due presentment at maturity, and give notice to the indorsers of the maker's default.<sup>83a</sup> Even if there are no secondary liabilities to be established, reasonable diligence must be used to obtain payment of obligations of third persons held as collateral.<sup>83b</sup> But a failure on the part of the pledgee in his duty of care whereby the pledgor is injured, will not relieve the latter from liability on the debt, but will only justify the allowance of such damage as he may have suffered.<sup>84</sup> And if the injury to the pledge was not caused by negligence of the pledgee, the pledgor must pay the full amount of the debt and also bear the loss of his security.<sup>85</sup>

#### § 1045. Hired service or storage of property.

Whether a bailment for which the bailee is paid involves

Exch. 299; *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321, 23 L. Ed. 886; *Williams v. Ashe*, 111 Calif. 189, 43 Pac. 595; *Brittan v. Oakland Sav. Bank*, 124 Calif. 282, 57 Pac. 84, 71 Am. St. Rep. 58; *Belden v. Perkins*, 78 Ill. 449; *Lynn v. McCue*, 94 Kan. 761, 147 Pac. 808, 96 Kan. 114, 150 Pac. 523; *First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198; *Schaaf v. Fries*, 90 Mo. App. 111. Cf. *Sherman v. Connecticut Mut. L. Ins. Co.*, 222 Mass. 159, 110 N. E. 159.

<sup>81</sup> *Mairs v. Taylor*, 40 Pa. St. 446. See also *Uniform Warehouse Receipts Act*, § 44; *Uniform Bills of Lading Act*, § 35; *Uniform Sales Act*, § 36.

<sup>82</sup> *Goldstein v. Hort*, 30 Cal. 372.

<sup>83</sup> *Coggs v. Bernard*, 2 Ld. Ray. 909; *Syred v. Carruthers*, E. B. & E. 469.

<sup>83a</sup> *Peacock v. Pursell*, 14 C. B. (N.

S.) 728; *Coleman v. Lewis*, 183 Mass. 485, 67 N. E. 603, 66 L. R. A. 482, 97 Am. St. 450; *City Bank of York v. Rieker*, 262 Pa. 28, 31, 104 Atl. 804.

<sup>83b</sup> *Lawrence v. McCalmont*, 2 How. 426, 454, 11 L. Ed. 326; *Hawley Hardware Co. v. Brownstone*, 123 Cal. 643, 56 Pac. 648; *Aldrich v. Goodell*, 75 Ill. 452; *Griggs v. Day*, 136 N. Y. 152, 32 N. E. 612, 18 L. R. A. 120, 32 Am. St. 704; *Betterton v. Roope*, 3 Lea, 215, 31 Am. Rep. 633. Cf. *Loeb v. German Nat. Bank*, 88 Ark. 108, 113 S. W. 1017; *City Bank of York v. Rieker*, 262 Pa. 28, 104, Atl. 804.

<sup>84</sup> *May v. Sharp*, 49 Ala. 140; *Faulkner v. Hill*, 104 Mass. 188; *Coleman v. Lewis*, 183 Mass. 485, 67 N. E. 603, 66 L. R. A. 482, 97 Am. St. 450.

<sup>85</sup> *Winthrop Sav. Bank v. Jackson*, 67 Me. 570, 573, 24 Am. Rep. 56.

the performance of work upon the chattel or merely storage of it, the fundamental principles are the same, unless the bailment is to an innkeeper or common carrier. The bailor is bound to pay the agreed compensation and the bailee is bound to ordinary diligence in caring for the bailed property.<sup>86</sup> The care, however, which the bailee must exercise is the reasonable care of one qualified to perform the duties of the bailment. This degree of skill, the bailee warrants that he possesses.<sup>87</sup> The business of storing goods for hire is one of great importance and the receipts of warehousemen given to bailors on the storage of goods have great importance as mercantile symbols of the property which they represent. A uniform statute has been passed in the majority of the United States which codifies the rights and duties not only of the bailor and bailee under such receipts, but also the rights of third persons who may acquire the receipts. In the main this statute enacts rules of the common law except that it gives a degree of negotiability to receipts made out to the order of the bailee beyond that which is given by the common law. The text of this act therefore may serve as a statement of the rules governing the contract between bailor and bailee expressed in a warehouse receipt.<sup>88</sup>

\* *Best v. Yates*, 1 Vent. 268; *Clarke v. Earnshaw*, 1 Gow, 30; *Brabant v. King*, [1895] A. C. 632, 640; *Cheshire v. Bailey*, [1905] 1 K. B. 237, 241; *National Bank v. Graham*, 100 U. S. 699, 704, 25 L. Ed. 750; *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, 67 C. C. A. 265; *Russel v. Koehler*, 66 Ill. 459; *William J. Newman Co. v. Sanitary District*, 210 Ill. App. 395; *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131; *Kash v. Krebs* (N. Y. Misc.), 167 N. Y. S. 1035; *Safe Deposit Co. v. Pollock*, 85 Pa. 391, 27 Am. Rep. 660; *Robinson v. Southern Cotton Oil Co.*, 108 S. Car. 92, 93 S. E. 395; *Kelton v. Taylor & Co.*, 11 Lea, 264; *Gleason v. Beers*, 59 Vt. 581. As to the liability of the bailee for the wrongful act of his servant see *Firemen's Fund Ins. Co.*

*v. Schreiber*, 150 Wis. 42, 135 N. W. 507, 45 L. R. A. (N. S.) 314, Ann. Cas. 1913 E. 823, and cases cited.

\* *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480.

\* It has been enacted in Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Philippine Islands, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

§ 1046. The issue and form of warehouse receipts.

Section 1.—[PERSONS WHO MAY ISSUE RECEIPTS.] Warehouse receipts may be issued by any warehouseman.<sup>89</sup>

Section 2.—[FORM OF RECEIPTS. ESSENTIAL TERMS.] Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

- (a) The location of the warehouse where the goods are stored,
- (b) The date of issue of the receipt,
- (c) The consecutive number of the receipt,
- (d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.
- (e) The rate of storage charges,
- (f) A description of the goods or of the packages containing them,
- (g) The signature of the warehouseman, which may be made by his authorized agent,
- (h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and
- (i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required.<sup>90</sup>

<sup>89</sup> This should be read in connection with the definition of warehouseman in section 58. On account of varying local conditions and laws it seemed impracticable in an act intended to be passed in many States to fix limits as

to who might carry on the business of warehousing.

<sup>90</sup> This section is in accordance with business custom except (h) and (i). As some abuses have arisen from warehousemen issuing receipts on their

**Section 3.—[FORM OF RECEIPTS. WHAT TERMS MAY BE INSERTED.]** A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to the provisions of this act,

(b) In any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.<sup>91</sup>

**§ 1047. Negotiable and non-negotiable receipts.**

**Section 4.—[DEFINITION OF NON-NEGOTIABLE RECEIPT.]** A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt.<sup>92</sup>

**Section 5.—[DEFINITION OF NEGOTIABLE RECEIPT.]** A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt.

No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted, shall be void.<sup>93</sup>

own goods, it seemed wise that when they issued negotiable receipts in this way, the document should carry notice of the fact on its face. Certificates issued by a distiller for whiskey stored in his own warehouse were held not "warehouse receipts" under the statute in *Moore v. Thomas Moore Distilling Co.*, 247 Pa. 312, 93 Atl. 347. It is obvious also that negotiable receipts should show on their face what charges are claimed against the goods. See further as to this Section 30, *infra*, § 1058.

Though it is desirable that all warehouse receipts shall conform to the rules here laid down, the essential thing is that negotiable receipts shall do so, and as to them only is a sanction imposed for failing to insert the statutory terms. A receipt which does not

include all the terms required by this section may nevertheless be governed by the Act. *New Jersey &c. Trust Co. v. Rector*, 76 N. J. Eq. 587, 75 Atl. 931. See also *Manufacturers' Mercantile Co. v. Monarch Refrigerator Co.*, 266 Ill. 584, 107 N. E. 885.

<sup>91</sup> Public policy demands the limitation in (b). See *Schouler on Bailments*, [1905] §§ 36, 362 *et seq.* A limitation of liability to \$10 in a receipt given on the deposit of a bag at a parcel room was held void as a violation of (b). *Healy v. New York Central &c. R. Co.*, 138 N. Y. S. 287, 153 N. Y. App. Div. 516.

<sup>92</sup> See *Manufacturers' Mercantile Co. v. Monarch Refrigerator Co.*, 266 Ill. 584, 107 N. E. 885.

<sup>93</sup> This Act makes a fundamental distinction throughout between nego-

**Section 6.—[DUPLICATE RECEIPTS MUST BE SO MARKED.]** When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.<sup>94</sup>

**Section 7.—[FAILURE TO MARK "NOT NEGOTIABLE."]** A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "non-negotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable.

This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character.<sup>95</sup>

§ 1048. When the warehouseman is bound to deliver.

**Section 8.—[OBLIGATION OF WAREHOUSEMAN TO DELIVER.]** A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

(a) An offer to satisfy the warehouseman's lien,

liable and non-negotiable receipts. The former is the negotiable representative of the goods, the latter is merely evidence of an ordinary contract of bailment. This distinction accords with mercantile usage. *Hallgarten v. Oldham*, 135 Mass. 1, 48 Am. Rep. 433.

<sup>94</sup> It is the practice of most if not all careful warehousemen not to issue

duplicate negotiable receipts at all, and such issues are to be discouraged, but following a large number of statutes already existing this act, instead of forbidding the practice altogether, safeguards it by requiring the receipt to be plainly marked.

<sup>95</sup> This section like the preceding is aimed at obvious frauds. Both follow much previously existing legislation.



(b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.<sup>96</sup>

§ 1049. When the warehouseman is justified in delivering, and his liability for misdelivery.

Section 9.—[JUSTIFICATION OF WAREHOUSEMAN IN DELIVERING.] A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

(a) The person lawfully entitled to the possession of the goods, or his agent,

(b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or

(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been endorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee.<sup>97</sup>

<sup>96</sup> See the definition of "holder" in Section 58. The requirement of signing an acknowledgment that the goods have been received is in accordance with universal business usage, though it is doubtful if the usage has been supported by law. As the usage is reasonable it is adopted as the rule of this act. The burden imposed on the warehouseman in the last paragraph agrees with previously existing law. Burnell

*v. New York Central R. Co.*, 45 N. Y. 184. A demand is not a condition precedent to suit by the depositor, if the goods have been destroyed. *Buffalo Grain Co. v. Sowerby*, 195 N. Y. 355, 358, 88 N. E. 569.

<sup>97</sup> This section gives the warehouseman a justification in some cases where he would not under the preceding section be bound to deliver; *e. g.*, if a thief presented a negotiable receipt

Prior to the enactment of the statute, a bailee might "excuse himself for a failure to deliver the property to the bailor when called for, by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of that fact to the owner."<sup>98</sup> No doubt the rule is the same under the statute if no negotiable warehouse receipt is outstanding. The officer of the law in the case supposed is a "person lawfully entitled to possession." But under Sections 10, 11 and 25 of the statute a warehouseman, who delivered the goods after garnishment without requiring the surrender of the negotiable receipt, was held liable to the indorsee of the receipt.<sup>99</sup>

**Section 10.—[WAREHOUSEMAN'S LIABILITY FOR MISDELIVERY.]** Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section;<sup>1</sup> and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.<sup>1a</sup>

properly indorsed, the warehouseman would be protected if he delivered the goods innocently, though he would not be bound to deliver to him.

<sup>98</sup> *Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57, 65, 25 N. E. 294, 9 L. R. A. 438, 20 Am. St. Rep. 718. See also *Stiles v. Davis*, 1 Black, 101, 17 L. Ed. 33; *Britton v. Aymar*, 23 La. Ann. 63; *Schrauth v. Dry Dock Sav. Bank*, 86 N. Y. 390; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145. See

also *Allswede v. Central Warehouse Co. (Mich.)*, 169 N. W. 13, and analogous cases relating to carriers, *infra*, § 1094.

<sup>99</sup> *Manufacturers' Mercantile Co. v. Monarch Refrigerating Co.*, 266 Ill. 584, 107 N. E. 885.

<sup>1</sup> *Blaisdell v. Hersum*, 233 Mass. 91, 123 N. E. 386.

<sup>1a</sup> See *Schouler*, [1905] §§ 44, 45; *Velsian v. Lewis*, 15 Oreg. 539, 16 Pac. 631.

§ 1050. Cancellation of receipts on delivery of goods.

Section 11.—[NEGOTIABLE RECEIPTS MUST BE CANCELLED WHEN GOODS DELIVERED.] Except as provided in Section 36, where a warehouseman delivers goods for which he has issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt he shall be liable to any one who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman.<sup>1b</sup>

Section 12.—[NEGOTIABLE RECEIPTS MUST BE CANCELLED OR MARKED WHEN PART OF GOODS DELIVERED.] Except as provided in Section 36, where a warehouseman delivers part of the goods for which he has issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

§ 1051. Effect of alteration.

Section 13.—[ALTERED RECEIPTS.] The alteration of a receipt shall not excuse the warehouseman who issues it from any liability if such alteration was

- (a) Immaterial,
- (b) Authorized, or
- (c) Made without fraudulent intent.

If the alteration was authorized, the warehouseman

<sup>1b</sup> It is an obvious requirement of the mercantile use of negotiable receipts that the goods shall remain in the warehouse as long as the receipt is outstanding, and statutes similar in effect to this section have been previously in force in some States.

The section does not apply to non-negotiable receipts, because usage and mercantile necessity frequently require delivery in such cases without surrender of the receipt.

shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration.

Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase.<sup>2</sup>

§ 1052. Delivery of goods when receipt is lost.

Section 14.—[LOST OR DESTROYED RECEIPTS.] Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.<sup>3</sup>

<sup>2</sup> This section adopts the prevailing rule of the common law. Even fraudulent alteration cannot divest the title of the owner of stored goods and the warehouseman is therefore liable to redeliver them to the owner.

<sup>3</sup> As it is for obvious reasons for-

bidden and indeed made a criminal offence, [Section 52] to issue an additional negotiable receipt, it is evident that even when receipts are supposed to have been lost or destroyed, great care must be used in permitting such an issue or (what is the same thing) the

§ 1053. Effect of a duplicate receipt.

Section 15.—[EFFECT OF DUPLICATE RECEIPTS.] A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability.<sup>4</sup>

§ 1054. Adverse claims to goods.

Section 16.—[WAREHOUSEMAN CAN NOT SET UP TITLE IN HIMSELF.] No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt.<sup>5</sup>

Section 17.—[INTERPLEADER OF ADVERSE CLAIMANTS.] If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead.<sup>6</sup>

Section 18.—[WAREHOUSEMAN HAS REASONABLE TIME TO DETERMINE VALIDITY OF CLAIMS.] If some one other than the depositor or person claiming under him

redelivery of the goods, without the surrender of the original receipt. It is not enough that the parties agree that the goods shall be given up or a new receipt issued. It is essential that a court shall pass upon the question and make sure that the original is lost or destroyed and that a proper indemnity is taken, for the rights of possible innocent purchasers of the original receipt are involved. This is especially important, because under the laws of many States a warehouseman may be and frequently is of slight financial responsibility.

<sup>4</sup> See note to Section 6.

<sup>5</sup> See *supra*, § 1036.

<sup>6</sup> The case of *Crawshay v. Thornton*, 2 Myl. & C. 1, unfortunately held that interpleader was not a proper remedy in such a case. It is, however, the only adequate remedy and is probably generally allowed in this country. 3 Am. & Eng. Encyc. of Law, 762. Under the statute interpleader was allowed in *New Jersey &c. Trust Co. v. Rector*, 76 N. J. Eq. 587, 75 Atl. 931; *Manhattan &c. Warehouse Co. v. Benquiat Art Museum*, 155 N. Y. App. Div. 196, 139 N. Y. S. 1073.

has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman had has a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.<sup>7</sup>

Section 19.—[ADVERSE TITLE IS NO DEFENSE EXCEPT AS ABOVE PROVIDED.] Except as provided in the two preceding sections and in sections 9 and 36, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt.<sup>8</sup>

§ 1055. Warehouseman is liable for the non-existence or misdescription of goods.

Section 20.—[LIABILITY FOR NON-EXISTENCE OR MISDESCRIPTION OF GOODS.] A warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor.<sup>9</sup>

<sup>7</sup> It seems obviously proper that the warehouseman should be protected for such brief period as may be necessary to enable him to determine the rights of the claimants. See *Zuber v. Mehrle*, 112 N. Y. S. 1093.

<sup>8</sup> *Supra*, § 1036.

<sup>9</sup> This section imposes on the warehouseman a stricter rule than that generally in force in this country in that it makes a warehouseman liable for an innocent misdescription of the goods. See *Hale v. Milwaukee Dock Co.*, 23 Wis. 276, 99 Am. Dec. 168; but

**§ 1056. Warehouseman's duty of care of goods.**

**Section 21.—[LIABILITY FOR CARE OF GOODS.]** A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.<sup>10</sup> By special contract a warehouseman may assume a larger responsibility.<sup>11</sup>

**Section 22.—[GOODS MUST BE KEPT SEPARATE.]** Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and re-delivery of the goods deposited.

**Section 23.—[FUNGIBLE GOODS MAY BE COMMINGLED, IF WAREHOUSEMAN AUTHORIZED.]** If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole.<sup>12</sup>

**Section 24.—[LIABILITY OF WAREHOUSEMAN TO DEPOSITORS OF COMMINGLED GOODS.]** The ware-

as the warehouseman can readily protect himself by inserting in the receipt only what he knows, namely, the marks on the goods or the statements of the depositor regarding them, it seems best to make the warehouseman responsible for what he asserts. If, however, a warehouseman's agent in violation of his authority issues a warehouse receipt when no goods have been delivered, the statute does not render the warehouseman liable. Whether the act of the agent is the act of the principal must be determined by the common law. *Rosenberg v. National*

*&c. Warehouse Co.*, 218 Mass. 518, 106 N. E. 171.

<sup>10</sup> It has been held that this section merely states the common-law rule. See *H. J. Keith Co. v. Booth Fisheries Co.*, 4 Boyce, 218, 87 Atl. 715; *Levine v. Wolff*, 78 N. J. L. 306, 73 Atl. 73, 138 Am. St. Rep. 617; *Mortimer v. Otto*, 206 N. Y. 89, 99 N. E. 189, Ann. Cas. 1914 A. 1121.

<sup>11</sup> See *infra*, §§ 932, *n.*, 1946.

<sup>12</sup> An exceptional rule prevails in this country by custom as to grain and similar merchandise. See definition of "fungible" in Section 58, *infra*, § 1065.

houseman shall be severally liable to each depositor for the care and re-delivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate.<sup>13</sup>

**§ 1057. Remedies of bailor's creditors.**

**Section 25.—[ATTACHMENT OR LEVY UPON GOODS FOR WHICH A NEGOTIABLE RECEIPT HAS BEEN ISSUED.]** If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they can not thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

**Section 26.—[CREDITORS' REMEDIES TO REACH NEGOTIABLE RECEIPTS.]** A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which can not readily be attached or levied upon by ordinary legal process.

**§ 1058. Warehouseman's lien.**

**Section 27.—[WHAT CLAIMS ARE INCLUDED IN THE WAREHOUSEMAN'S LIEN.]** Subject to the provisions of Section 30, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooperating and other charges and expenses in relation to such goods; also

<sup>13</sup> This section and the two preceding law. See Williston, Sales, §§ 153 & sections state the general American seq.



for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien.<sup>14</sup>

**Section 28.—[AGAINST WHAT PROPERTY THE LIEN MAY BE ENFORCED.]** Subject to the provisions of Section 30 a warehouseman's lien may be enforced—

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted, and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted if such person had been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid.<sup>15</sup>

**Section 29.—[HOW THE LIEN MAY BE LOST.]** A warehouseman loses his lien upon goods—

(a) By surrendering possession thereof, or

(b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act.

**Section 30.—[NEGOTIABLE RECEIPT MUST STATE CHARGES FOR WHICH LIEN IS CLAIMED.]** If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of Section 27, although the amount of the charges so enumerated is not stated in the receipt.

**Section 31.—[WAREHOUSEMAN NEED NOT DELIVER UNTIL LIEN IS SATISFIED.]** A warehouseman having a

<sup>14</sup> This extends the common law, but had the precedent of other statutes. See *Alton v. New York Taxicab Co.*, 66 N. Y. Misc. 191, 121 N. Y. S. 271, as to the scope of the section.

<sup>15</sup> See *Ludwig v. Roth*, 67 N. Y. Misc. 458, 123 N. Y. S. 191; *Farrell v. Harlem &c. Warehouse Co.*, 127 N. Y. S. 306, 70 N. Y. Misc. 565.

lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied.

**Section 32.—[WAREHOUSEMAN'S LIEN DOES NOT PRECLUDE OTHER REMEDIES.]** Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay.

**Section 33.—[SATISFACTION OF LIEN BY SALE.]** A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due,

(b) A brief description of the goods against which the lien exists,

(c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien

was acquired, or, if such place is manifestly unsuit for the purpose, at the nearest suitable place. After time for the payment of the claim specified in the n to the depositor has elapsed, an advertisement of the a describing the goods to be sold, and stating the name of owner or person on whose account the goods are held, the time and place of the sale, shall be published one week for two consecutive weeks in a newspaper publi in the place where such sale is to be held. The sale s not be held less than fifteen days from the time of the 1 publication. If there is no newspaper published in s place, the advertisement shall be posted at least ten d before such sale in not less than six conspicuous pla therein.

From the proceeds of such sale the warehouseman st satisfy his lien, including the reasonable charges of noti advertisement, and sale. The balance, if any, of such p ceeds shall be held by the warehouseman, and delivered demand to the person to whom he would have been bound deliver or justified in delivering the goods.

At any time before the goods are so sold any person clai ing a right of property or possession therein may pay t warehouseman the amount necessary to satisfy his lien a to pay the reasonable expenses and liabilities incurred serving notices and advertising and preparing for the s up to the time of such payment. The warehouseman sh deliver the goods to the person making such payment if he i person entitled, under the provisions of this Act, to the posse sion of the goods on payment of charges thereon. Otherwi the warehouseman shall retain possession of the goods a cording to the terms of the original contract of deposit.<sup>15</sup>

<sup>15</sup> This section is copied with slight changes from the previously existing New York Law, which is still applica- ble to liens generally. General Busi- ness Law, Sec. 202. Unless the statu- tory requirements are complied with the sale is invalid; *Beken v. Kingsbury*, 113 N. Y. App. D. 555, 100 N. Y. S. 323; *Robinson v. Wappans*, 34 N. Y. Misc. 199, 68 N. Y. S. 815; *Dawley v.*

*Loria*, 173 N. Y. S. 468, and an attempted waiver by the depositor w he stores the goods is ineffectual. Se *v. Rosenagel*, 40 N. Y. Misc. 666, N. Y. S. 255. As to the right o bailee to sell sealed packages with opening, see the conflicting decisio *Nathan v. Shivers*, 71 Ala. 117, 46 A Rep. 303; *Adams Express Co. Schlessinger*, 75 Pa. 246.

lien valid against the person demanding the  
refuse to deliver the goods to him until  
satisfied.

**Section 32.—[WAREHOUSEMAN'S LIE PRECLUDE OTHER REMEDIES.]** Where

man has or has not a lien upon the goods, and all remedies allowed by law to a creditor for the collection from the depositor, advances which the depositor has extracted with the warehouseman to

**Section 33.—[SATISFACTION**  
**warehouseman's lien for a cl**  
**may be satisfied as follows:**

The warehouseman shall deliver the goods to the person on whose account they are stored, or to any other person known by him, or to the person having an interest in the goods. The warehouseman shall deliver the goods in person or by his agent to the person at his last known place of abode, or to the person notified. The notice shall be given to the person notified.

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632, a warehouseman was held liable for injury to perishable goods where he failed to give the notice allowed by the statute.

receipts may be negotiated.  
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60. Transfer of receipts without negotiation.  
Section 39. [TRANSFER OF RECEIPTS.]

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<sup>21</sup> The three preceding

**Section 34.—[PERISHABLE AND HAZARDOUS GOODS.]** If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof.

The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the proceeding section.<sup>17</sup>

**Section 35.—[OTHER METHODS OF ENFORCING LIENS.]** The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

**Section 36.—[EFFECT OF SALE.]** After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable.

<sup>17</sup> This section was copied with slight changes from Massachusetts Rev. Laws, c. 69, sec. 9.

In *Noel v. Schuur* (Tenn.), 204 S. W.

632, a warehouseman was held liable for injury to perishable goods where he failed to give the notice allowed by the statute.

§ 1059. How receipts may be negotiated.

Section 37.—[NEGOTIATION OF NEGOTIABLE RECEIPTS BY DELIVERY.] A negotiable receipt may be negotiated by delivery—

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated on the indorsement of such indorsee.<sup>18</sup>

Section 38.—[NEGOTIATION OF NEGOTIABLE RECEIPTS BY INDORSEMENT.] A negotiable receipt may be negotiated by the indorsement of the person to whom the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.<sup>19</sup>

§ 1060. Transfer of receipts without negotiation.

Section 39.—[TRANSFER OF RECEIPTS.] A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A non-negotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right.<sup>20</sup>

<sup>18</sup> It is not usual for warehouse receipts to be made to bearer but as it seems clear that if a receipt were made in that form it should be negotiable by delivery it seemed wise to make provision for the case. The rule as to restrictive indorsement was also aimed

rather to cover a possible continuation than a usual practice.

<sup>19</sup> This section applies the law to bills and notes, as it is in fact a part of mercantile custom, to warehouse receipts.

<sup>20</sup> The three preceding sections

**§ 1061. Who may negotiate, and the effect of negotiation.**

**Section 40.—[WHO MAY NEGOTIATE A RECEIPT.]**  
A negotiable receipt may be negotiated—

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery.<sup>21</sup>

**Section 41.—[RIGHTS OF PERSON TO WHOM A RECEIPT HAS BEEN NEGOTIATED.]** A person to whom a negotiable receipt has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.<sup>22</sup>

low the terminology of the Negotiable Instruments Law in distinguishing "negotiation" and "transfer." Section 39 applies not only to the transfer of non-negotiable receipts, but also to the transfer without a necessary indorsement of negotiable receipts.

<sup>21</sup> This section and the next are of fundamental importance to the mercantile community. They state familiar law in regard to bills and notes and there is authority for them in the statutes making warehouse receipts and bills of lading negotiable and in well recognized mercantile custom. It will be noticed that one who takes by tres-

pass or a finder is not included within the description of those who may negotiate. But one entrusted with such receipts by a banker, under a trust agreement, is included. *Commercial Germania &c. Bank v. W. M. Hoyt Co.*, 205 Ill. App. 352. Under the Uniform Bills of Lading Act (Section 31), and under the Federal statute based thereon (Section 37), even such a person may negotiate an order bill of lading, so as to give good title to an innocent purchaser. See *infra*, § 1130.

<sup>22</sup> This section follows the mercantile theory of making the negotiable



§ 1062. Effect of transfer of receipt.

**Section 42.—[RIGHTS OF PERSON TO WHOM A RECEIPT HAS BEEN TRANSFERRED.]** A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title of the goods subject to the terms of any agreement with the transferor.

If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.<sup>23</sup>

**Section 43.—[TRANSFER OF NEGOTIABLE RECEIPT WITHOUT INDORSEMENT.]** Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears.

receipt represent not simply the title the person negotiating it had, but also whatever property the depositor had, that being what the receipt represented. Many States previously had statutes making warehouse receipts negotiable; but these statutes have been so brief that they have been variously construed and have to some extent failed of their purpose. See *Shaw v. Railroad Co.*, 101 U. S. 557; *Hurt's Case*, 99 Ala. 140; *Bank v. Lee*, 99 Ala. 496. The Supreme Court of the United States has shown a disposition to construe the present statute liberally. *Commercial Nat. Bank v.*

*Canal-Louisiana Bank*, 239 U. S. 52, 36 Sup. Ct. 194, 60 L. Ed. 417. See also *Commercial Germania &c. Bank v. W. M. Hoyt Co.*, 205 Ill. App. 35. Cf. Under the common-law view, the expressions of the court in *Sanders v. Standard Warehouse Co.*, 101 S. Cal. 381, 386, 85 S. E. 900.

<sup>23</sup> So far as a non-negotiable receipt is concerned, this states the rights at common law of any purchaser of bailed goods. Therefore the purchaser gets nothing by the warehouse receipt except evidence. In the case of a negotiable receipt the purchaser has the further right given by the next section.

The negotiation shall take effect as of the time when the indorsement is actually made.<sup>24</sup>

§ 1063. Warranties on assignment of receipt.

**Section 44.—[WARRANTIES ON SALE OF RECEIPT.]** A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

- (a) That the receipt is genuine,
- (b) That he has a legal right to negotiate or transfer it,
- (c) That he has knowledge of no fact which would impair the validity or worth of the receipt, and
- (d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.<sup>25</sup>

**Section 45.—[INDORSER NOT A GUARANTOR.]** The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfil their respective obligations.<sup>26</sup>

**Section 46.—[NO WARRANTY IMPLIED FROM ACCEPTING PAYMENT OF A DEBT.]** A mortgagee, pledgee or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described.

<sup>24</sup> This follows the analogy of bills and notes. Brannan, *Negot. Inst. Law*, Sec. 49.

<sup>25</sup> This section, except (d), follows the *Negotiable Instruments Law*. Brannan, *Neg. Inst. Law*, Sec. 65. (d) it is believed states the law as it exists apart from statute.

<sup>26</sup> Mercantile usage in regard to

warehouse receipts differs from that in regard to bills and notes in the matter to which this section relates. It states the previously existing law even where statutes made warehouse receipts and bills of lading negotiable. *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; *Mida v. Geissmann*, 17 Ill. App. 207.

§ 1064. Effect of fraudulent negotiation, etc.

**Section 47.—[WHEN NEGOTIATION NOT IMPAIRED BY FRAUD, MISTAKE, OR DURESS.]** The validity of a negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the receipt was induced by fraud, mistake, or duress, or that the receipt was entrusted to such person, if the person to whom the receipt was negotiated, or the person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, fraud, mistake or duress.<sup>27</sup>

**Section 48.—[SUBSEQUENT NEGOTIATION.]** Where a person having sold, mortgaged, or pledged goods which were in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the goods, and then issued a negotiable receipt representing such goods, continues in possession of the goods, the subsequent negotiation of the receipt by that person under any sale, or other disposition thereof, to any person receiving the same in good faith, for value without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods had expressly authorized the subsequent negotiation of the receipt.

**Section 49.—[NEGOTIATION DEFEATS VENDOR'S LIEN.]** Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation.<sup>28</sup>

<sup>27</sup> This section merely elaborates for the sake of clearness certain cases within the terms of Section 40.

<sup>28</sup> This is copied from Section 25 (1) of the English Sale of Goods Act, where

it applies to all sales of goods. It is of especial importance in the case of negotiable documents of title.

<sup>29</sup> This perhaps goes beyond previously existing law. Mechem on Sa

**§ 1065. Definition of terms in the Act.**

**Section 58.—[DEFINITIONS.]** (1) In this Act, unless the context or subject-matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Delivery” means voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

“Goods” means chattels or merchandise in storage, or which has been or is about to be stored.

“Holder” of a receipt means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement on the receipt.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee or as pledgee.

“Purchaser” includes mortgagee and pledgee.

“Receipt” means a warehouse receipt.

“Value” is any consideration sufficient to support a simple contract. An antecedent or preëxisting obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

“Warehouseman” means a person lawfully engaged in the business of storing goods for profit.<sup>30</sup>

§ 1507. See, however, *Newhall v. Central Pac. R. R.*, 51 Cal. 345, 21 Am. Rep. 713; *Williston, Sales*, § 542. The protection of dealings in negotiable receipts clearly requires that a vendor, who has by giving up possession of goods or warehouse receipts allowed negotiable receipts to be outstanding, should not be permitted to defeat one who buys such receipts. Sections 50-55 impose criminal penalties for various frauds connected with the issue of, or dealing, with receipts.

Sections 56 and 57 relate to the interpretation of the Act, providing in effect that the unwritten law shall govern cases not covered by the statute, and that the statute shall be so construed as to give effect to its purpose to make uniform the law of the States which enact it. See *Commercial Nat. Bank v. Canal-Louisiana Bank*, 239 U. S. 520, 36 Sup. Ct. 194, 60 L. Ed. 417.

<sup>30</sup> This included one who conducts safe deposit vaults. *New Jersey &c.*

(2) A thing is done "in good faith" within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.<sup>31</sup>

### § 1066. Innkeepers.

An innkeeper is one who holds himself out to the public as prepared to accommodate all travellers with the necessities for a temporary sojourn.<sup>32</sup> This definition excludes a householder who for hire occasionally takes travellers into his house, but who refuses to accept others;<sup>33</sup> one who keeps a restaurant without rooms for lodgings;<sup>34</sup> one who furnishes lodgings without food;<sup>35</sup> one who keeps a boarding house for those planning to make a stay of long duration.<sup>36</sup>

On the other hand, one who keeps a hotel on the European plan is an innkeeper, though meals are separately paid for in a room resorted to not only by guests of the hotel, but by others, as a restaurant;<sup>37</sup> and an innkeeper who supplies food and lodging need not necessarily provide all conveniences, as for instance, accommodation for horses.<sup>38</sup>

### § 1067. Who are guests.

The obligations of one who is not an innkeeper with reference to property intrusted to him, and even such obligations

*Trust Co. v. Rector*, 76 N. J. Eq. 587, 75 Atl. 931, but not a casual bailee for hire. *Alton v. New York Taxicab Co.*, 66 N. Y. Misc. 191, 121 N. Y. S. 271.

<sup>31</sup> The only one of these definitions requiring comment is that of value, which follows the Negotiable Instruments Law (Sec. 25. See *infra*, § 1146), and applies the rule generally prevailing in regard to bills and notes to warehouse receipts. See also *Williston, Sales*, §§ 619, 620.

<sup>32</sup> See *Cooley, Torts* (3d ed.), § 1338. *Jackson v. Virginia Hot Springs Co.*, 213 Fed. 969, 975, 130 C. C. A. 375, 381.

<sup>33</sup> *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218. See also *McClougherty v. Cline*, 128 Tenn. 605, 163 S. W. 801.

<sup>34</sup> *Regina v. Rymer*, 2 Q. B. D. 1. *Lewis v. Hitchcock*, 10 Fed. 4; *Meigs v. Hodson*, 88 Conn. 314, 91 Atl. 1. L. R. A. 1915 B. 481, Ann. Cas. 1 D. 917; *Sheffer v. Willoughby*, Ill. 518, 45 N. E. 253, 34 L. R. A. 4 54 Am. St. Rep. 483; *Kisten v. Hildebrand*, 9 B. Mon. 72, 48 Am. Dec. 4. <sup>35</sup> *Davis v. Gay*, 141 Mass. 531 N. E. 549; *Kelly v. New York Commissioners*, 54 How. Pr. 327. *Huntley v. Stanchfield* (Wis.), N. W. 276.

<sup>36</sup> *Bonner v. Welborn*, 7 Ga. 296.

<sup>37</sup> *Pinkerton v. Woodward*, 33 C. 557, 91 Am. Dec. 657; *Nelson v. Johnson*, 104 Minn. 440, 116 N. W. 828, L. R. A. (N. S.) 1259.

<sup>38</sup> *Kisten v. Hildebrand*, 9 B. M. 72, 48 Am. Dec. 416.

of an innkeeper to one who is not a guest, are simply those of a bailee in regard to property intrusted to him. If the service is paid for directly or indirectly the bailment is for hire. The existence of obligations other than those ordinarily relating to bailed property must depend on the implication in fact of special contracts, or on the law of torts. But to his guests the innkeeper has a larger duty. It is, therefore, essential to determine who is a guest. He is a temporary sojourner who for a price paid, or to be paid, is furnished with either food or lodging or who is received for the purpose of being so furnished.<sup>39</sup> One who makes an inn his home permanently or under a special contract for a long period is a boarder and not within the definition of a guest.<sup>40</sup> Nor is a friend invited gratuitously.<sup>41</sup> When a porter engaged by a hotel solicits custom at a railway station and receives baggage from one who thereupon takes a vehicle to which he is directed by the porter, for transportation to the inn, the relation of guest begins when the baggage is delivered to the porter.<sup>42</sup> But if after the baggage is thus delivered the owner changes his mind and does not go to the inn, the innkeeper is under no liability as such for the baggage.<sup>43</sup> Whether securing accommodation for a servant or a horse at an inn will make one a guest, has given rise to a difference of opinion.<sup>44</sup> Un-

<sup>39</sup> As to the necessity of the innkeeper's consent to receive a guest, see *Gastenhofer v. Clair*, 10 Daly, 265.

<sup>40</sup> *Moore v. Long Beach Development Co.*, 87 Cal. 483, 26 Pac. 92; *Walling v. Potter*, 35 Conn. 183; *Vance v. Throckmorton*, 5 Bush, 41, 96 Am. Dec. 327; *Hall v. Pike*, 100 Mass. 495; *Lusk v. Belote*, 22 Minn. 468; *Wiser v. Chesley*, 53 Mo. 547; *Hancock v. Rand*, 94 N. Y. 1, 46 Am. Rep. 112; *Crapo v. Rockwell*, 48 N. Y. Misc. 1, 94 N. Y. S. 1122; *Meacham v. Galloway*, 102 Tenn. 415, 52 S. W. 859, 46 L. R. A. 319, 73 Am. St. Rep. 886.

<sup>41</sup> *Beale, Innkeepers*, § 125.

<sup>42</sup> *Coskery v. Nagle*, 83 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. 333; *Dickinson v. Winchester*, 4 Cush. 114, 50 Am. Dec. 760.

<sup>43</sup> *Tulane Hotel Co. v. Holohan*, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. 930. See also *Strauss v. County Hotel &c. Co.*, 12 Q. B. D. 27.

<sup>44</sup> That it will, see *Yorke v. Grenaugh*, 2 Ld. Raym. 866; *Russell v. Fagan*, 7 Houst. 389; *Mason v. Thompson*, 9 Pick. 280, 20 Am. Dec. 471; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574. But see *Hickman v. Thomas*, 16 Ala. 666; *Thickstun v. Howard*, 8 Blackf. 535; *Healey v. Gray*, 68 Me. 489, 28 Am. Rep. 80; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663; *Ingallsbee v. Wood*, 33 N. Y. 577, 88 Am. Dec. 409; *Neale v. Crocker*, 8 Up. Can. C. P. 224. In *Brewer v. Caswell*, 132 Ga. 563, 64 S. E. 674, 23 L. R. A. (N. S.) 1107, 131 Am. St. Rep. 216, the court held that where the

doubtedly resort to an inn by a traveller even for a single meal makes him a guest;<sup>45</sup> and it has been said in England that the same is true of one who is not a traveller,<sup>46</sup> but may be questioned whether this would be accepted in the United States.<sup>47</sup>

**§ 1068. Obligations of innkeepers in regard to guests' property.**

The obligations of an innkeeper to his guests with reference to their goods are generally classed as those of a bailee under a special duty and analogous to those of a carrier. It has been pointed out, however,<sup>48</sup> that the obligation may arise where there is no bailment, as where the goods are in the guest's own keeping, and the guest need not have legal capacity to make a contract.<sup>49</sup> Historically the innkeeper's liability seems properly regarded as a positive obligation imposed by law to protect guests from wrongs committed by the innkeeper's servants or by thieves or marauders from without

owner of a mule left him in the stable of an inn where guests were allowed to leave their horses without saying he would return for dinner at the inn and would feed the mule himself, the relation of guest was clearly not established.

<sup>45</sup> *Orchard v. Bush*, [1898] 2 Q. B. 284; *Overstreet v. Moser*, 88 Mo. App. 72; *McDonald v. Egerton*, 5 Barb. 560; *Read v. Amidon*, 41 Vt. 15, 98 Am. Dec. 560; *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233.

<sup>46</sup> In *Orchard v. Bush & Co.*, [1898] 2 Q. B. 284, 287, Wills, J., said: "I confess I do not understand why he should not be a guest if he uses the inn as an inn for the purpose merely of getting a meal there. There is not much to be said, upon the authorities, for the proposition that a person, in order to be a guest at the inn, must be a wayfarer or traveller. I quite agree that in olden times wayfarers were more often 'guests' than anybody else. The innkeeper's liability is said to

arise because he receives persons *causa hospitandi*. I cannot see why he receives them less *causa hospitandi* if he gives them refreshment for half a day, receiving them in the same way as other persons are received, than if they stay the night at his inn. It makes no difference that he receives a large number of people who only take a meal at the inn. He does receive them, and, as an innkeeper, and his liability as an innkeeper thereupon attaches in respect of them."

Kennedy, J., said: "Apart from the question whether he was a traveller or not, I am of opinion that if a man is in an inn for the purpose of receiving such accommodation as the innkeeper can give him, he is entitled to the protection the law gives to a guest at an inn."

<sup>47</sup> See decisions distinguishing boarders at hotels from guests.

<sup>48</sup> Beale on Innkeepers, § 182.

<sup>49</sup> *Id.*, § 112.

An analogy to carriers, which was not suggested until the nineteenth century,<sup>50</sup> seems, however, in many jurisdictions to have prevailed in recent years, and the innkeeper has been subjected to the same degree of liability as a carrier.<sup>51</sup> But in other jurisdictions the innkeeper, unlike a carrier, is free from liability for loss by fire not caused by his fault,<sup>52</sup> and for loss from other causes involving neither negligence or misconduct of the innkeeper or his servants, nor a failure to afford protection from outside trespassers.<sup>53</sup> Under either view the innkeeper is liable for theft whether by the innkeeper's servant,<sup>54</sup> or by a stranger.<sup>55</sup>

### § 1069. Limitations of innkeeper's liability in regard to guests' property.

In order to give rise to extraordinary liability, the goods

<sup>50</sup> *Richmond v. Smith*, 8 B. & C. 9. See Beale on Innkeepers, § 83.

<sup>51</sup> *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 16 L. R. A. 188, 27 Am. St. Rep. 198 (26 Pac. 1099, 28 Pac. 943); *Norcross v. Norcross*, 53 Me. 163; *Mason v. Thompson*, 9 Pick. 280, 20 Am. Dec. 471; *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109, 41 Am. Rep. 772; *Sibley v. Aldrich*, 33 N. H. 553, 66 Am. Dec. 745; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405; *Lucia v. Omel*, 53 N. Y. App. Div. 641, 66 N. Y. S. 1136; *Slater v. Landes*, 172 N. Y. S. 190; *Cunningham v. Bucky*, 42 W. Va. 671, 26 S. E. 442, 35 L. R. A. 850, 57 Am. St. Rep. 876; *Jalil v. Cardinal*, 35 Wis. 118.

<sup>52</sup> *Vance v. Throckmorton*, 5 Bush, 41, 96 Am. Dec. 327; *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127; *Merritt v. Claghorn*, 23 Vt. 177. In Germany, the innkeeper is not liable for loss caused by the guest himself or an associate, or by the inherent nature of the property or by *vis major*. Burg. Gesetzbuch, § 701.

<sup>53</sup> *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *Baker v. Dessauer*, 49 Ind. 28; *Woodworth v. Morse*,

18 La. Ann. 156; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47, 14 Am. Dec. 254; *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127; *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218; *Howe Machine Co. v. Pease*, 49 Vt. 477. See also *Johnson v. Chadbourn Finance Co.*, 89 Minn. 310, 94 N. W. 874, 99 Am. St. 571; *W. R. Case & Sons Cutlery Co. v. Canode* (Tex. Civ. App.), 205 S. W. 350; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574.

<sup>54</sup> *Shultz v. Wall*, 134 Pa. 262, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97.

<sup>55</sup> *Lanier v. Youngblood*, 73 Ala. 587; *Sasseen v. Clark*, 37 Ga. 242; *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *Lusk v. Belote*, 23 Minn. 468; *Olson v. Crossman*, 31 Minn. 222, 17 N. W. 375; *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109, 41 Am. Rep. 772; *Wies v. Hoffman House*, 28 N. Y. Misc. 225, 59 N. Y. S. 38; *Gast v. Gooding*, 1 Ohio Dec. 315; *Newson v. Axon*, 1 McCord (S. Car.), 509, 10 Am. Dec. 685; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574. See *contra*, *Baker v. Dessauer*, 49 Ind. 28.



## § 1070 CONTRACTS OF BAILMENT AND OF INNKEEPERS

in question while not necessarily in the actual possession of the innkeeper,<sup>56</sup> must be within his general control.<sup>57</sup> is he liable except as an ordinary bailee for merchant brought for purposes of exhibition and sale by traveling salesmen and put in a separate room for that purpose.<sup>58</sup> innkeeper may establish reasonable rules, and if the guest has notice of these rules he must observe them, or suffer consequences of loss caused by his failure to do so.<sup>59</sup> A common rule of this sort is one requiring a deposit of valuable property in a safe kept by the innkeeper. For goods so deposited the innkeeper is liable.<sup>60</sup> Frequently statutes enact similar rules. Clothing and articles of ordinary daily use can be required by him to be deposited in this way.<sup>61</sup> If the loss of the goods was caused or contributed to by the owner's own act or negligence, the innkeeper is not liable.<sup>62</sup> Whatever degree of liability may be imposed upon him by law he is not allowed to limit by contract.<sup>63</sup>

### § 1070. Innkeeper's obligations in regard to guests' comfort and safety.

The obligations of an innkeeper are imposed by law irrespective of contract, and may arise when no contract or can be made.<sup>64</sup> There is nevertheless frequently a co

<sup>56</sup> *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; *Jalie v. Cardinal*, 35 Wis. 118.

<sup>57</sup> *Vance v. Throckmorton*, 5 Bush, 41, 96 Am. Dec. 327.

<sup>58</sup> *Burgess v. Clements*, 4 M. & S. 306; *Fisher v. Kelsey*, 121 U. S. 383, 30 L. Ed. 930, 7 Sup. Ct. Rep. 929.

<sup>59</sup> *Stanton v. Leland*, 4 E. D. Smith, 88.

<sup>60</sup> *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

<sup>61</sup> *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369.

<sup>62</sup> *Cashill v. Wright*, 6 E. & B. 891; *Elcox v. Hill*, 98 U. S. 218, 25 L. Ed. 103; *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82; *Spring v. Hager*, 145 Mass.

186, 13 N. E. 479, 1 Am. St. R. 451.

<sup>63</sup> *Stanton v. Leland*, 4 E. D. Smith, 88; *Fuller v. Coats*, 18 Ohio St. 343.

<sup>64</sup> *Beale, Innkeepers*, § 111; *Floren Hotel Co. v. Bumpas*, 194 Ala. 69, 1 So. 56C, Ann. Cas. 1918 E. 252.

In *Stanley v. Bircher*, 78 Mo. 24, 248, the court said: "In this case the relation of host and guest which originated in contract, explains how the defendant's testator came to owe the plaintiff a duty. That duty, however the law imposes. It is a public duty which is not defined by the contract. Neither can the proprietor relieve himself from that duty by contract. The action in truth is for a violation of the duty which the law imposes."

tract between the parties fixing the terms of their relation within the limits which the law permits. How far the duties which the law imposes become by implication part of such a contract is not always easy to say,<sup>65</sup> and it is not often material to determine whether the obligation is imposed not only by virtue of general public policy, but also by virtue of mutual assent. In a recent decision,<sup>66</sup> the court thus stated the extent of the obligation: "The general rule of law governing the liability of innkeepers when these defendants made their agreement with the plaintiff, the rule which had received the approval of every court which had ever decided the question, so far as we have been able to discover, was that an innkeeper was not an insurer of the safety of the person of his guest against injury, but that his obligation was limited to the exercise of reasonable care for the safety, comfort, and entertainment of his visitor."<sup>67</sup> So much is clear. The court added, however, "In another class of cases, those involving the liability of common carriers and of the operators of palace cars to their passengers, this measure of liability has in later years been extended to include responsibility for the willful and negligent acts of those to whom the carriers intrust the transportation of their passengers, such as brakemen, porters, and conductors, upon the ground that these servants, when upon the trains or steamboats, are engaged in the course or scope of their employment to conduct the safe transportation of the passengers, whatever they may be doing. Whether innkeepers also are liable absolutely for the negligent and tortious acts of their servants towards

independent of contract. Neither the damages, nor the scope of the action can be measured or limited by the contract."

<sup>65</sup> See *supra*, § 615.

<sup>66</sup> *Clancy v. Barker*, 131 Fed. 161, 163, 66 C. C. A. 469.

<sup>67</sup> Citing *Calye's Case*, 8 Coke, 202, 206; *Sandys v. Florence*, 47 L. J. C. P. D. 598; *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693; *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148, 153; *Sheffer v. Willoughby*, 163 Ill. 518, 521, 523,

45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; *Gilbert v. Hoffman*, 66 Iowa, 205, 23 N. W. 632, 55 Am. Rep. 263; *Overstreet v. Moser*, 88 Mo. App. 72, 75; *Stanley v. Bircher's Ex'r*, 78 Mo. 245, 248; *Stott v. Churchill*, 15 N. Y. Misc. 80, 36 N. Y. S. 476, 477; *Sneed v. Moorehead*, 70 Miss. 690, 13 So. 235. See also *Bechtold v. Rae*, 231 Mass. 151, 120 N. E. 377; *Strahl v. Miller*, 97 Neb. 820, 151 N. W. 952, Ann. Cas. 1917 A. 141; *Seay v. Plunkett*, 44 Okl. 794, 145 Pac. 496.

guests upon the premises of the inn has been the subject of a difference of judicial opinion." In the case from which the quotation has just been made, an innkeeper was distinguished from a carrier and held to be liable for acts of his servants only when they are actually engaged in the duties of their employment.<sup>68</sup> A similar decision has been made in California.<sup>69</sup> The stricter rule, however, has been enforced in other cases.<sup>70</sup> And any distinction between innkeepers and carriers in this respect seems to rest on slight foundation.

<sup>68</sup> The defendant was therefore held not liable to the plaintiff a young boy, for an injury caused by being carelessly shot by an employee of the hotel who though on the premises was not engaged in any duty at the time.

<sup>69</sup> *Rahmel v. Lehdorff*, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154.

<sup>70</sup> *Clancy v. Barker*, 71 Neb. 83, 98 N. W. 440, 69 L. R. A. 642, 115 Am. St. Rep. 559. See also *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517; *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732. See also *Beale, Innkeepers*, § 174.

<sup>71</sup> In *Clancy v. Barker*, 71 Neb. 83, 98 N. W. 440, 69 L. R. A. 642, 115 Am. St. Rep. 559, the court quoting from *Story, J.*, in *Jencks v. Coleman*, 2 Sumn. 221; Fed. Cas. No. 7,258, said: "An owner of a steamship or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound so to regulate his house, as well with regard to the peace and comfort of his guests who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and, of course, he has a right and is bound to exclude from his premises all disorderly persons not conforming to regulations necessary and proper to secure such quiet and good order." The court

added: "The foregoing language quoted with approval in *Bass v. C.* N. W. R. Co., 36 Wis. 450, 459 Am. Rep. 495. Substantially the same language is employed by the court in *Dickson v. Waldron*, 135 Ind. 507, N. E. 510, 24 L. R. A. 483, 41 Am. Rep. 440. See also *Norcross v. Norcross*, 53 Me. 163, 169; *Pinkerton v. Woodward*, 33 Cal. 557, 585, 91 Am. Dec. 657; *Commonwealth v. Powell*, 7 Metc. 596, 601, 41 Am. Dec. 481; *Russell v. Fagan*, 7 Houst. 389, 3 Atl. 258; *Pullman Car Co. v. Lovell*, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325. The foregoing also shows that the duties of a hotel keeper to his guests are regarded as similar to the common-law obligations of a common carrier to his passengers. Those duties spring from the implied terms of his contract, and a failure to discharge them, which it may in some instances amount to tort, amounts in every instance to breach of contract.

"If, then, the defendants were under a contractual obligation that the plaintiff and his family should be treated with due consideration for their comfort and safety, the act of the servant, resulting in the injuries complained of, obviously amounts to a breach of contract. That the wrongful act was committed by a servant is wholly immaterial. The rule that requires that a guest at a hotel be treated with due consideration for

If the innkeeper is negligent in selecting or retaining a servant, on any view he is responsible for the consequences.<sup>72</sup> When a guest has been assigned a room in an inn he has a right to its exclusive possession, subject only to such occasional entries as the innkeeper or his servants may find it necessary to make in the reasonable discharge of their duties. For inconvenience or humiliation caused by invasion of privacy or ejection without reasonable cause, the innkeeper is liable.<sup>73</sup> An innkeeper's liability for serving injurious food has been elsewhere considered.<sup>74</sup>

his comfort and safety would be of little value if limited to the proprietor himself. As a rule, he does not come in contact with the guests. His undertaking is not that he personally shall treat them with due consideration, but that they shall be so treated while inmates of the hotel as guests; and, if they be not thus treated, there is a breach of the implied contract, whether the lack of such treatment is the result of some act or omission of the proprietor himself, or of his servant or servants.

"Neither do we deem it material whether the servant at the time of the injury was actively engaged in the discharge of his duty as servant or not. He was a servant of the proprietor, and an inmate of the hotel. His duty as to the treatment to be accorded the guests of the hotel was a continuing one, and rested upon him wherever, within the hotel, he was brought in contact with them. To hold otherwise would be to say that a guest would have no redress for any manner of indignity received at a hotel, so long as it was inflicted by a servant not actively engaged in the discharge of some duty. The following from *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, 122, 24 N. E. 319, 8 L. R.

A. 224, 17 Am. St. Rep. 611, is peculiarly applicable at this point: 'The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing, or had completed the performance of it, when the blow was struck.'"

<sup>72</sup> In *Duckworth v. Appostolis*, 208 Fed. 936, an innkeeper was held liable for an assault on a guest made by a servant, whose temper was known to be quarrelsome and who was known to have made previous assaults on guests.

<sup>73</sup> *Florence Hotel Co. v. Bumpas*, 194 Ala. 69, 69 So. 566; *Jones v. Shannon* (Mont.), 175 Pac. 882; *DeWolf v. Ford*, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969.

<sup>74</sup> *Supra*, § 996 a.

## CHAPTER XXXII

### CONTRACTS OF AFFREIGHTMENT

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### § 1071. Contracts of carriers.

The contracts of carriers with reference to goods bailed to them are usually (but by no means universally) in writing, and may be divided into two general classes,<sup>1</sup> based on the nature of the agreement, 1. Charter parties; 2. Bills of lading and shipping receipts. Charter parties are used where the whole of a vessel is to be utilized by a shipper of goods. Analogous contracts, though readily supposed for land carriage, are not ordinarily made by carriers and in any event are not called charter parties. A further important distinction, based on the character of the contracting carrier, is between contracts of common carriers and those of private carriers; and again between contracts of common carriers engaged in interstate business (whose contracts as to such business are controlled by the United States Interstate Commerce Acts) and those of common carriers not engaged in such business. Upon some points separate treatment of these different classes is unnecessary, on other points it is essential.

<sup>1</sup> Hereafter separately considered.

### § 1072. Definition of a common carrier.

A common carrier is one who professes to carry for a reasonable price either goods generally or any particular kind of goods for all who apply, according to the method of transportation professed by him, and under regulations established by him.<sup>2</sup> Such a carrier may demand payment in advance as a condition of accepting goods, and the shipper must be ready and willing to pay, but an actual tender of payment is not a condition precedent to the carrier's obligation to receive the goods.<sup>3</sup> It is not essential that the carrier should exercise his vocation only between fixed termini,<sup>4</sup> or should have fixed or regular dates of travel.<sup>5</sup> It is im-

<sup>2</sup> *Belfast Ropework Co. v. Bushell*, [1918] 1 K. B. 210. See *Liver Alkali Co. v. Johnson*, L. R. 9 Exch. 338; *Dickson v. Great Northern Ry. Co.*, 18 Q. B. D. 176, 183; *Lang v. Brady*, 73 Conn. 707, 49 Atl. 199; *Central of Georgia Ry. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 5 L. R. A. 673; *Williams v. Kinston Mfg. Co.*, 175 N. Car. 226, 95 S. E. 366; *Cushing v. White*, 101 Wash. 172, 172 Pac. 229.

In *Faucher v. Wilson*, 68 N. H. 338, 339, 38 Atl. 1002, 39 L. R. A. 431, the court said: "It is not found that the defendant was a common carrier. The finding, that he was engaged in the business of trucking goods for hire from the railway freight station to different stores in the city, lacks the distinguishing characteristic of a common carrier, namely, the holding of oneself out as ready 'to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow.' *Sheldon v. Robinson*, 7 N. H. 157, 163, 26 Am. Dec. 726; *Elkins v. Boston & Maine Railroad*, 23 N. H. 275; *Moses v. Boston & Main Railroad* 24 N. H. 71, 80, 82, 89, 55 Am. Dec. 222; *McDuffee v. Portland, etc., Railroad*, 52 N. H. 430, 448, 13 Am. Rep. 72; *State v. United States & Canada Express Co.*, 60 N. H. 219, 261, 2 Kent, 597, 598,

*Sto. Bailm.*, §§ 495, 508; *Brind v. Dale*, 8 C. & P. 207; *Liver Alkali Co. v. Johnson*, L. R. 9 Exch. 338, 343; *Scaife v. Farrant*, L. R. 10 Exch. 358, 365; *Nugent v. Smith*, 1 C. P. D. 423; *Fish v. Chapman*, 2 Kelly (Ga.), 349, 46 Am. Dec. 393; *Allen v. Sackrider*, 37 N. Y. 341; *Lough v. Outerbridge*, 143 N. Y. 271, 278, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712. The inference from this finding is as strong, to say the least, that the defendant's business was limited to trucking for particular customers, at prices fixed in each case by special contract, as it is that he held himself out as ready to truck for the public indiscriminately at reasonable prices. If such was the character of his business, he was not an insurer of the plaintiff's goods,—there being no special contract of insurance,—and was only bound to exercise ordinary care in respect to them."

<sup>3</sup> *Pickford v. Grand Jct. Ry. Co.*, 8 M. & W. 372.

<sup>4</sup> *Liver Alkali Co. v. Johnson*, L. R. 7 Exch. 267, 9 *id.* 338; *Anderson v. Fidelity &c. Co.*, 183 N. Y. App. D. 170, 170 N. Y. S. 431.

<sup>5</sup> *Pennewill v. Cullen*, 5 Harr. 238, 241; *Anderson v. Fidelity &c. Co.*, 183 N. Y. App. D. 170, 170 N. Y. S. 431. But see *Nugent v. Smith*, 1 C. P. D. 423, 427.

material what is the nature of the vehicle used for transportation. Canal boats,<sup>6</sup> lighters,<sup>7</sup> ferryboats,<sup>8</sup> as well as vessels of larger size,<sup>9</sup> stage coaches,<sup>10</sup> cabs, trucks, and express wagons,<sup>11</sup> street railways,<sup>12</sup> steam railroads<sup>13</sup> though operated by a private individual<sup>14</sup> or by a receiver or trustee under a mortgage,<sup>15</sup> may any of them be the means of common carriage. Express companies are common carriers though their only business may be to forward goods by the agency of other carriers,<sup>16</sup> as are freight lines and other companies which employ the agency of other carriers to perform their contracts.<sup>17</sup> Sleeping and parlor car companies, however, are not common carriers and are only bound to the exercise of reasonable care.<sup>18</sup> Nor are livery stable keepers,<sup>19</sup> mail

<sup>6</sup> *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Fuller v. Bradley*, 25 Pa. 120.

<sup>7</sup> *Ingate v. Christie*, 3 Car. & Kir. 61.

<sup>8</sup> *Griffith v. Cave*, 22 Cal. 534, 83 Am. Dec. 82; *Lewis v. Smith*, 107 Mass. 334.

<sup>9</sup> *Liverpool &c. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 Sup. Ct. 469. See also *Nugent v. Smith*, 1 C. P. D. 19, 423.

<sup>10</sup> *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276.

<sup>11</sup> *Hebard v. Riegel*, 67 Ill. App. 584; *Hinchliffe v. Wenig Teaming Co.*, 274 Ill. 417, 113 N. E. 707; *Caye v. Pool's Assignee*, 108 Ky. 124, 55 S. W. 887, 49 L. R. A. 251, 94 Am. St. Rep. 348; *Jackson, etc., Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665.

<sup>12</sup> *Citizens' R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55; *East Omaha St. R. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491.

<sup>13</sup> *Contra Costa, etc., R. v. Moss*, 23 Cal. 323; *Choctaw, etc., R. Co. v. Hill*, 110 Tenn. 396, 75 S. W. 963.

<sup>14</sup> *Davis v. Button*, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545.

<sup>15</sup> *Rogers v. Wheeler*, 2 Lans. 486, 43 N. Y. 598; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424.

<sup>16</sup> *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872; *Taylor v. Wells, Fargo & Co.*, 249 Fed. 109, 161 C. C. A. 161; *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122.

<sup>17</sup> *Merchants' Despatch Co. v. Bolles*, 80 Ill. 473; *Wilde v. Merchants' Despatch Trans. Co.*, 47 Ia. 247, 29 Am. Rep. 479; *Merchants' Despatch Co. v. Bloch*, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847.

<sup>18</sup> *Hughes v. Pullman's Palace-Car Co.*, 74 Fed. 499; *Pullman Palace-Car Co. v. Adams*, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767; *Dawley v. Wagner Palace Car Co.*, 169 Mass. 315, 47 N. E. 1024; *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616 (distinguishing a steamboat with state-rooms); otherwise by constitution in Mississippi, *Pullman Palace-Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; nor are they innkeepers. *Lewis v. Sleeping Car Co.*, 143 Mass. 267, 273, 9 N. E. 615.

<sup>19</sup> *Stanley v. Steele*, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561.



contractors or carriers,<sup>20</sup> messenger companies,<sup>21</sup> or telegraph companies.<sup>22</sup> Carriers of passengers are not subject to the same liability as common carriers of goods. They are, however, bound to receive passengers who present themselves, in the absence of legal excuse.<sup>23</sup> They are liable also as common carriers of the baggage of the passengers, even though no separate charge is made for its transportation.<sup>24</sup>

The suggestion has been made that carriers who are not common carriers may assume the same liabilities as if they were. There seems no reason to doubt that a private carrier may by representations to one or several individuals by word or conduct, estop himself to deny that he is a common carrier, but if he made such representations to the public generally he would thereby become in fact a common carrier.<sup>25</sup>

### § 1073. Limitation of carriers' capacity to contract.

A carrier which is not a common carrier has the same freedom of contract as an ordinary bailee for hire. That is, it can contract on any terms except for total exemption from liability for negligence. A common carrier, whose operations are confined within the limits of a single State, is further limited by the common-law rules restraining such carriers from unreasonably limiting their liabilities and by the statutes of the State in which it does business. The same rule is applicable to interstate carriers so far as concerns business which is exclusively intrastate.<sup>26</sup> A common carrier, how-

<sup>20</sup> *Conwell v. Voorhees*, 13 Oh. 523, 42 Am. Dec. 206.

<sup>21</sup> *Haakell v. Boston Dist. Messenger Co.*, 190 Mass. 189, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. Rep. 324.

<sup>22</sup> See *infra*, § 1114.

<sup>23</sup> *Pearson v. Duane*, 4 Wall. 605, 18 L. Ed. 447; *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301, 302.

<sup>24</sup> *Brooke v. Pickwick*, 4 Bing. 218, 222. See also *Hooker v. Boston & Maine R.*, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912 B. 669; *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868; *Hollister*

*v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455.

<sup>25</sup> *Watkins v. Cottell*, [1916] 1 K. B. 10, 15. "It is said that there is a third class of persons who are under the liability of a common carrier, namely, persons who exercise a public employment of carrying goods for hire. I very much doubt whether there is any such third class as distinct from common carriers. I should have thought that if a man exercises his employment in such a way as to incur the liability of a common carrier he is a common carrier."

<sup>26</sup> *Minneapolis & St. L. R. Co. v.*

ever, engaged in transportation between the several States is subject to a much more stringent regulation in regard to contracts relating to such interstate transportation. By virtue of the Interstate Commerce Acts as amended,<sup>27</sup> it can make no contract relating to such transportation of goods unless it has previously filed in Washington schedules stating the terms thereof, and that it is open for acceptance by any of the public, and also stating the rate for which the carrier will enter into it,<sup>28</sup> and this rate must be payable in money.<sup>29</sup> The carrier and the shipper, therefore, can only choose which of the contracts filed in the carrier's schedules they will adopt. No further freedom of contract is open to them; and how far such obligations should be called contracts may be questioned, for one entering into an agreement for a service thus enumerated in the carrier's schedules, becomes liable to the carrier, irrespective of the agreement and in spite of any provision therein to the contrary, to pay the rate specified in the schedule.<sup>30</sup> And not only does the Federal law thus prescribe the contracts which alone may be entered into for interstate transportation, but its own construction of a permitted contract is controlling and local rules as to its meaning or legal effect must yield.<sup>31</sup>

Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151. The Federal control "applies with respect to transportation within the bounds of a State as part of an interstate journey." *New York Central R. Co. v. Gray*, 239 U. S. 583, 60 L. Ed. 451, 36 Sup. Ct. 176. See also *Cincinnati, etc., R. Co. v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555.

<sup>27</sup> The original Act was passed February 4, 1887. Important amendments were made March 2, 1889, January 29, 1906, June 18, 1910, March 4, 1915, Aug. 9, 1916. See U. S. Comp. Stat., §§ 8563 *et seq.*

<sup>28</sup> *Chicago, etc., R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033. Cf. *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 61 L. Ed. 1131, 37 S. Ct. Rep. 499, 501, whereth e

court said in an action for personal injuries to a caretaker travelling on a pass, that the dependent would not be "heard in this court to urge the inconsistent defence that its own tariff made unlawful this contract on which in the alternative it relies."

<sup>29</sup> *Louisville &c. R. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265; *Chicago &c. R. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272.

<sup>30</sup> *Texas, etc., R. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, 1915 B. L. R. A. 450; *Louisville, etc., R. Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, 1915 E. L. R. A. 665.

<sup>31</sup> *Cincinnati &c. R. Co. v. Rankin*,

Though the statute requires the tariff fixed by the schedules to be posted in railroad stations, compliance with this requirement is not essential to the binding efficiency of the filed schedules.<sup>32</sup> Moreover, a limitation of liability in the form of a valuation of the goods stated in the schedule has been held binding upon the shipper, though the shipper had no knowledge in fact of the schedule or of any proposed valuation or limitation of liability.<sup>33</sup> It is a logical consequence of this that a carrier can not only impose on a shipper a published rate for whatever contract the shipper may enter into, but may subject the shipper to a stipulation limiting or varying in any way its own liability for breach of the contract, by filing in its schedules a statement that in the absence of agreement to the contrary, such a stipulation will be assumed;<sup>34</sup> provided the limitation is one which could

241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022; *Continental Paper Bag Co. v. Maine Central R.*, 115 Me. 449, 99 Atl. 259.

<sup>32</sup> *Texas, etc., R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562; *American Express Co. v. United States Horse Shoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990.

<sup>33</sup> *Boston & Maine R. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, 1915 B. L. R. A. 450. See also *American Express Co. v. United States Horse Shoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990, and *infra*, § 1110.

<sup>34</sup> This consequence has been accepted by the New Jersey Supreme Court which has held the shipper bound by the terms of a published bill of lading though no bill of lading had in fact been issued. *Standard Combed Thread Co. v. Pennsylvania R. Co.*, 88 N. J. L. 257, 95 Atl. 1002, 1003, L. R. A. 1916 C. 606. The court said: "The 'Carmack amendment,' which is part of section 20 of the Interstate Commerce Act, as amended by the Hepburn Act of June 29, 1906 (34

Stat. at L. 584, c. 3591, quoted in *Adams Ex. Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257), requires the issue by carriers of a bill of lading. Under the act, and the regulations made by the Interstate Commerce Commission pursuant thereto, defendant was required to submit and publish with its tariffs a uniform bill of lading; and, in the absence of a disclaimer by the shipper and the acceptance of a ten per cent, higher rate, the terms of the uniform bill of lading are declared applicable. Such a bill of lading was submitted, approved, and published. It contained the clause quoted above. In *International Watch Co. v. D., L. & W. R. Co.*, 80 N. J. L. 553, 78 Atl. 49, affirmed 82 N. J. L. 528, 82 Atl. 730, on the opinion delivered in the Supreme Court, it was held (page 556 of 80 N. J. L. page 50, of 78 Atl.), that: 'Where no bill of lading is given, the shipper himself stands in the same position as if he was the lawful holder of such bill of lading, and the liability of the company to such shipper is the same liability as is imposed in favor of the lawful holder of a receipt or bill of

have been lawfully made by agreement between the shipper and carrier, had the Interstate Commerce Acts not been enacted.<sup>35</sup> If the law permitted a carrier to make a contract in one form only, there would be no difficulty in thus imposing on a shipper both the terms of the service to which he becomes entitled, and the rate for which he becomes liable. The power of contract, however, is not wholly taken away from a carrier by the Federal legislation, and the carrier's schedules customarily contain provision for a contract with the full liability imposed by the common law, as well as for a contract under a bill of lading limiting liability. The effect of the decisions under discussion seems to permit the carrier to impose either of these contracts that it chooses on a shipper without the latter's assent, provided the choice is stated in the schedules, *e. g.*, "A shipper who does not expressly declare that he prefers to contract in one form will be assumed to accept the other form."

An amendment to the Interstate Commerce Acts (called the first Cummins Amendment), passed in 1915,<sup>36</sup> modified the effect of such decisions by providing that a shipper shall be entitled to recover full damages for unjustifiable loss of his goods in spite of any agreement or tariff to the contrary. The carrier, however, is given the right to demand information of the character of the goods if hidden by covering or boxing, or of their value, and if a valuation is made by the shipper, the carrier is not liable for any greater amount. A

lading.' The clause in question, then, was binding on both parties."

<sup>35</sup> In *Boston & Maine R. v. Piper*, 246 U. S. 439, 38 S. C. Rep. 354, 62 L. Ed. 820, the court held a filed stipulation limiting the carrier's liability for delay in transporting cattle to the amount expended for food and water during the delay ineffectual, saying: "The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (*Kansas Southern Ry. v. Carl*, 227 U. S. 639, 654, 33 S. C. Rep. 391, 57 L. Ed. 683); but not so of conditions and limitations

which are, as is this one, illegal and consequently void." This decision seems to qualify somewhat *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 528, 58 L. Ed. 868, 1915, B, L. R. A. 450, Ann. Cas. 1915 D. 593, for such a limitation of liability as that in question in the *Hooker* Case had been forbidden by a ruling of the Interstate Commerce Commission made prior to the filing of the carrier's schedules.

<sup>36</sup> Act of March 4, 1915, 39 Stat. 1197. See discussion of the effect of this in 33 Interstate Com. Com. Rep. 682.

later amendment (the second Cummins Amendment) passed in the following year<sup>37</sup> excepted baggage from the provisions of the first Cummins Amendment, and while authorizing the Interstate Commerce Commission to sanction rates based on valuation denied this right in contracts for the shipment of live stock.<sup>38</sup> By the Amendment (called the Carmack Amendment) of 1906, the initial carrier was made liable for any loss occurring in the course of a through interstate shipment, for which any of the connecting carriers would otherwise have been liable.<sup>39</sup> If the schedule provisions, either in regard to the service offered or the rates therefor, are unreasonable, the shipper is indeed allowed redress by direct proceedings provided by the statute.<sup>40</sup> This redress, however, does not prevent a carrier from effectively filing as part of the schedules any limitation of liability which the law permits a common carrier to stipulate for, since the shipper by delivering his property for shipment in effect has imposed upon him such a contract. To prevent this imposed liability the shipper must attack before the Interstate Commerce Commission the reasonableness of the schedule prior to the shipment of his goods, and make the shipment only after the carrier has changed its schedules in conformity with an order of the commission. Such a course involves obvious delay. The same construction of the Federal statute which forbids a carrier to make contracts (if they can be so called) for interstate carriage except on the terms stated in its filed schedules, denies validity to a subsequent change

<sup>37</sup> Aug. 9, 1916, 39 Stat. 441.

<sup>38</sup> See Live Stock Classification, 43 Interstate Com. Com. Rep. 510; Express Rates 47 *Ibid.* 335, and 66 Univ. of Pa. L. Rev. 166.

<sup>39</sup> See *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7; and in regard to a South Carolina statute making each of the connecting carriers agents for one another in intrastate shipments, and as such liable for the acts of one another, *Atlantic Coast Line R. Co. v. Glenn*, 239

U. S. 388, 60 L. Ed. 344, 36 Sup. Ct. Rep. 154.

<sup>40</sup> *Texas, etc., Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350; *Robinson v. Baltimore, etc., R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114; *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915 A. 315; *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472.

of the terms of such a contract by a waiver on the part of the carrier of any of its provisions.<sup>41</sup>

**§ 1074. Demise of vessel distinguished from ordinary charter party.**

In an opinion of the Supreme Court of the United States,<sup>42</sup> Mr. Justice Clifford thus stated an important distinction: "Affreightment contracts are of two kinds, and they differ from each other very widely in their nature, as well as in their terms and legal effect. Charterers or freighters may become the owners for the voyage, without any sale or purchase of the ship, as in the cases where they hire the ship, and have, by the terms of the contract, and assume in fact, the exclusive possession, command and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command and navigation of the ship, and contracts for a specified voyage,—as, for example, to carry a cargo from one port to another,—the arrangement in contemplation of law, is a mere affreightment sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. Unless the ship itself is let to hire, and the owner parts with the possession, command, and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command, and navigation of the ship, is the agent of the general owners, and the mariners are regarded as in his employment, and he is responsible for their conduct. Courts of Justice are not inclined to regard the contract as a demise of the ship, if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer;<sup>43</sup> but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the

<sup>41</sup> *Georgia &c. R. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; *Metz Co. v. Boston & Maine R.*, 227 Mass. 307, 116 N. E. 475.

<sup>42</sup> *Reed v. United States*, 11 Wall. 591, 600, 20 L. Ed. 220.

<sup>43</sup> *Hagar v. Clark*, 78 N. Y. 45. *Grimberg v. Columbia Packers' Assoc.*, 47 Oreg. 257, 83 Pac. 194, 114 Am. St. Rep. 927, *acc.*

owner during the term of the contract, and, if need be may appoint the master, and ship the mariners, and he comes responsible for their acts." <sup>44</sup>

It may be added that "the charterer is owner *pro hac* where the master is subject to his orders and directions though appointed to his position as master by the general owner." <sup>45</sup> And where this is true, the charter has been held a demise even though it provides in express terms that the charterer shall not be responsible for

<sup>44</sup> "The same distinction and the same rule for determining whether a charterer is to be treated as the owner of the ship during the life of the charter party are recognized and applied in nearly all of the decisions cited upon the argument of this case," it was said in *The Del Norte*, 117 Fed. 542, 544, citing *Marcadier v. Insurance Co.*, 8 Cranch, 39, 3 L. Ed. 481; *The Gracie v. Palmer*, 8 Wheat. 605, 5 L. Ed. 696; *Leary v. United States*, 14 Wall. 607, 20 L. Ed. 756; *Shaw v. United States*, 93 U. S. 235, 23 L. Ed. 880; *United States v. Shea*, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403; *Donahoe v. Kettell*, Fed. Cas. No. 3,980; *The Aberfoyle*, Fed. Cas. No. 16; *Certain Logs of Mahogany*, Fed. Cas. No. 2,559; *Drinkwater v. The Spartan*, Fed. Cas. No. 4,085; *Eames v. Cavaroc*, Fed. Cas. No. 4,238; *Hill v. The Golden Gate*, Fed. Cas. No. 6,492; *Mott v. Ruckman*, Fed. Cas. No. 9,881; *Richardson v. Winsor*, Fed. Cas. No. 11,795; *Webb v. Peirce*, Fed. Cas. No. 17,320; *Winter v. Simonton*, Fed. Cas. No. 17,894; *The Volunteer*, Fed. Cas. No. 16,991; *Posey v. Scoville* (C. C.), 10 Fed. 140; *The T. A. Goddard* (D. C.), 12 Fed. 174; *Anderson v. The Ashbrook* (C. C.), 44 Fed. 124; *The Euripides* (D. C.), 52 Fed. 161; *The Konge Frode*, 6 C. C. A. 313, 57 Fed. 224, 13 U. S. App. 459; *The Alvira* (D. C.), 63 Fed. 144; *The Nicaragua* (D. C.), 71 Fed. 723; *Id.*, 18 C. C. A. 511, 72 Fed. 207, 30 U. S. App. 710; *The*

*Terrier* (D. C.), 73 Fed. 265; *Brar v. Culmer*, 24 C. C. A. 182, 78 L. 497, 42 U. S. App. 303; *The Elton* C. C. A. 496, 83 Fed. 519, 42 U. S. App. 666; *McGough v. Ropner* (D. C.), Fed. 534; *American Steel-Barge v. Cargo of Coal* (D. C.), 107 Fed. (reversed on another point in Fed. 669, 53 C. C. A. 301). The court added: "In some of these cases it was decided, in accordance with the rule stated, that the charterer was owner *pro hac vice*, and in others the charter was found to be not such owner. We have not separated one class from the other, because it would be useless to do so, since both give equal support to the general rule."

<sup>45</sup> *Hills v. Leeds*, 149 Fed. 878, 881, quoting *The Del Norte* (D. C.), 117 Fed. 542, *affd.* 119 Fed. 118, 55 C. C. A. 220. Two decisions where the charter was held to be a demise after considerable discussion are: *Baumwoll Manufaktur v. Furness*, [1893] A. C. 411; *Callahan v. Munson Steamship Line*, 141 N. Y. App. D. 791, 794, 126 N. Y. S. 538. In *The Willie*, 231 Fed. 866, 867, 146 C. C. A. 61, it was said: "Charters of scows in this harbor without motive power of their own and subject to the orders and control of the charterers, are treated as demises even though the owner keeps a master aboard, called captain by courtesy." *Monk v. Cornell Steamboat Co.*, 198 Fed. 472, 117 C. C. A. 232."

acts of the captain in the care, movement or navigation of the vessel.<sup>46</sup>

### § 1075. Mutual obligations under charter parties.

A charter party is to be construed as a written document according to the same principles that are applicable to contracts generally. Besides the mutual promises of the parties there are not infrequently obligations of a special character incurred by them, especially by the charterer. In the negotiations, assertions concerning the vessel are often made by the owner which subsequently the charterer discovers or contends are untrue. If the statements are made prior to the formation of the written contract and not repeated therein, they are merely representations. If such representations are fraudulent and material, they will enable the charterer to avoid the contract.<sup>47</sup> And even though based on innocent mistake it seems that they may be so material as to justify a rescission;<sup>48</sup> but generally unless there was actual fraud, representations not embodied in the charter party have been held to be superseded by it;<sup>49</sup> though prior statements or correspondence may sometimes be admissible to explain the meaning of the charter party.<sup>50</sup> If, however, statements

<sup>46</sup> *Brooklyn Ash Removal Co. v. Connell*, 225 N. Y. 503, 122 N. E. 620. See also *Dailey v. Carroll*, 248 Fed. 466, 160 C. C. A. 476.

<sup>47</sup> See *infra*, § 1487.

<sup>48</sup> See *infra*, § 1500.

<sup>49</sup> In *Matthias v. Beeche*, 111 Fed. 940, 941, the court said: "The charterers pleaded false, but not fraudulent, representations respecting the speed of the vessel, which in fact preceded and are not embodied in the charter party, and are superseded by that instrument, in the absence of fraud or mutual mistake. This rule applies to usual contracts. *Seitz v. Refrigerating Mach. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837 (see cases cited in the opinion); *DeWitt v. Berry*, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896; *Wilson v. Cattle Ranch Co.*, 20

C. C. A. 244, 73 Fed. 994, 999; *Godkin v. Monahan*, 27 C. C. A. 410, 83 Fed. 116; *Lawrence v. Steamboat Co.*, 12 Fed. 850; *Union Nat. Bank v. German Ins. Co.*, 18 C. C. A. 203, 71 Fed. 473, 476; *Reid v. Glass Co.*, 29 C. C. A. 110, 85 Fed. 193; *Buckstaff v. Russell*, 25 C. C. A. 129, 79 Fed. 611; and hence to bills of lading and charter parties, *The Golden Rule* 9 Fed. 334; *Baker v. Ward*, 3 Ben. 499; *Fed Cases No. 785*; *Rawson v. Lyon*, 23 Fed. 107; *Petrie v. Heller*, 35 Fed. 310; *The Lakme*, 93 Fed. 230."

<sup>50</sup> In *Sewall v. Wood*, 135 Fed. 12, 18, 67 C. C. A. 580, the court said: "We think the statements contained in the correspondence between the parties prior to making the charter party, had relation to the contract contained in that instrument, were not



of fact are made in the charter party itself relating to vessel or to some material matter connected with the voyage they are called warranties. The untruth of such a statement in a charter party will justify a refusal to accept the vessel. For this reason in modern English terminology the shipowner's obligation is called a condition rather than a warranty.<sup>51</sup> The older term "warranty," which is still in general use in America is far better.

Guaranty and warranty, guarantee and warrant are obviously the same words. To attach different legal effects to them surely would be unfortunate. When an owner guarantees or warrants that a situation exists or that his ship shall do something, a business man would properly understand not merely that he agreed to pay damages, but that the obligation of the charterer to perform the contract depended on the owner's making the guaranty or warranty good.<sup>52</sup> Such, however, is not the English legal usage. No doubt there may be promises in a charter party breach of which will not be sufficient to excuse the injured party from further performance of the contract, and so it seems that they may be statements of fact for the truth of which the owner

is inconsistent with it, but made clear its terms, and as such entered into and formed part of the written contract. We think the principles in this regard, stated and approved by this court in the case of *Bacon v. The Poconoket*, 67 Fed. 262, require this conclusion. See also, *Clydesdale Ship-owners Co. v. Brauer S. S. Co.*, 120 Fed. 854; *Morris v. Levison*, L. R. 1 C. P. Div. 155; and *Wilfred v. Myers*, 40 Fed. 170."

<sup>51</sup> See *Scrutton on Charter Parties* (7th ed.), 68. This terminology is singularly inaccurate to express a provision which is primarily an obligation, though the breach of it will operate as an excuse to the other party.

<sup>52</sup> In *Pedersen v. Pagenstecher*, 32 Fed. 841, the court said: "The charter describes her as 'now at Bremen, loading for Philadelphia, quar-

anteed to sail on or before December 10th, 1885.'" The respondents refused to accept her because, as they alleged, she did not sail from Bremen until after December 10th.

The stipulation as to the time of sailing was a condition precedent which, if not fulfilled, entitled the respondents to reject the vessel. It was not a question of fault or reasonable excuse for not sailing within the time provided. The vessel, under such stipulation, takes upon herself the risks of all causes that may prevent compliance with the condition. *Davies v. VonLingen*, 113 U. S. 40, 49; *Sup. Ct. Rep.* 346, 28 L. Ed. 885, and cases there cited; *Hore v. Whitmore*, 784; *Croockewit v. Fletcher*, *Hurl. & N.* 893; *Weisser v. Maitland*, 3 Sandf. 318."

is bound yet which are not so essential that their untruth will defeat the contract. Statements of this sort have been called warranties in England.<sup>53</sup> But in the United States the untruth of a statement material enough to be called a warranty will excuse a refusal to accept a vessel (at least where part performance has introduced no disturbing element into the case), unless, as sometimes happens, the charter party itself specifies the character of the breach which will justify a cancellation or refusal to proceed with the contract.<sup>54</sup> It

<sup>53</sup> In *Bentsen v. Taylor*, [1893] 2 Q. B. 274, 280, Bowen, L. J., said: "When you have a representation made in a written document, it is obviously no longer for the jury, but for the court, to decide whether it is a mere representation, or whether it is what is called (I admit not very happily), a 'substantive part of the contract,' that is, a part of the contract which involves a promise in itself. . . .

"Assuming the court to be of opinion that the statement made amounts to a promise, or, in other words, a substantive part of the contract, it still remains to be decided by the court, as a matter of construction, whether it is such a promise as amounts merely to a warranty, the breach of which would sound only in damages, or whether it is that kind of promise the performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party—a promise the failure to perform which gives to the opposite party the right to say that he will no longer be bound by the contract.

"Of course it is often very difficult to decide as a matter of construction whether a representation which contains a promise, and which can only be explained on the ground that it is in itself a substantive part of the contract, amounts to a condition precedent, or is only a warranty. There is no way of deciding that question except by

looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out."

<sup>54</sup> In *Rosasco v. Pitch Pine Lumber Co.*, 138 Fed. 25, 70 C. C. A. 455, the charter party provided "Charterers have option of cancelling charter if vessel not arrived at loading port by Nov. 15th, 1901." The designated loading port was Ship Island, Miss. The vessel reported there for cargo November 12, 1901. The charter also provided that the loading port should be named before the vessel left Venice, and that it should sail 48 hours after orders were given. Construing this language as requiring the bark to sail from Venice within 48 hours after notice of loading port was given, the District Judge, nevertheless, decided that the stipulation was not a condition precedent, the breach of which warranted the cancellation of the charter;

it said that such descriptive statements in order to be warranties (or so-called conditions) must be "intended to be a substantive part of the contract."<sup>55</sup>

But if a statement is contained in the writing, the only test which is generally possible of such an intention is whether the statement related to a material matter.<sup>56</sup> If the charter party is a demise of the vessel, the purely promissory obligations of the charter party on the part of the owner are limited. But if the owner still retains control of the vessel he naturally engages in the charter party to accept the proposed cargo and make the agreed voyage or voyages. Subsidiary provisions in regard to loading and unloading are common. The primary obligations on the part of the charterer are to load and unload the vessel and to pay agreed freight.

#### § 1076. A charter party contemplates a double transaction.

A charter party, it seems, is a contract of a type previously

but that in view of the subsequent provision for cancelling the charter if the bark reached Ship Island after November 15th the failure to sail from Venice within 48 hours was the breach of an independent covenant which entitled the charterer to any damage it might have sustained thereby but did not give it the right to refuse the bark. The Circuit Court of Appeals sustained this position.

<sup>55</sup> In *Behn v. Burness*, 3 B. & S. 751, 755, Williams, J., said: "With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it

has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word—*viz.*, a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

<sup>56</sup> In *Behn v. Burness*, 3 B. & S. 751, 755, the charter party stated that the ship was then in the port of Amsterdam. This was not true and the defendant refused to accept and load the vessel. Williams, J., said:

"The question is simply whether, in the true construction of the charter party, the Court ought to infer that the statement as to the ship's being at that date in the port of *Amsterdam* was meant to be a substantive part of the contract, or a representation collateral to it. And this question appears to be properly raised by the

referred to<sup>57</sup> where a double transaction is contemplated. The furnishing a proper vessel and the acceptance of it by the charterer are mutual performances intended as the exchange for one another. The payment of freight, however, is in exchange not for the vessel but for the carriage of the goods. If the goods are safely carried the fact that the vessel was unseaworthy becomes immaterial. Of course if the charterer when he loaded the vessel knew or ought to have known that it was unseaworthy his election to go on with the contract would preclude him from subsequent objection, though not necessarily from suing for damages suffered because of the breach of warranty. It may be supposed, however, that the charterer did not know and could not have ascertained the unseaworthiness of the vessel. In such a case he can hardly be said to have made a binding election, and he should be allowed, even if he has loaded the vessel, to reclaim his goods and avoid the charter party.<sup>58</sup>

#### § 1077. Express warranties.

The statements in charter parties which have usually been construed as warranties fall into several classes, as statements of

1. The shipper's registered classification.<sup>59</sup> This warranty does not involve any obligation that the classification is accurate or that it will continue until the expiration of the charter party.<sup>60</sup>

2. The ship's capacity.<sup>61</sup>

3. The name and nationality of the vessel. The importance of this may be considerable in time of war.<sup>62</sup>

4. The place of the ship at the making of the charter party, or some other specified time.<sup>63</sup>

averment in the plea that time and the situation of the vessel were essential and material parts of the contract."

<sup>57</sup> See § 873.

<sup>58</sup> In *Ronalds v. Leiter*, 109 Fed. 905, 907, 48 C. C. A. 708, the vessel being found unseaworthy, the jury were directed in accordance with the decision of the Supreme Court in *Strong v. United States*, 154 U. S. 632, 14 Sup. Ct. 1182, 24 L. Ed. 664, that the

charterer might have abandoned the yacht on discovering this fact, without further liability to the owner.

<sup>59</sup> *Routh v. Macmillan*, 2 H. & C. 750; *French v. Newgass*, 3 C. P. D. 163.

<sup>60</sup> *French v. Newgass*, 3 C. P. D. 163.

<sup>61</sup> *Barker v. Windle*, 6 E. & B. 675; *Mackill v. Wright*, 14 A. C. 106.

<sup>62</sup> See *Behn v. Burness*, 3 B. & S. 751, 757.

<sup>63</sup> In *Ollive v. Booker*, 1 Exch. 416,

Where the statement is in terms that the vessel will be at a certain place on a given day in the future, it is rather in the nature of an ordinary promise than analogous to representations of existing facts, but no distinction seems taken in the cases. Certainly the promise is material.<sup>64</sup>

a statement that the ship was "now at sea having sailed three weeks ago," was held a warranty excusing the charterer from accepting the ship. In *Behn v. Burness*, 1 B. & S. 877, 3 B. & S. 751, a statement that the chartered vessel was "now in the Port of Amsterdam," was held if untrue to justify a refusal to accept.

In *Davison v. VonLingen*, 113 U. S. 40, 49, 28 L. Ed. 885, 5 Sup. Ct. 346, the court said: "That the stipulation in the charter party, that the vessel is 'now sailed, or about to sail, from Benisaf, with cargo, for Philadelphia,' is a warranty, or a condition precedent, is, we think, quite clear. It is a substantive part of the contract, and not a mere representation, and is not an independent agreement, serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor. The case falls within the class of which *Glaholm v. Hays*, 2 Man. & Gr. 257; *Ollive v. Booker*, 1 Exch. 416; *Oliver v. Fielden*, 4 Exch. 135; *Gorriksen v. Perrin*, 2 C. B. (N. S.), 681; *Crookewit v. Fletcher*, 1 H. & N. 893; *Seeger v. Duthie*, 8 C. B. (N. S.) 45; *Behn v. Burness*, 3 B. & S. 751; *Corkling v. Massey*, L. R. 8 C. P. 395, and *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768, are examples; and not within the class illustrated by *Tarrabochia v. Hickie*, 1 H. & N. 183; *Dimech v. Corlett*, 12 Moore P. C. 199, and *Clipsam v. Vertue*, 5 Q. B. 265. It is apparent, from the averments in the pleadings of the charterers of facts which are established by the findings,

that time and the situation of the vessel were material and essential parts of the contract. Construing the contract by the aid of, and in the light of, the circumstances existing at the time it was made, averred in the pleadings and found as facts, we have no difficulty in holding the stipulation in question to be a warranty."

In *Bentsen v. Taylor*, [1893] 2 Q. B. 274, "now sailed or about to sail from a pitch pine port to the United Kingdom" were similarly construed. In *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. 663, 665, the court said: "'Time and situation of a vessel are materially essential parts of the contract of a charter party affreightment.' *Gray v. Moore* (C. C.), 37 Fed. 266; *Lowber v. Bangs*, 2 Wall. 732, 17 L. Ed. 768; *Davison v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885. 'The place where a ship is, is a material point in making the charter party, for two reasons: The charterer learns what sort of a voyage the ship is about to make, and also how long it will probably be before the ship arrives. . . . The statement of the place of the ship is a substantive part of the contract. . . . This statement is a condition precedent.'"

"A statement that a chartered vessel was 'expected to be at X about the 15th of December' was held a warranty in *Corkling v. Massey*, L. R. 8 C. P. 395. So a statement that a ship was 'now on the stocks and ready to receive cargo in all May.' *Oliver v. Fielden*, 4 Exch. 135; and a statement that the ship was 'to proceed to X, the vessel to sail from New York on or before the 4th of February.' *Glaholm*

**§ 1078. Implied warranties. Seaworthiness.**

Besides the express warranties contained in charter parties there are implied in every such contract, except so far as the express terms of the agreement may limit them, warranties or undertakings by the owner (1) that the ship is seaworthy; (2) that the ship shall begin and continue the voyage with reasonable diligence and without unnecessary deviation. The basis of the undertaking of seaworthiness is the same as that of implied warranties in the sale of goods; the shipowner is in a position to know the condition of his ship and the charterer justifiably relies upon his judgment. As in the case of other warranties the extent of the obligation is not limited to cases of negligence—the undertaking is absolute that the ship is fitted to meet the ordinary perils of the voyage or voyages contracted for;<sup>65</sup> but insurability of the cargo at usual rates is not by implication of law a test of such fitness.<sup>66</sup> Sometimes the parties provide in the charter a method of determining whether the warranty has been broken.<sup>67</sup> The obligation applies not only to the condition of the vessel at the

*v. Hays*, 2 M. & G. 257. See also *The Themis*, 244 Fed. 545.

<sup>65</sup> *Steele v. State Line Steamship Co.*, 3 A. C. 72, 86; *Hedley v. Pinkney Steamship Co.*, [1894] A. C. 222, 227; *Maori King v. Hughes*, [1895] 2 Q. B. 550; *McFadden v. Blue Star Line*, [1905] 1 K. B. 697, 706; *Work v. Leathers*, 97 U. S. 379, 24 L. Ed. 1012; *The Caledonia*, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 567; *The Jeannie*, 225 Fed. 178, 180; *Arundel Sand & Gravel Co. v. Naylor*, 242 Fed. 494, 155 C. C. A. 270.

<sup>66</sup> In *J. J. Moore & Co. v. Cornwall*, 144 Fed. 22, 75 C. C. A. 180, the court said: "A warranty of seaworthiness in a charter does not imply a warranty of the insurability of the vessel's cargo at the usual rates, and a refusal of insurance, while it may be considered as evidence of unseaworthiness, is never of itself conclusive thereof, but is a fact to be considered in connection

with evidence of the actual condition of the vessel." See also *Harloff v. Barber*, 150 Fed. 185.

<sup>67</sup> In *Cornwall v. J. J. Moore & Co.*, 125 Fed. 646, *affd.* 144 Fed. 22, 75 C. C. A. 180, the charter party contained the following provision: "Captain to furnish charterers a certificate from charterers' marine surveyor (at San Francisco) that the vessel is in proper condition for the voyage. Should the vessel fail to pass a satisfactory survey this charter to be void at charterer's option." It was held that this provision was for the purpose of determining the seaworthiness of the vessel for the voyage in hull and equipment, and that the charterers could exercise the option given to cancel the charter only on an adverse report of their surveyor after an actual survey, which it was incumbent on them to have made unless prevented by the fault of the owners.

time of the charter, but at the time of sailing,<sup>68</sup> and there is a further obligation implied that it shall continue seaworthy during the voyage subject to the exceptions stated in the contract, and to the qualifications which the law makes to the liability of a common or a private carrier, as the case may be.<sup>69</sup> The same principle is applied to charters for a series of voyages or for a period of time as to charters for a single voyage.<sup>70</sup> The owner may be relieved of the obligation of warranty which would otherwise be implied not only by express agreement, but where the charter is a demise,<sup>71</sup> a patent defect which the charterer has had an opportunity

<sup>68</sup> *Cohn v. Davidson*, 2 Q. B. D. 455; *The Glenfruin*, 10 Probate Div. 103; *The Undaunted*, 11 Probate Div. 46; *The Waikato*, [1899] 1 Q. B. 56; *Bowring v. Thebaud*, 56 Fed. 520, 5 C. C. A. 640, 11 U. S. App. 648.

<sup>69</sup> See *Worms v. Storey*, 11 Exch. 427; *The Rona*, 51 L. T. 28. In *Work v. Leathers*, 97 U. S. 379, 380, 24 L. Ed. 1012, Swayne, J., said: The owner "is obliged to keep her in proper repair unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear. *Putnam v. Wood*, 3 Mass. 481, 3 Am. Dec. 179." The owner may also be liable for negligence if by failure to repair during the voyage he causes injury to the cargo even though the defective condition of the vessel arose from excepted perils. *Thin v. Richards*, [1892] 2 Q. B. 141.

<sup>70</sup> In *Dene Shipping Co. v. Tweedie Trading Co.*, 143 Fed. 854, 856, 74 C. C. A. 606, the court said: "Appellant seeks to make a distinction between time charters, such as the one in question, and voyage charters. We fail to see what bearing this can have upon the fundamental question in this case, which is that of seaworthiness. Mr. Justice Day, delivering the opinion of the Supreme Court of the United States in *The Southwark*, 191

U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65, says: 'In the case of *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241, Mr. Justice Gray said: "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport." This is the commonly accepted definition of seaworthiness. As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect.' The agreement of the owner is that the vessel shall be fit for the services in which it is employed, including therein fitness for the carriage of such reasonable and proper cargo as she may take on board. In this case the owners agreed under the charter that the vessel should be 'in every way fitted for the service . . . to be employed in carrying lawful merchandise.' They failed to carry out this agreement, and the expenses of the charterer, and deduction for time lost in repairing the resulting damage were properly offset against the charter hire. The decree is affirmed, with interest and costs."

<sup>71</sup> See *supra*, § 1074.

to discover by inspecting the vessel will not render the owner liable,<sup>72</sup> the same principles being applicable as in case of the sale of a ship or other chattel.<sup>73</sup> "A vessel to be seaworthy must be tight, staunch, strong, well furnished, manned and victualled, and in all respects equipped in the usual manner" for the service for which it is engaged.<sup>74</sup> What amounts to seaworthiness or the reverse will vary according to the voyage and the nature of the cargo to be carried.<sup>75</sup>

"Ordinarily . . . the charterer is required to furnish what may be rendered necessary in the way of fittings by reason of the character of the cargo, such as grain, for example, but where the ship, owing to her construction, requires something to be done to put her in the condition presented by ordinary seaworthy vessels for lawful cargo then the burden is justly upon her."<sup>76</sup>

<sup>72</sup> *Sanford & Brooks Co. v. Columbia Dredging Co.*, 160 Fed. 362, 177 Fed. 878, 101 C. C. A. 92; *The Transit*, 250 Fed. 71, 162 C. C. A. 243.

<sup>73</sup> See *supra*, §§ 982 *et seq.*

<sup>74</sup> *The Jeannie*, 225 Fed. 178, 180. The vessel must be seaworthy in respect to stowage of the cargo, *Id.*, p. 183; *Corsar v. Spreckels*, 141 Fed. 260, 269, 72 C. C. A. 378. *Cf. The Thorsa*, [1916] Prob. 257.

<sup>75</sup> See *Thin v. Richards*, [1892] 2 Q. B. 141; *Maori King v. Hughes*, [1895] 2 Q. B. 550; *Queensland Bank v. Peninsular, etc., Co.*, [1898] 1 Q. B. 567; *The Caledonia*, 157 U. S. 124, 39 L. Ed. 644, 15 S. C. Rep. 537; *The Southwark*, 191 U. S. 9, 48 L. Ed. 65, 24 Sup. Ct. Rep. 3; *The Jeannie*, 225 Fed. 178, 180; *The Hispania*, 242 Fed. 95, 156 C. C. A. 523.

<sup>76</sup> In *Tweedie Trading Co. v. Dene Steam Shipping Co.*, 140 Fed. 779, 781, (affd. 143 Fed. 854, 74 C. C. A. 606), the court added: "A cargo of asphalt was lawful and it was known that this ship would in all probability

be employed to carry one from Trinidad. The permanent battens were a detriment to the carriage of this material and it was apparently the ship's duty to prepare herself for it." *Cf. The Hiram*, 101 Fed. 138. There, the vessel was described in the charter as a water-ballast ship, and was so accepted without objection by the charterer, who contracted for the carriage in her of a cargo of cattle. The charterer desired to load a number of the cattle on the deck, which was refused by the master on the ground that it would be unsafe, with the ballast the ship carried. It was held, that he could not be required to provide additional ballast nor could the ship be held liable for his refusal to load the cattle as required by the charterer; it being shown that his objections were well founded, and there being no provision of the charter specifically requiring the vessel to take a deck cargo, or to carry any specific number of cattle.



**§ 1079. Implied obligation to prosecute the voyage promptly and without deviation.**

The undertaking to begin and continue the voyage with reasonable despatch and without deviation is promissory in character. The owner is not here asserting expressly or impliedly a present fact but promising to do something in the future—something moreover which is within his power to do. It is not like an agreement that a certain state of affairs which is not within the control of the promisor shall exist in the future. So far, therefore, as there is any distinction in the legal effect of a warranty and an ordinary promise, the obligation of reasonable despatch should have attached to it the incidents of ordinary promises, and in considering whether a breach excuses the charterer, the test to be applied should be the materiality of the breach.<sup>77</sup> It is true that the owner may be prevented from fulfilling his obligation by matters beyond his control, which will excuse him from liability, but this is true of any promise. Even though the delay is due to perils of the sea and, therefore, the owner is not liable for it, the charterer may, nevertheless, refuse to continue performance if the delay is unreasonable having regard to the character of the commercial adventure in question, or, as it is often put, if the delay frustrates the object of the voyage.<sup>78</sup> So where those in charge of the vessel abandon her for whatever cause, the owner of the cargo may treat the contract of affreightment as terminated.<sup>79</sup> The right of a charterer to refuse to proceed on account of the shipowner's delay is even clearer where the owner is in fault.<sup>80</sup> Unnecessary deviation also subjects the carrier to

<sup>77</sup> *Freeman v. Taylor*, 8 Bing. 124; *MacAndrew v. Chapple*, L. R. 1 C. P. 643.

<sup>78</sup> *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125; *Tully v. Howling*, 2 Q. B. D. 182; *Assicurazioni Generali v. Steamship Bessie Morris Co.*, [1892] 1 Q. B. 571, 577; *Porteous v. Williams*, 115 N. Y. 116, 21 N. E. 711.

<sup>79</sup> *The Cito*, 7 P. D. 5; *The Arno*, 72 L. T. 621; *H. Newsum & Co., Ltd., v. Bradley*, 1917 2 K. B. 112.

<sup>80</sup> In *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. 663, the defendants chartered from the owners' agent in Mobile an Italian ship to be loaded in Mobile. The charter party stated that she was then on passage from Sydney to Genoa, Italy, and stipulated that she should 'proceed with all possible dispatch to port of loading to enter upon this charter.' Defendants required the ship, not later than November, to carry a cargo they had

liability for damages.<sup>81</sup> What amounts to a deviation depends upon the customary route between the ports in question. A more troublesome question is whether the deviation in question was necessary or reasonable. Deviation to save life is permissible but not to save property of third persons.<sup>82</sup> Therefore to tow a vessel in distress is wrongful.<sup>83</sup> Deviation for repairs made necessary by an excepted peril is permissible, if limited to such a port of refuge as will cause no unnecessary delay or expense.<sup>84</sup> If information is received of unusual dangers in the contemplated voyage, a reasonable deviation is permissible to avoid it,<sup>85</sup> and even relanding and refusing to carry may be justified if previously unforeseen perils, as danger of capture of a contraband cargo, arise.<sup>86</sup>

Moreover, a right to deviate may be stipulated for by the terms of the contract.<sup>87</sup> But such a clause must be given a

sold, and relied on the agent's representation that she could reach Mobile by that time. Nothing was said as to whether she was then carrying a cargo. She arrived in Genoa September 27th with a cargo of coal, and sailed from there for Mobile December 7th, not arriving until in the following March, when defendants refused to load her, having previously procured another vessel. The weight of evidence was that there were good facilities in Genoa for discharging coal, and that the ship in the usual course there should have discharged in from 10 to 14 days, and should have been ready to sail in from 10 to 12 days more. It was *held*, that the provision that she should "proceed with all possible dispatch" was a warranty, and that her remaining in Genoa for 70 days was unusual and unnecessary, and, in view of the circumstances under which the charter was made, relieved defendants from the obligation to accept her when tendered.

<sup>81</sup> *Thorley v. Orchis S. S. Co.*, [1907] 1 K. B. 660; *Robinson v. Holst*, 96 Ga. 19, 23 S. E. 76.

<sup>82</sup> *Scaramanga v. Stamp*, 5 C. P. D.

295. See the Harter Act, 27 U. S. Stat. 445, § 3, 3 U. S. Comp. St. (1901), p. 2946, *infra*, § 1106.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Phelps v. Hill*, [1891] 1 Q. B. 605.

<sup>85</sup> *The Teutonia*, L. R. 4 P. C. 171, 179; *Nobel's, etc., Co. v. Jenkins*, [1896] 2 Q. B. 326.

<sup>86</sup> *The Styria v. Morgan*, 186 U. S. 1, 46 L. Ed. 1027, 22 Sup. Ct. Rep. 731. The *Styria*, an Austrian steamship sailing from Trieste via Sicilian ports to New York, took on board at Port Empedocle, Sicily, a quantity of sulphur for New York. Before sailing the master learned that war had broken out between Spain and the United States, and as sulphur was an article contraband of war, he had the sulphur all unloaded and warehoused at Port Empedocle before sailing. The court held that the master was justified in so doing, having reasonable regard for the interests of both ship and cargo. *Cf. Mitsui & Co., Ltd., v. Watts, Watts & Co., Ltd.*, [1916] 2 K. B. 826; *Watts, Watts & Co., Ltd., v. Mitsui*, [1917] A. C. 227.

<sup>87</sup> See *Velasco, etc., R. Co. v. The Brixham*, 54 Fed. 539; *Hurlbut v.*

reasonable construction and unless the language clearly requires that result, will not authorize such deviation as would frustrate the object of the voyage.<sup>88</sup>

### § 1080. Effect of breach of warranty.

Two methods of dealing with breach of warranty seem suggested by the cases: 1. That a warranty is to be dealt with like any promise in a contract. On this theory the warrantor will always be liable for the damages caused by his breach of warranty, and the other party will be justified in refusing to go on with the contract, or will not be so justified according as the breach is of vital importance or not, and according as the extent of part performance and the impossibility of restoring the parties to their former status may make it desirable to compel the injured party to continue performance and to seek redress in damages. Under the second view the preliminary inquiry whether an undertaking amounts to a warranty depends on the materiality of the promise. But when once it has been determined to be material and therefore a warranty, any breach whatever is operative to entitle the injured party not only to sue for damages, but also to refuse to continue performance. In support of the latter view the analogy of warranties both in the law of sales and of insurance may be cited. Where rescission is permitted for breach of warranty in a sale, it seems to be allowed without regard to the magnitude of the breach,<sup>89</sup> and in insurance law when a stipulation has once been called a warranty, any breach which cannot be disposed of under the maxim *de minimis non curat lex* is fatal.<sup>90</sup>

Turnure, 81 Fed. 208, 51 U. S. App. 280, 26 C. C. A. 335, aff'g 76 Fed. 587; Pacific Coast Co. v. Yukon, etc., Co., 155 Fed. 29, 83 C. C. A. 625; Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316.

<sup>88</sup> Potter v. Burrell, [1897] 1 Q. B. 97; Ardan S. S. Co. v. Theband, 35 Fed. Rep. 620. See also James Morrison & Co., Lim., v. Shaw, etc., Co., [1916] 2 K. B. 783.

<sup>89</sup> *Infra*, § 1462.

<sup>90</sup> "A warranty in a policy of insur-

ance is a condition or contingency, and unless that is performed, it is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but being inserted, the contract does not exist, [or no liability under the contract arises] unless it is literally complied with." Mackie v. Pleasants, 2 Binney, 363, 373. Many decisions are collected in 2 Cooley, Briefs on Ins. 1154 *et seq.*; 6 *Id.* 443 *et seq.*, May, Ins., § 151. The dis-

It has been suggested that if a so-called warranty of an existing fact is untrue, there is in principle such a repugnancy between the fact warranted and the truth as to prevent the existence of a contract,<sup>91</sup> though it is clear that this is not the law. Where a seller agreed to sell specific barrels as "these barrels of mackerel," and the barrels contained salt instead of mackerel, it is urged that there is no contract, if it can be supposed that the mistake was an innocent one on both sides.<sup>92</sup> Why, it may be asked, is not the untruth of a material fact equally destructive of the contract in a charter party? If, for instance, the charter states the vessel is then in the port of Amsterdam and, in fact, it is not, why is there not "as fatal a repugnancy between the different terms of this contract as was found in that for the sale of the barrels of salt described as containing mackerel?"<sup>93</sup> There are two answers: first, because it is still the same ship though not at Amsterdam. Whether words of description go so far to the essence of the thing described that their untruth will make it a different thing, is a matter governed by the popular or general view of mankind in regard to the matter. A term of description may be very material and yet not affect the identity of the thing in question, and it is only when it can be said that there is no such thing in existence as that in regard to which the parties were bargaining that a transaction to which the parties have given mutual assent can be absolutely void.<sup>94</sup> A lesser mistake may be material and render the agreement voidable, but it will not make it void. The second answer is, that even if the ship were regarded as a different ship because not at Amsterdam the transaction involves an undertaking by the seller that all the facts asserted by him as essential parts of the bargain shall be true. Wherever words of description in a contract are properly

inction attempted between conditions precedent and warranties in *Everson v. General Accident &c. Corp.*, 202 Mass. 169, 173, 88 N. E. 658, so far as insurance law is concerned, is not supported by the authorities. In a number of States statutes have been passed denying to warranties in policies the

effect of defeating the insurance, where not made with intent to deceive and not increasing the risk. 2 Cooley, *Briefs on Ins.* 1189 *et seq.*; 7 *id.* 449.

<sup>91</sup> Holmes, *Common Law*, 329.

<sup>92</sup> *Ibid.* See also *infra*, § 1559.

<sup>93</sup> Holmes, *Common Law*, 330.

<sup>94</sup> See Williston, *Sales*, §§ 180, 183.

construed as the language of one party, accepted and relied on by the other, they are part of the undertaking of the former. Therefore, even in the case of the mackerel, though there can be no sale, there can be a contract. The seller would be liable, it is submitted, for failure to perform (though performance would be impossible) an agreement to deliver the ten barrels in question with mackerel that had been contained in them at the time of the bargain, if the seller had asserted as an inducement to the sale, or as one of its terms that the barrels were barrels of mackerel, and the buyer justifiably relied on the assertion. It would be possible to suppose facts excluding such an assertion by the seller, but they would be unusual, and not analogous to the case supposed of the charter party.

### § 1081. Definition of a bill of lading.

A bill of lading is a written receipt given by a carrier acknowledging that goods have been received for transportation to a special place. It ordinarily contains the name of the person from whom the goods have been received and to whom they are to be delivered, as well as a statement, partial or complete, of the terms and conditions upon which the carrier agrees to transport the goods. It thus often repeats terms of a charter-party, if one had previously been entered into between the shipper and carrier.<sup>95</sup> Originally the use of the term *bill of lading* was confined to documents given by the masters of vessels for carriage of the goods by sea; and in England the use of the term is still so limited.<sup>96</sup> On the conti-

<sup>95</sup> In *Pollard v. Vinton*, 105 U. S. 7, 8, 26 L. Ed. 998, a bill of lading was defined as "an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter it is a contract to carry safely and deliver." It may be added that it is also a symbol of the goods. Another definition of a bill of lading may be found, in the Civil Code of California, Sec. 2126; and this definition has been

copied in other States: Rev. Code, Mont. (1907), § 5314; Rev. Codes, N. Dak. (1905), § 5646; Gen. Stat. Okl. (1908), § 2990; Rev. Codes, S. Dak. (1903), C. C., § 1551.

<sup>96</sup> *Encyc. of Laws of England* (2d ed.), 222, quoting English judicial decisions. Dealings with goods in the hands of railroads seem to be carried on in England by means of delivery orders, which may be lodged with or accepted by the railroad. See *Knights v. Wiffen*, L. R. 5 Q. B. 550; *Coventry v. Great Eastern Ry. Co.*, 11 Q. B. D. 776

nent of Europe the usage is the same as in England, although with the increasing importance of transportation by railroads, documents similar in nature and legal effect to bills of lading are used in case of transportation by land. Such documents, however, are given a different name from those used for maritime bills of lading.<sup>97</sup> In the United States the document by which a railroad acknowledges the receipt of goods and contracts to carry them to their destination, though sometimes known under other names, has generally been called a bill of lading. The American usage seems more desirable. There is no occasion for distinguishing the name of the document because the transportation is to be by land rather than by sea. Indeed, at the present time, through bills of lading are frequently used which relate to a transit partly by land and partly by sea. By the Carmack Amendment to the Interstate Commerce Act,<sup>98</sup> a carrier is required to give a receipt or bill of lading to the shipper under an interstate shipment.<sup>99</sup>

#### § 1082. Signature of the parties.

In maritime bills of lading the master of a vessel ordinarily signs the bills. Though such a signature does not specify the name of the owner of the vessel, nevertheless the owner is bound.<sup>1</sup> The owner himself, however, may sign the bill,<sup>2</sup> or it may be signed on his behalf by any authorized agent other than the master.<sup>3</sup>

Bills of lading issued for transportation on land are almost always signed in the name of the principal; but such a bill

<sup>97</sup> In France the document issued by a railroad is called "lettre de voiture" or "recépissé; the document issued by a carrier by sea is called "connaissancement." In Germany, similarly the document issued by a railroad or river boat is called "Ladeschein;" the document issued by a carrier by sea "Konossement."

<sup>98</sup> Act of June 29, 1906.

<sup>99</sup> See the discussion of the nature and functions of a bill of lading in 52 Interstate Com. Com. Rep. 671.

<sup>1</sup> *McTyer v. Steele*, 26 Ala. 487;

*Mosely v. Lord*, 2 Conn. 389; *Stark v. Broom*, 7 La. Ann. 337; *Ferguson v. Cappeau*, 6 Har. & J. 394; *Blanchard v. Page*, 8 Gray, 281.

<sup>2</sup> *Dows v. Greene*, 16 Barb. 72, 32 Barb. 490, 24 N. Y. 638; *Dows v. Perrin*, 16 N. Y. 325; *Dows v. Rush*, 28 Barb. 158, 183; *Chandler v. Sprague*, 5 Metc. 306, note. The contrary decision of *Wolfe v. Myers*, 3 Sandf. 7, is discredited.

<sup>3</sup> *Royal Canadian Bank v. Caruthers*, 29 Upper Canada, Q. B. 283.

would be valid and the principal bound even though he was not specifically named.<sup>4</sup> It is only on principles of agency that a connecting carrier can bind other carriers by a through bill of lading over their lines. Accordingly, the authority of the issuing carrier must be shown in order to bind other carriers in the course of the route.<sup>5</sup> Though such authority did not originally exist the lack may be supplied by subsequent ratification.<sup>6</sup> But the receipt and transportation of the goods will not of itself amount to ratification of the terms of the bill of lading.<sup>7</sup> Doubtless the initial carrier would be liable for breach of warranty of its authority to act for the other carriers over whose lines the goods were to be carried by the terms of the bill of lading, since such a warranty exists generally in the law of agency.

**§ 1083. Order bills of lading and straight bills of lading.**

In the early cases on bills of lading little regard seems to have been paid by the courts to the distinction between bills where the consignee in the document was designated as the sole person to whom delivery might be made, and bills where by the terms of the document delivery was promised to the order of the consignee. It is probable that most early order bills of lading were made to the order of the shipper, but the use of the words "order, or assigns," was rather to enable the shipper to reserve the right subsequently to name the person to whom the goods were to be delivered rather than to give negotiability to the instrument. In the United States, however, there has grown up a custom of merchants and bankers in regard to bills of lading and warehouse receipts, recognizing a distinction between such instruments when made out to "order" and when not so made out, corresponding in most respects to the distinction between the negotiable and non-negotiable promises to pay money. The vital importance of this distinction will hereafter appear.<sup>8</sup> Perhaps the most striking advance in the forms of bills of lading first

<sup>4</sup> *Lyon v. Williams*, 5 Gray, 557.

<sup>5</sup> *Gulf, etc., R. R. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470; *Dillingham v. Fischl*, 1 Tex. Civ. App. 546.

<sup>6</sup> *Gulf, etc., R. R. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470.

<sup>7</sup> *Gulf, etc., R. R. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470.

<sup>8</sup> See *infra*, §§ 1118 *et seq.*

recommended and afterwards required by the Interstate Commerce Commission<sup>9</sup> over forms previously in use, is the clear recognition and protection of this distinction. Order bills of lading are required to be printed upon yellow paper; straight bills of lading are required to be printed on white paper. The words "order of" are printed in the form of an order bill instead of written as had been the previous practice. It becomes practically impossible for fraudulent holders of a straight bill of lading to alter it into an order bill of lading in such a way as to deceive a purchaser or lender. Notable frauds of this sort had occurred under the old practice.

#### § 1084. Issue of bills of lading.

A bill of lading, like other formal documents, is not binding until delivered.<sup>10</sup> The appropriate time for delivering it is immediately after the receipt of the goods. In contemplation of law the goods are exchanged for the bill concurrently. The receipt of the goods for transportation and the payment of the freight or the promise to pay it being the consideration for the promises contained in the bill of lading. Apart from the Carmack Amendment to the Interstate Commerce Act,<sup>11</sup> requiring the issue of bills of lading in every interstate shipment by a common carrier, an oral contract of carriage has the same legal contractual validity as a bill of lading;<sup>12</sup> though the functions of a bill of lading as a means of dealing with the goods obviously require a writing. The custom of issuing receipts or bills of lading is, moreover, so general, that when goods are delivered to a carrier before a bill of lading is issued, the obligations of the carrier will generally be merely that of a warehouseman. Unless a bill of lading is issued, there is still a possibility that the parties may not agree on the terms of carriage. The shipper would still have a right to withdraw the goods and, similarly, the carrier would have

<sup>9</sup> See 14 Interstate Com. Com. Rep. 346, 52 *id.* 671.

<sup>10</sup> *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 28 L. Ed. 527, 4 Sup. Ct. 566; *Graham v. Ledda*, 17 La. Ann. 45.

<sup>11</sup> Act of June 29, 1906.

<sup>12</sup> *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 28 L. Ed. 527, 4 Sup. Ct. 566; *Missouri, etc., R. Co. v. Patrick*, 144 Fed. 632, 75 C. C. A. 434; *Johnson v. Stoddard*, 100 Mass. 306, 309; *Texas Pacific R. Co. v. Nicholson*, 61 Tex. 491.



a right to refuse to carry them on any other terms than those it demanded, except in so far as its public duty, if it was a common carrier, forbade such an attitude.<sup>13</sup> It sometimes happens that the goods constituting a shipment cannot all be delivered to the carrier at the same time. Under these circumstances it is common for a temporary receipt to be given for the various portions of goods, as delivered from time to time, and when all have been delivered to the carrier a bill of lading is issued.

### § 1085. Preparation of bills of lading by shippers.

The practice has become common with many large shippers by rail in this country of preparing their own bills of lading; spur tracks frequently run into the yards of factories, for instance, and empty cars are brought there and packed by the employees of the shipper, and when the cars are filled the railroad removes them and attaches them to its trains. None of the officers or agents of the railroad have any knowledge of the contents of such cars except from the statements of the shipper. Such bills of lading are frequently marked "shippers' load and count," to indicate that the carrier is accepting the shipper's word, and will not guarantee its accuracy. These or similar words should always be thus used to avoid the possibility of the deception of innocent third persons. This is especially important in the case of order bills of lading, on the faith of the statements in which large sums of money are advanced. Even in the case of straight bills it is important that the words in question should appear, for though such bills of lading are not properly relied upon by purchasers, the practice is common for the consignees named in such bills to pay the consignor the price for the goods described therein or to make an advance upon them.

<sup>13</sup> The *M. K. Rawley*, 2 Lowell, 447. In this case goods were delivered to a carrier but a dispute arose as to the form in which the bill of lading should be given. The Court held the property did not pass to the buyer to whom the shipper was bound to send the goods, and that the carrier had no

right to take them on any other terms than those on which the shipper offered them. The carrier must accept these terms or reject the goods altogether. See also *Missouri Pac. Ry. Co. v. Douglas*, 2 Tex. Civ. App. 32 (*Willson's Civ. Cases*).

In doing so the consignee rightfully relies upon the assertion by the railroad, that it has received goods of a certain description for shipment, unless the carrier in some way indicates that it does not know whether the goods described in the bill of lading have been received by it or not. On the other hand, the carrier should not be allowed to impair the value of bills of lading in commerce, by throwing upon the shipper under all circumstances the burden of determining the contents of a shipment, and by marking all bills, as has sometimes been attempted by carriers, "shippers load and count."<sup>14</sup>

### § 1086. Bills in sets.

From a very early period it became customary to issue maritime bills of lading in sets of three or more. The purpose of this was doubtless two-fold: First: In order that a copy might be sent to the consignee, a copy retained by the consignor, and a copy retained by the master of the vessel. Second: In order to guard against loss, since owing to the uncertain means of communication, the chance of a copy of the bill being lost was much greater than it is at the present day. A third reason may now be added that under the customs laws of some countries, an original bill of lading must be lodged in the custom house. The practice has continued to the present time, so far as foreign commerce is concerned, not only in England and the United States, but in the countries of continental Europe. Some of the commercial codes of continental Europe require, indeed, that a number of copies shall be signed and as many as six bills are not infrequently executed. If one of the several parts of a bill of lading had been regarded as an original and the others as copies, the practice would have been convenient and would have served in the main, at least, the purposes for which it was designed. It has become settled law, however, that the several parts of a bill of lading constitute but one bill,<sup>15</sup> except the part retained by the master of the vessel. This part is, however,

<sup>14</sup> See *infra*, § 1123.

<sup>15</sup> *Meyerstein v. Barber*, L. R. 2 C. P. 38; *Richmond, etc., R. Co. v. Shomo*, 90 Ga. 496, 16 S. E. 220. This is also

the law in regard to bills of exchange drawn in sets, as foreign bills of exchange frequently are. See, *infra*, § 1207.

merely a memorandum or copy. Accordingly if the parts delivered to the consignee, or on his order, vary in their terms from that retained by the master, the parts delivered are the true and only evidence of the contract.<sup>16</sup> And if the copy retained by the master is subsequently and without authority from the shipper delivered to the consignee in order that the latter may present it and demand the goods, the delivery of the goods is unauthorized and the vessel will be liable to one who has bought one of the other parts or advanced money upon it.<sup>17</sup>

The practice of having outstanding several original documents representing the same shipment must be considered mischievous and generally has been abandoned in the United States in coastwise shipments, and in transportation by rail. The advantages aimed at by issuing bills by sets can be substantially secured without the evils which necessarily attend the existence of several original documents. All that is necessary is to make clear that one document only is the original and that other similar documents have merely the force of copies. Such copies can be sent to the consignee or retained by the carrier for the purpose of information, and if the original document is lost or destroyed the copy will furnish evidence of its terms, so that the contract in the bill of lading may be enforced. This is substantially the usage of railroads in the United States. By means of carbon paper several copies of each bill of lading issued are taken. The copies indicate from their heading that they are not originals. In the issue of the uniform bills of lading provided for by the order of the Interstate Commerce Commission of June 27, 1908, three documents are, by the use of carbon paper simultaneously made out when each bill of lading is issued. The original bill of lading is so marked at the top. The two copies made at the same time are identical with the original excepting the heading. One of the copies is designated in the heading "a shipping order," and is to be retained by the railroad agent; the other copy is designated as "a memorandum," and is

<sup>16</sup> *The Thames*, 14 Wallace, 98, 20 L. Ed. 804; *Ontario Bank v. Hanlon*, 23 Hun, 283.

<sup>17</sup> *The Mary Bradford*, 18 Fed. 189; *The Saugerties*, 44 Fed. 625, 629.

delivered to the shipper. It is specifically stated upon this memorandum that it is not the original bill of lading nor a copy or duplicate, and is intended solely for filing or record. Duplicate or triplicate bills of lading, so called, have sometimes been issued on request of the shipper by vessels engaged in domestic trade and also by railroads. Such duplicates have given rise to some confusion. It has been sometimes supposed that the duplicates were originals like the parts of a bill issued in sets. This view, however, seems unsound. The fundamental distinction lies in the provisions contained in each part of a bill of lading in a set that when one part is accomplished the others are void. This provision puts each part on an equality. Statutes have been passed in a number of States making it illegal for carriers to issue duplicate bills of lading without marking them as such.

**§ 1087. Desirability of uniformity in bills of lading.**

For several reasons it is highly desirable that the bills of lading in use should so far as is possible be uniform as to their terms and conditions. A bill of lading is ordinarily a somewhat elaborate instrument, containing a number of carefully drawn conditions. It cannot be expected that shippers will read these conditions and consider their meaning every time a shipment is made. If, however, one form of bill of lading is habitually used, careful shippers may without difficulty familiarize themselves with the terms embodied therein. Furthermore, if a standard form is habitually used, the meaning of its terms will become clearly settled by custom and by judicial decision, whereas unfamiliar terms and conditions are naturally the subject of dispute, uncertainty and litigation. The issue of bills of lading in different forms also may be made a means of discrimination between shippers, since a shipper whom it is desired to favor can be given a bill of lading on unusually favorable terms. These reasons for uniformity affect chiefly shippers and consignees, or indorsees who advance money on the faith of bills of lading. To some extent these reasons also have force with the carriers which issue bills of lading, but another circumstance of importance to the carrier alone has been influential in leading

the railroads of the country to take an active part in the movements designed to secure the use of uniform bills of lading.

Vast amounts of freight are carried over connecting lines on through bills of lading issued by the initial carrier, acting not simply for itself, but as agent for its connecting carriers. On the large terminal roads of the northeast, the same freight trains frequently carry goods originally shipped over many different initial roads. If each of these initial roads issue a through bill of lading in a different form, the terminal railroad becomes subject to such a great variety of contracts as necessarily to confuse the management of its business.

**§ 1088. Threefold importance of bills of lading.**

A bill of lading is always a receipt and important as such; that is, it furnishes the shipper with evidence of the delivery of the goods to the carrier. Like other receipts it is only *prima facie* evidence of the acknowledgments contained in it unless the parties by its express terms make it conclusive, as they may do;<sup>18</sup> though such an agreement would certainly not exclude proof of fraud. It is also a contract, or evidence of a contract. In the case of transportation by sea a vessel is frequently chartered by the shipper and the charter party provides in detail the agreement in regard to the carriage of the goods. When the goods are actually shipped, a bill of lading is customarily signed which may contain a reference to the charter party or a repetition of its terms. It has been said that such a bill is merely evidence of the contract between the parties, while the charter party is the contract itself.<sup>19</sup> It has been even said of a bill of lading by a judge of the highest authority, that "to my mind there is no contract in it. It is a receipt for the goods stating the terms on which they were delivered to and received by the shipper and therefore excellent evidence of those terms, but it is not a con-

<sup>18</sup> *Crossfield v. Kyle Shipping Co.*, [1916] 2 K. B. 885, 890.

<sup>19</sup> *Rodocanachi v. Milburn*, 17 Q. B. D. 316, 18 Q. B. D. 67; *Capper v. Wallace*, 5 Q. B. D. 163, 166; *Wags-*

*taff v. Anderson*, 5 C. P. D. 171, 177; *The San Roman*, L. R. 3 Ad. Ec. 583; *Gledstanes v. Allen*, 12 C. B. 202.

tract.”<sup>20</sup> But it is submitted that a paper which states the terms on which goods have been delivered and received, if those terms require action by the bailee, as is the case with the terms in a bill of lading, involves a promise to perform those terms and, therefore, is a contract. It would be possible doubtless for a writing to contain a recital of what previously had been agreed, and not a statement of present agreement; and this seems to be the view expressed in the quotation above, but the ordinary bill of lading is rather to be construed as stating what the parties agree at the time of shipment, than as reciting a previous contract made by them. In bills of lading issued by railroads indeed no other view is possible, for there is generally nothing in the way of a preliminary agreement prior to the issue of the bill of lading. Such a bill must necessarily be the written expression of the contract between the parties. Even where a preliminary agreement exists the bill of lading is given in the same form as where no such preliminary contract existed. If the bill of lading is a written contract in one case, it would seem to be such in the other. In spite, therefore, of the statement quoted above it seems clear that a bill of lading is not simply a receipt, but a written contract. Moreover, “that part of the bill which constitutes a receipt may be treated as distinct from the part incorporating the contractual terms. Ordinarily parol evidence will not be admitted to vary the terms or legal effect of a bill of lading considered as a contract between the parties to it, although, it seems, that as a receipt for the goods it may be contradicted by oral testimony.”<sup>21</sup>

**§ 1089. Liability of a carrier for destruction of goods.**

If a shipowner or other carrier is not a common carrier, he is simply a bailee for hire of goods in his charge and liable as such;<sup>22</sup> except so far as a shipowner's obligation that his

<sup>20</sup> Lord Bramwell in *Sewell v. Burdick*, 10 A. C. 74, 105.

<sup>21</sup> In the Matter of Bills of Lading, 52 Interstate Com. Com. Rep. 671, 681, citing *The Delaware*, 14 Wall. 579, 20 L. Ed. 779; *Higgins v. U. S. Mail S. S. Co.*, 3 Blatchf. 282; *Myer*

*v. Peck*, 28 N. Y. 590; *Porter*, *Law of Bills of Lading*, § 14.

<sup>22</sup> *Supra*, § 1045. See *Nugent v. Smith*, 1 C. P. D. 423, at page 434. (In the same case below, 1 C. P. D. 19, *Brett, J.*, held that every shipowner is subject to the extraordinary liability

vessel shall be seaworthy, and other warranties impose additional liabilities. Unless his liability is more narrowly limited by special contract, a common carrier is liable for injuries to goods in transit,<sup>23</sup> which were not caused by act of God, by the country's enemies, by legal seizure, by the inherent nature of the goods themselves, or by the negligence of the owner of them.<sup>24</sup> He is therefore liable irrespective of any negligence on his part for damage caused by fire,<sup>25</sup> theft,<sup>26</sup> or collision.<sup>27</sup> If made necessary by perils of the sea without fault of the owner or his agents, jettison of any part or of all of the cargo may be made without liability.<sup>28</sup>

A sleeping-car company is subject neither to the severe rule of liability for loss of property applicable to carriers nor to that applicable to innkeepers, but is liable only for negligence.<sup>29</sup> The mere fact of loss by a passenger in a sleeping-car may, however, so strongly indicate negligence as to establish without more a *prima facie* case of liability.<sup>30</sup>

of a common carrier.) *The Xantho*, 12 A. C. 503; *Allen v. Sackrider*, 37 N. Y. 341.

<sup>23</sup> See *infra*, § 1104, as to when this extraordinary liability begins and ends.

<sup>24</sup> *Nugent v. Smith*, 1 C. P. D. 19, 423; *Baldwin v. London, etc., R. Co.*, Q. B. D. 582; *Pandorf v. Hamilton*, 17 Q. B. D. 670, 683; *Ames Mercantile Co. v. Kimball S. S. Co.*, 125 Fed. 332, 335; *Louisville & Nashville R. Co. v. Taylor (Ky.)*, 205 S. W. 934, and see the following sections.

<sup>25</sup> *Louisville, etc., Packet Co. v. Rogers*, 20 Ind. App. 594, 49 N. E. 970; *Stiles v. Louisville & C. R. Co.* 129 Ky. 175, 110 S. W. 820, 130 Am. St. Rep. 429; *Miller v. Steam Navigation Co.*, 10 N. Y. 431. *Cf. Lehman v. Morgan & C. S. S. Co.* 115 La. 1, 38 So. 873, 70 L. R. A. 562, 112 Am. St. Rep. 259.

<sup>26</sup> *The Saratoga*, 20 Fed. 869; *Boon v. The Belfast*, 40 Ala. 184, 88 Am. Dec. 761; *The Belfast v. Boon*, 41 Ala. 50; *Schieffelin v. Harvey*, 6 Johns. 170, 5 Am. Dec. 206.

<sup>27</sup> *Plaisted v. Boston, etc., Navigation Co.*, 27 Me. 132, 46 Am. Dec. 587; *Mershon v. Hobensack*, 22 N. J. L. 372; *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627.

<sup>28</sup> *Whitecross Wire, etc., Co. v. Savill*, 8 Q. B. D. 653; *Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58; *The Rebecca*, 1 Ware, 187; *Bentley v. Bustard*, 16 B. Mon. 643, 63 Am. Dec. 561.

<sup>29</sup> *Beale on Innkeepers*, §§ 318 *et seq.*

<sup>30</sup> In *Goldstein v. Pullman Co.*, 220 N. Y. 549, 116 N. E. 376, L. R. A. 1918 B. 1060, a satchel belonging to the plaintiff disappeared during the night from the aisle next the plaintiff's berth. The court held that in view of the company's duty to maintain a watch during the night the circumstances established a *prima facie* case of negligence. See also *Robinson v. Southern Ry.*, 40 App. Dist. Col. 549, Ann. Cas. 1914 C. 959. *Cf. Carpenter v. New York, etc., Ry. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644.

### § 1090. What is an act of God.

Except in the law of carriers it is not important to distinguish between an act of God and other causes not due to a promisor's fault, which render performance impossible; but in that branch of the law it is held that a common carrier whether by land or sea is not excused for losses due to any breach of obligation unless the cause of the breach was one of those stated in the previous section, the most important of which is the so-called Act of God. "Act of God" is merely a short way of expressing this proposition: A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."<sup>31</sup> Under this definition it is not essential that the inevitable situation shall have arisen from any sudden or violent manifestation of natural phenomena. It is enough for instance that an obstruction from fallen timber or other cause shall have arisen in a channel or stream upon which the carrier's vessel, following a course usually safe, strikes.<sup>32</sup> Here there is neither any violent convulsion of nature, nor is the creation of the situation which causes the loss contemporaneous with the accident. One of these circumstances may be true and not the other. Thus the sudden cessation of wind causing a vessel to drift upon the rocks has been regarded as an Act of God.<sup>33</sup> Generally, however, such an act is substantially contemporaneous with the loss and is due to a positive rather than negative condition,<sup>34</sup>

<sup>31</sup> Per Mellish, L. J. *Nugent v. Smith*, 1 C. P. D. 423, 444. See also *Alaska Coast Co. v. Alaska Barge Co.*, 79 Wash. 216, 140 Pac. 334.

<sup>32</sup> *Smyrl v. Niolon*, 2 Bail. 421, 23 Am. Dec. 146.

<sup>33</sup> *Colt v. McMechen*, 6 Johns. 180, 5 Am. Dec. 200.

<sup>34</sup> In *Nugent v. Smith*, L. R. 1 C. P. D. 423, 442, "Violent storms and tempests have always been considered as coming within the words, and men have thought they could avert them

by prayers and offerings. Mr. Wallace, the American editor of *Smith's Leading Cases*, as cited in the note to *Angell on Carriers*, s. 155 (p. 153), attempts a definition. 'Upon the whole it would seem that the act of God signifies the extraordinary violence of nature.' This entirely disapproves of those two American cases referred to in the argument, *Colt v. McMechen*, 6 Johns. (N. Y.) 180, 5 Am. Dec. 200; and *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235, which appeared to go to the



as a tempest or violent wind,<sup>35</sup> a flood,<sup>36</sup> an extreme an extraordinary snowstorm,<sup>38</sup> an exceptional frost either venting transportation by the freezing of a canal or str or injuring the goods in transit,<sup>40</sup> a washout caused l earthquake.<sup>41</sup> Sudden insanity of a railroad engineer and careless action has been held not to excuse liability for consequences of his carelessness.<sup>42</sup>

Though fire is not usually an act of God,<sup>43</sup> yet if c extent of shewing that 'act of God' and 'act of Nature' meant the same thing. I mean, of course, 'act of God' as applied to the carrier's exception. I would not adopt this or any definition as exact and including all cases, but wherever there is that unusual violence of nature, against which, in the opinion of the jury, precautions would be considered unavailing, and could not be expected to be taken, I should say the case would come within the exception."

<sup>35</sup> *Alabama, etc., R. Co. v. Quarles*, 145 Ala. 436, 40 So. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54; *Blythe v. Denver, etc., R. Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403; *New England, etc., S. S. Co. v. Paige*, 108 Ga. 296, 33 S. E. 969; *Gillett v. Ellis*, 11 Ill. 579; *Tuthill v. Norfolk Southern R.*, 174 N. Car. 77, 93 S. E. 446; *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649; *Wells, Fargo & Co. v. Porter* (Tex. Civ. App.), 202 S. W. 987.

<sup>36</sup> *Seaboard Air Line Ry. v. Mullin*, 70 Fla. 450, 70 So. 467, L. R. A. 1916 D. 982, Ann. Cas. 1916 D. 982; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340, 1 S. W. 327; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Long v. Pennsylvania R. Co.*, 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732; *Porter Screen Mfg. Co. v. Central Vermont R.*, (Vt. 1917), 102 Atl. 44. In *Norris v. Savannah, etc., Ry. Co.*, 23 Fla. 182, 1 So. 475, 11 Am. St. Rep. 355, a flood was held to excuse liability for loss caused by

decaying fruit delayed by extraor flood, though the water did not the fruit.

<sup>37</sup> *Hecht v. Boston Wharf Co* Mass. 397, 402, 107 N. E. 990, L. 1915 D. 725, Ann. Cas. 1917 A.

<sup>38</sup> *Briddon v. Great Northern Co.*, 28 L. J. Ex. (N. S.) 51; *Balle v. North Missouri R. Co.*, 40 Mo. 93 Am. Dec. 315; *Feinberg v. Dela etc., R. Co.*, 52 N. J. L. 451, 20 At <sup>39</sup> *Harris v. Rand*, 4 N. H. 25 Am. Dec. 421; *Bowman v. Teal Wend*. 306, 35 Am. Dec. 562; *Spa Transportation Co.*, 11 N. Y. 1 680, 33 N. Y. S. 566.

<sup>40</sup> *Swetland v. Boston & Alban Co.*, 102 Mass. 276; *Vail v. Pe Railroad*, 63 Mo. 230.

<sup>41</sup> *Slater v. South Carolina Ry.* 29 S. C. 96, 6 S. E. 936.

<sup>42</sup> *Central of Georgia R. Co. v. I* 124 Ga. 322, 52 S. E. 679, 4 L. R. (N. S.) 898, 110 Am. St. Rep. The court said (p. 334), "If the ag of the company had made a mist and delivered the plaintiff's horse some other person, whereby it lost to the plaintiff, would it be un that, if the agent were insane, delivery of the horse to the wr person was an act of God? Surely n Sudden death, or sickness of such character as to render action imposs may sometimes excuse non-acti But tortious action does not becom the act of God because the pers acting may be sick."

<sup>43</sup> *Forward v. Pittard*, 1 T. R. 27, 3 Merchants' Despatch Co. v. Smit

by lightning,<sup>44</sup> or spread by an exceptional wind from a distant forest<sup>45</sup> it is so considered. A bursting boiler is not an act of God,<sup>46</sup> nor is loss from any elemental disturbance excused if the loss could have been avoided by reasonable care.<sup>47</sup>

### § 1091. Animals.

Contracts for the carriage of live stock have often been placed on a different plane from those for transporting ordinary goods. Unquestionably common carriers are not liable for any injury to livestock which arises from the inherent character or propensities of the animals.<sup>48</sup> But a few courts have gone further and held that livestock is not properly to be considered goods which a common carrier is bound to receive as such, and that it is liable only for negligence or failure to perform a special contract, but not as an insurer.<sup>49</sup>

In England, and by the great weight of authority in the United States, however, the carrier is held liable, as such, for losses not due to the inherent nature of the animals<sup>50</sup> except as the carrier by special contract limits its liability;

76 Ill. 542; *Miller v. Steam Navigation Co.*, 10 N. Y. 431.

<sup>44</sup> *Parker v. Flagg*, 26 Me. 181, 45 Am. Dec. 101.

<sup>45</sup> *Pennsylvania R. Co. v. Fries*, 87 Pa. 234. A contrary decision, however, was reached in *Chevallier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639.

<sup>46</sup> *Caldwell v. New Jersey Steamboat Co.*, 56 Barb. 425; *M'Call v. Brock*, 5 Strobb. 119.

<sup>47</sup> *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039. See *infra*, § 1096.

<sup>48</sup> *Kendall v. London, etc., R. Co.*, L. R. Ex. 373; *Coupland v. Housatonic R. Co.* 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; *Burke v. United States Express Co.*, 87 Ill. App. 505; *United States Express v. Burke*, 94 Ill. App. 29; *Chicago, etc., R. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558; *Swetland v. Boston & Albany R. Co.*, 102 Mass. 276; *Cragin v. New York Central R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559.

<sup>49</sup> *Louisville, etc., R. Co. v. Hedger*, 9 Bush, 645; *Louisville & N. R. Co. v. Wathen*, 23 Ky. L. Rep. 2128, 66 S. W. 714. But see *Cincinnati, etc., R. Co. v. Sanders*, 25 Ky. L. Rep. 2333, 80 S. W. 488; *Michigan, etc., R. Co. v. McDonough*, 21 Mich. 165; *McKenzie v. Michigan Central R. Co.*, 137 Mich. 112, 100 N. W. 260.

<sup>50</sup> *Kendall v. London, etc., R. Co.*, L. R. 7 Ex. 373; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Louisville, etc., R. Co. v. Smitha*, 145 Ala. 686, 40 So. 117; *Cooper v. Raleigh, etc., Co.*, 110 Ga. 659, 36 S. E. 240; *Baltimore, etc., R. Co. v. Fox*, 113 Ill. App. 180; *St. Louis, etc., R. Co. v. Clark*, 48 Kans. 321, 329, 29 Pac. 312; *Dow v. Packet Co.*, 84 Me. 490, 24 Atl. 945; *Evans v. Fitchburgh R. Co.*, 111 Mass. 142, 15 Am. Rep. 19; *Chicago, etc., Ry. Co. v. Slattery*, 76 Neb. 721, 107 N. W. 1045, 124 Am. St. Rep. 825; *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077.

and it may be supposed that since the passage of the Mack Amendment of 1906, any local rules to the contrary are superseded so far as concerns interstate shipments.<sup>51</sup>

### § 1092. Public enemies, restraint of princes.

The common law excused a common carrier from liability for losses caused by the King's enemies.<sup>52</sup> King's enemies may be translated into the law of the United States as public enemies. Therefore, capture by the forces of a country with which the carrier is at war with that to which the carrier belongs, is an excusable loss.<sup>53</sup> The exception does not, however, include belligerent forces,<sup>54</sup> and covers enemies of only the country of the owners, not of the shipper.<sup>55</sup>

Losses by mob violence of any kind are not excused, but where rebellion goes so far as to produce *de facto* a state of war the carriers of either side would be protected against losses due to the other.<sup>57</sup> An exception after contained in charter parties and bills of lading excuses the carrier from losses caused by restraint of princes.<sup>58</sup> This covers seizure or detention by government embargo or blockade, or other effective means,<sup>59</sup> or detention by quarantine laws;<sup>60</sup>

<sup>51</sup> *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314. See also *American Express Co. v. United States Horseshoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990, and cases cited.

<sup>52</sup> *Coggs v. Bernard*, 2 Ld. Ray. 909. See *Holmes*, Common Law, 177, 201.

<sup>53</sup> *Russell v. Neimann*, 17 C. B. (N. S.) 163.

<sup>54</sup> See *Forward v. Pittard*, 1 T. R. 27, 34.

<sup>55</sup> See *Russell v. Niemann*, 17 C. B. (N. S.) 163; *Scrutton on Charter Parties* (7th ed.), 206.

<sup>56</sup> *Coggs v. Bernard*, 2 Ld. Ray. 909; *Hall v. Pennsylvania R. Co.*, 14 Phil. 414.

<sup>57</sup> *Mauran v. Insurance Companies*, 6 Wall. 1, 18 L. Ed. 836; *Thorington v.*

*Smith*, 8 Wall. 1, 19 L. Ed. 361; *E. v. Adams Express Co.*, 1 Duval, 85 Am. Dec. 623; *Nashville &c. v. Estes*, 10 Lea, 749.

<sup>58</sup> Similar exceptions are common to contracts of marine insurance. For construction of the words in the different forms of contract is compare in 32 Harv. L. Rev. 839.

<sup>59</sup> *Geipel v. Smith*, L. R. 7 Q. B. 1; *Miller v. The Law Accident Ins. Co.* [1903] 1 K. B. 712; *Nobel's Explosives Co. v. Jenkins*, [1896] 2 Q. B. 326. *Furness v. Rederiaktiebolaget Bahr* [1917] 2 K. B. 873, it was held that where a Swedish vessel had been chartered for voyages outside Swedish waters an order of the Swedish Government prohibiting such voyages was a restraint of princes, though

<sup>60</sup> *Miller v. Law Accident Ins. Co.*, [1903] 1 K. B. 712; *Clyde Commercial*

*S. S. Co. v. West India S. S. Co.*, [1903] 1 K. B. 712; *Clyde Commercial S. S. Co. v. West India S. S. Co.*, 1 Fed. 275, 94 C. C. A. 551.

does not cover seizure by ordinary legal process;<sup>61</sup> nor the actions of persons who do not claim governmental authority for their acts,<sup>62</sup> or even of persons claiming such authority but not having it in fact.<sup>63</sup> It has been held, also, that a

vessel was in English waters and the only effect of disobedience would be to render the owners and master liable to imprisonment if they return to Sweden.

In *The Athanasios*, 228 Fed. 558, the Greek government appropriated a Greek vessel in the port of New York. The court said (p. 559), "I am of opinion that performance of contract has been prevented, and the charter party relieved, by 'restraint of princes.' This Greek steamer cannot fulfill her charter without lawfully clearing from this port; she cannot clear without her papers; the Greek consul has them, under orders from his government to see to it that the vessel loads for governmental purposes, and he has authority to put on her a captain who will obey these orders, if the present master does not. In the phrase now current, the sovereign of the ship's home and owner has 'commandeered' or requisitioned the steamer for government account.

"There is certainly no power in any court of the United States to prevent or undo this act of the Greek king and his consul. It is of no moment whether the Greek municipal law is being correctly interpreted by the various Grecian officials concerned—the restraint is actual and is governmental. Restraint need not be by physical force. *Olivera v. Union Ins. Co.*, 3 Wheat. 183, 4 L. Ed. 365. Many of the cases on restraint are cited in *The Styria*, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027; all the British decisions and the American rule as to quarantine, in *Carver on Carriage by Sea* (5th ed.), § 82, and *Scrutton on Charter Parties* (6th ed.), art. 82.

"It is unnecessary to parade the

opinions; the essential holding is that restraint which fulfills the exception must be actual, not potential or probable, and must emanate from recognized authority, not, *e. g.*, the brute power of a pirate. I am quite unable to conceive any more actual restraint than is here present."

<sup>61</sup> *Finlay v. Liverpool, etc., S. S. Co.*, 23 L. T. 251.

<sup>62</sup> *Nesbitt v. Lushington*, 4 T. R. 783.

<sup>63</sup> In *Northern Pacific Railway Co. v. American Trading Co.*, 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269, a deputy collector, through his mistaken understanding of the law, refused a clearance to a steamer unless a shipment of lead which was contraband of war during the Chinese-Japanese War were first discharged. There was no statute of the United States nor any proclamation of the President requiring clearance to be refused to a vessel having on board articles contraband of war. Mr. Justice Peckham said: "Here there was no intervention of the government of the United States. The exportation of lead was never prohibited by the Treasury Department during the war between China and Japan. There was no change in the law or the policy of this government subsequently to the making of the contract by which its performance was refused. The exportation of the lead was legal when the contract was made and continued to be so after the execution of such contract, although the deputy collector mistakenly refused to grant the clearance unless the lead was taken off the vessel. Such mistaken decision did not render the original loading of the lead on the ship unlawful, nor would it have been unlawful

reasonable apprehension which turned out to be well founded that the Dardenelles through which the chartered vessel must pass to reach its destination would be closed by war, was not restraint of princes.<sup>64</sup> The decision seems somewhat narrow, for in many cases where there has been held a restraint of princes, there is on close analysis only a reasonable apprehension, for instance, that an existing embargo of a port of destination will continue if the vessel should actually go there.<sup>65</sup>

It should be observed that when the carrier is excused from its obligation, it does not necessarily follow that the charterer is similarly excused from paying charter hire.<sup>66</sup>

for the ship to proceed with the lead on board provided the clearance had been had. It was not an act of the state, therefore, which prevented the sailing of the vessel within the true meaning of such a term, but a mistaken act of a subordinate official not justified by law, and not sufficient as an excuse for the nonperformance of the contract in question under the circumstances already detailed. If the bill of lading were regarded as applicable for this purpose, the refusal of the clearance did not constitute a 'restraint of princes, rulers or people,' within that clause of the bill." Cf. *Russian Bank v. Excess Insurance Co.*, [1918] 2 K. B. 123, [1919] 1 K. B. 39, 40; *Brunner v. Webster*, 5 Comm. Cas. 167.

<sup>64</sup> *Mitsui v. Watts, Watts & Co., Ltd.*, [1916] 2 K. B. 826; *Watts, Watts & Co., Ltd., v. Mitsui*, [1917] A. C. 227. See also *Becker v. London Assurance Corp.*, [1918] A. C. 101, and *supra*, § 877.

<sup>65</sup> In *North German Lloyd v. Guaranty Trust Co.*, 244 U. S. 12, 37 S. C. Rep. 490, 61 L. Ed. 960, the steamship *Kronprinzessin Cecilie* was freed from liability under a contract requiring it to deliver gold in Europe because on account of well-founded apprehension

of war between England and Germany the captain returned to America; though as events turned out the vessel could have completed the remainder of her voyage before the declaration of war. The only pertinent exception in the bills of lading was of "restraint of princes." The court, however, held that under this contract as under contracts generally, "other exceptions are necessarily to be implied," and cites cases of impossibility actual and prospective. See *supra*, §§ 877 *et seq.*

<sup>66</sup> In *Clyde Commercial S. S. Co., Ltd., v. West India S. S. Co.*, 169 Fed. 275, 278, 94 C. C. A. 551, the court said: "Detention by quarantine authority is a restraint of princes or people. *Street v. Progresso* (D. C.), 42 Fed. 229; *Street v. Progresso*, 50 Fed. 835, 2 C. C. A. 45; *The Santona* (D. C.), 152 Fed. 516; *Carver on Carriage of Goods by Sea*, § 82. Accordingly this exception which prevented the owner from prosecuting his voyage with dispatch relieves him from liability to the charterer for the delay so caused. The case is to be treated as if no delay had occurred. On the other hand, the charterer is not protected by the exception from paying hire because it was not thereby prevented from paying hire and because it had the use of the

**§ 1093. Inherent vice.**

The carrier is not liable for damage due to the inherent character of the goods themselves, such as the decay of perishable goods,<sup>67</sup> or the injury or death of animals through their own characteristics, irrespective of outside interference.<sup>68</sup>

vessel for which it was to pay notwithstanding the interruption. There could be no doubt of the correctness of the conclusion of the court if the charter party had been a demise of the vessel. As it was not, it seems that the charterer should have the right of refusing to proceed with the charter if the delay were so material as to frustrate the object of the voyage; *Scottish Nav. Co. v. Soutter*, [1917] 1 K. B. 222, but if the charterer, whether bound to do so or not, continues to take the benefit of the charter, there seems little precedent for arguing under the common law that the hire shall be diminished. See *infra*, § 1101.

<sup>67</sup> *Nelson v. Chicago &c. Ry.*, 102 Neb. 439, 167 N. W. 574; *Gulf, C. & S. F. Ry. v. Persky* (Tex. Civ. App.), 200 S. W. 606. In *Faucher v. Wilson*, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431, a hogshead of molasses while being unloaded burst because of fermentation. The carrier was held not liable.

In *Lister v. Lancashire, etc., Ry. Co.*, [1903] 1 K. B. 878, the defendants contracted with the plaintiff as common carriers to carry for them an engine from his yard to a neighboring town on the defendants' railway. The engine was on wheels and fitted with shafts to allow of its being drawn by horses. While the defendants were drawing the engine with their horses to the railway station one of the shafts, owing to its being rotten, broke; the horses took fright and upset the engine, which was damaged. The defective condition of the shaft was not known to either the plaintiff or the defendants, and could not have been

discovered by any ordinary examination. It was held that as the engine was not in fact fit to be carried in the way in which it was intended to be carried, and the damage resulted in consequence of that unfitness, the defendants were excused.

<sup>68</sup> *Libro v. Cleveland &c. Ry.*, 202 Ill. App. 418, and see cases cited *supra*, § 1091. The distinction between loss from inherent vice or defect and loss from outside agency was thus discussed in *Kendall v. London, etc., Ry. Co.*, L. R. 7 Exch. 373, 377, by Bramwell, B.: "There is no doubt in this case that the horse was the immediate cause of its own injuries. That is to say, no person got into the box and injured it. It slipped, or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, 'its proper vice,' that is to say, from fright, or temper, or struggling to keep its legs, the defendants are not liable. But if it so hurt itself from the defendant's negligence, or any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, then the defendants would, as insurers, be liable. If perishable articles, say soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable."

The extent of the carrier's duty in regard to such go to use reasonable care and diligence.<sup>69</sup>

### § 1094. Seizure by legal process.

Goods in the hands of a carrier are not infrequently under legal process, and the carrier thereby prevented<sup>70</sup> fulfilling its contract to deliver to the consignee. In England this seems to afford no defence to the carrier for the non-fulfilment of its contract, unless an express stipulation to this effect has been made,<sup>71</sup> but in the United States such seizure has generally been held an implied exception to the carrier's contract.

<sup>69</sup> *Daniels v. Northern Pacific Ry. Co.*, 88 Oreg. 421, 171 Pac. 1178.

<sup>70</sup> See *Clifford v. Brockton Trans. Co.*, 214 Mass. 466, 101 N. E. 1092, Ann. Cas. 1914 B. 909, and cases cited.

<sup>71</sup> In *Finlay v. Liverpool, etc., Steamship Co.*, 23 L. T. (N. S.) 251, though the cases arose in 1870 at a time when equitable pleas were allowed, and the seizure in question was pleaded as "a defence upon equitable grounds," Martin, B., said (at page 254): "This is an action founded on contract, and I do not see how the act of any court of law, or any judicial tribunal, deciding that the defendants should hold possession of the goods and deliver them to the order of the true owners, can relieve the defendants, the ship-owners, from performing their contract, unless such an act or decision of a court or judicial tribunal had been expressly excepted." Channell, B., and Cleasby, B., concurred in this opinion. The case of *Verrall v. Robinson*, 2 C. M. & R. 495, s. c. 4 Dowl. 242, relied on in *Stiles v. Davis*, 1 Black, 101, 106, 19 L. Ed. 33, and *Hutchinson on Carriers* (3d ed.), §§ 739, 740, as indicating a contrary rule, relates to the liability of a livery stable keeper, and therefore does not involve any question of the extraordinary liability of a carrier. Moreover, the decision

even as to ordinary bailees for hire has not escaped judicial criticism. *Pillott v. Wilkinson*, 3 H. & C. 34.

<sup>72</sup> *American Express Co. v. Missouri*, 212 U. S. 311, 29 Sup. Ct. 381, Ed. 525; *Wells, Fargo & Co. v. United States*, 238 U. S. 503, 35 Sup. Ct. 86, L. Ed. 1431; *Robinson v. Memphis R. Co.*, 9 Fed. 129, 16 Fed. 57; *M. M. Chase*, 37 Fed. 708; *Atchafalaya v. International & C. Co.*, Fed. 265, 159 C. C. A. 359; *Savary et al. v. R. Co.*, v. Wilcox, 48 Ga. 511, 19 Ohio, etc., R. Co. v. Yohe, 51 Ind. 19, 19 Am. Rep. 727; *Cleveland, etc. Co. v. Wright*, 25 Ind. App. 521, 19 N. E. 559; *Furman v. Chicago, Ry. Co.*, 57 Ia. 42, 10 N. W. 27; *La. 395*, 17 N. W. 598, 68 Ia. 211, 19 N. E. 83, 81 Ia. 540, 46 N. W. 1; *Bennett v. American Express Co.*, Me. 236, 22 Atl. 159, 13 L. R. A. 33; *Am. St. Rep. 774*; *Pingree v. Detroit, etc., R. Co.*, 66 Mich. 143, 33 N. W. 298, 11 Am. St. 479; *Mers v. Chicago, Ry. Co.*, 86 Minn. 33, 90 N. W. 7; *Hett v. Boston & Maine R. Co.*, N. H. 139, 44 Atl. 910; *Pecos Valley Trading Co. v. Atchison & C. Ry. Co.* (N. Mex.), 174 Pac. 736; *Bliven v. Hudson, etc., R. Co.*, 36 N. Y. 41; *Jewett v. Olsen*, 18 Or. 419, 23 P. 262, 17 Am. St. Rep. 745; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. D. 145.

This principle, however, is subject to some qualification even in America. In order to have a defence carriers must give the consignee prompt notice of the proceedings, so that he may have an opportunity to protect his interest.<sup>73</sup> The seizure also must in no way have been due to the laches or collusion of the carrier.<sup>74</sup>

A carrier by water has a more stringent duty. Since it is often impossible for the owner or consignee of the goods to receive notice and even after receiving notice to attend to the matter with sufficient promptness, the master must take part in the legal proceedings and continue to defend the rights of the absent consignee or owner until he has had a reasonable opportunity to assume the burden of the litigation.<sup>75</sup> Probably everywhere the seizure would give no defence if made by an officer without color of right, and in a few States the excuse of the carrier is limited by the further requirement that the process shall be valid and the goods shall have been seized as the goods of one to whom they actually belonged.<sup>76</sup> But if the legal process is apparently valid, and certainly if it justified the officer in seizing the goods, it should justify the carrier in surrendering them.<sup>77</sup> Where an order bill of lading is outstanding a creditor's right of seizure of the goods by attachment or garnishment is much limited by the Federal statute governing interstate bills of lading,<sup>78</sup> and by the Uniform

<sup>73</sup> *Wells, Fargo & Co. v. Ford*, 238 U. S. 503, 505, 35 Sup. Ct. 864, 59 L. Ed. 1431; *Ohio, etc., R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727; *Mertz v. Chicago, etc., Ry. Co.*, 86 Minn. 33, 90 N. W. 7; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Oh. St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579.

<sup>74</sup> *American Express Co. v. Mullins*, 212 U. S. 311, 314, 29 Sup. Ct. 381, 53 L. Ed. 525; *Robinson v. Memphis, etc., R. Co.*, 16 Fed. 57; *The M. M. Chase*, 37 Fed. 708, 710; *Western, etc., R. Co., v. Ohio Valley, etc., Co.*, 107 Ga. 512, 33 S. E. 821; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Oh. St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579.

<sup>75</sup> *The M. M. Chase*, 37 Fed. 708.

<sup>76</sup> See *Edwards v. White Line Transit Co.*, 104 Mass. 159, 6 Am. Rep. 213; *Gibbons v. Farwell*, 63 Mich. 344, 29 N. W. 855; *Merriman v. Great Northern Express Co.*, 63 Minn. 543, 65 N. W. 1080; *Mertz v. Chicago, etc., R. Co.*, 86 Minn. 33, 90 N. W. 7.

<sup>77</sup> "It is necessary that . . . the proceeding or process appear to be valid." *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 501, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579. In *McAllister v. Railroad Co.*, 74 Mo. 351, a writ issued under a statute held unconstitutional was held to excuse a carrier.

<sup>78</sup> See *infra*, § 1125.



Bills of Lading Act in jurisdictions where that has been enacted.<sup>77b</sup>

**§ 1095. A carrier is not responsible for delay unless unreasonable.**

The obligation of a carrier to transport goods is not absolute but merely to deliver within a reasonable time in view of all the circumstances.<sup>78</sup> In fulfilling this obligation regard must be had to the character of the goods <sup>78a</sup> and to all other circumstances of the case. If the carrier is aware that causes of unusual delay exist of which the shipper does not know, goods must not be accepted for transportation without informing the shipper of the facts; and if accepted without such notification, the carrier will be liable for injury caused by delay which would otherwise be excusable.<sup>78b</sup>

The general doctrine was thus stated in a leading New York decision.<sup>79</sup> "A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods

<sup>77b</sup> See the decision on the analogous point concerning negotiable Warehouse Receipts in *Manufacturers' Mercantile Co. v. Monarch Refrigerating Co.*, 266 Ill. 584, 107 N. E. 885.

<sup>78</sup> *Taylor v. Great Northern Railway Co.*, L. R. 1 C. P. 385; *The Prussia*, 100 Fed. 484; *Beam v. Cleveland &c. R. Co.*, 97 Ill. App. 24; *Pennington v. Grand Trunk Western R.*, 207 Ill. App. 89; *Cincinnati &c. Ry. Co. v. Case*, 122 Ind. 310, 23 N. E. 797; *Philadelphia &c. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415; *Stevens v. Northern Central Ry. Co.*, 129 Md. 215, 98 Atl. 551; *Denny v. New York &c. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645; *National Elevator Co. v. Great Northern Ry.*, 141 Minn. 407, 170 N. W. 515; *Burns Grain Co. v. Erie R. Co.*, 172 N. Y. S. 740; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Oh. St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; *John Vittucci Co. v. Canadian Pac. Ry. Co.* (Wash.), 174 Pac. 981; and see cases in the following notes.

<sup>78a</sup> See, *e. g.*, in regard to transportation of live stock: *Missouri, Kansas & T. Ry. Co. v. Truskett*, 104 Fed. 728, 44 C. C. A. 179, *affd.* in 186 U. S. 480, 46 L. Ed. 1259, 22 Sup. Ct. 943; *Southern Pac. Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131; *Louisville & N. Railroad Co. v. Smith*, 14 Ky. L. Rep. 814; *Sloop v. Wabash R. Co.*, 117 Mo. App. 204, 84 S. W. 111; *Elliott v. Chicago &c. Ry. Co.* (S. Dak.), 161 N. W. 347; *St. Louis Southern Railway Co. v. Hunt* (Tex. Civ. App.), 81 S. W. 322. See in regard to transportation of perishable vegetables: *O. J. Barnes Co. v. Northern Pac. R. Co.* (N. Dak.), 173 N. W. 943.

<sup>78b</sup> *Conover v. Wabash Ry. Co.*, 208 Ill. App. 105; *Tierney v. New York Central &c. R. Co.*, 76 N. Y. 305; *Meany v. Erie R. Co.*, 173 N. Y. S. 96.

<sup>79</sup> *Geismer v. Lake Shore, etc., Ry. Co.*, 102 N. Y. 563, 570, 17 N. E. 828, 55 Am. Rep. 837.

by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination; and so it has been uniformly decided.<sup>80</sup> In the absence of special contract<sup>80a</sup> there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination."<sup>81</sup> Where delay is proved the burden is upon the carrier to establish that it was not due to its own default.<sup>81a</sup>

A breach of duty to transport with reasonable despatch renders the carrier liable for such damages as the owner may have suffered, whether from "a fall in the market price or by damage to the goods themselves, or by a combination of the two causes,"<sup>82</sup> but not for the value of the goods on the theory

<sup>80</sup> Citing *Wibert v. New York & Erie R. Co.*, 12 N. Y. 245; *Blackstock v. New York & Erie R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372.

<sup>80a</sup> As in *John Vittucci Co. v. Canadian Pac. Ry. Co.* (Wash.), 174 Pac. 981.

<sup>81</sup> See also *Haas v. Kansas City, etc., R. Co.*, 81 Ga. 792, 7 S. E. 629. The uniform domestic and also export Bills of Lading prescribed by the Interstate Commerce Commission in 1919, provide: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch. Every carrier shall have the right, in case of physical necessity, to forward said property by any railroad or route

between the point of shipment and the point of destination, but if such diversion shall be from a rail to a water route, the liability of the carrier shall be the same as though the entire carriage were by rail." In the *Matter of Bills of Lading*, 52 Interstate Com. Com. Rep. 671.

<sup>81a</sup> *Young v. Grand Rapids & C. R. Co.*, 201 Mich. 39, 167 N. W. 11; *Tierney v. New York Central & C. R. Co.*, 76 N. Y. 305; *Meany v. Erie R. Co.*, 173 N. Y. S. 96.

<sup>82</sup> *Stevens v. Northern Central R. Co.*, 129 Md. 215, 98 Atl. 551. See also *Brown v. Chicago & C. Refrigerator Co.*, 207 Ill. App. 89; *International Harvester Co. v. Chicago & C. Ry. Co.* (Ia.), 172 N. W. 471; *New Orleans & N. E. R. Co. v. J. H. Miner Saw Mig.*

of conversion.<sup>83</sup> The effect of delay in causing a loss from excepted peril must however be borne in mind, and is discussed in the following section.<sup>83a</sup>

**§ 1096. If the carrier's fault is a contributing cause of a loss the carrier is liable.**

An excepted peril whether excepted by implication of law or by an express provision of contract, affords no excuse if no proximate cause of the loss in question. Therefore, a carrier whose negligence, deviation or other violation of duty directly contributes to the loss, will not be freed from liability because the loss ultimately was due to an excepted peril.<sup>84</sup>

The distinction in this respect between a contract of insurance, and a contract of carriage has been pointed out by Gray, J., of the Supreme Court of the United States.<sup>85</sup> "Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall exercise due care to avoid them."<sup>86</sup> But the ordinary contract of

Co., 117 Miss. 646, 78 So. 577; *Steinberg v. Erie R. Co.*, 103 N. Y. Misc. 573, 170 N. Y. S. 893.

<sup>83</sup> *Ellis v. Turner*, 8 T. R. 531; *Hackett v. B. C. & M. Railroad*, 35 N. H. 390.

<sup>83a</sup> As to the owner's liability for demurrage during delay, see *Kansas City Southern Ry. Co. v. Ft. Smith Compress Co.* (Ark.), 210 S. W. 147; *Louisville & Nashville R. v. Camody* (Ala. App.), 82 So. 648; *Pittsburgh, C., C. & St. L. R. Co. v. Templeton*, 210 Ill. App. 377; *Northern Pacific Ry. Co. v. Pleasant River Granite Co.*, 116 Me. 496, 102 Atl. 298; *Pennsylvania R. Co. v. Kittanning Iron & Steel Co. (Pa.)*, 106 Atl. 207.

<sup>84</sup> *Davis v. Garrett*, 6 Bing. 716 (capture caused by deviation); *James Morrison & Co., Lim., v. Shaw, etc.*,

Co., [1916] 2 K. B. 783 (vessel torpedoes while deviating); *Express Company v. Kountze*, 8 Wall. 342, 19 L. Ed. 100 (taking a more dangerous route than necessary); *Holladay v. Kennard*, Wall. 254, 20 L. Ed. 390; *Dunn v. Currie*, [1902] 2 K. B. 614 (negligence in taking into a cargo goods liable to seizure); *Harris v. Norfolk Southern R.*, 173 N. Car. 110, 91 S. E. 100 (lack of repair of warehouse); *Port Screen Mfg. Co. v. Central Vt. R.*, (1917), 102 Atl. 44 (failing to protect shipment of lime from rising flood).

<sup>85</sup> *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 438, 32 L. Ed. 788, 9 Sup. Ct. 469.

<sup>86</sup> Citing *General Ins. Co. v. Shaw*, 14 How. 352, 364, 365, 14 L. Ed. 452; *Orient Ins. Co. v. Adams*, 11 U. S. 67, 73, 8 Sup. Ct. 68, 31 L. Ed.

carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed."<sup>67</sup> Where, however, deviation, negligent delay or other wrong of the carrier, has no reasonable likelihood of increasing risk, the wrong seems merely a remote and not a directly contributing cause of a loss subsequently occurring from an excepted peril. Nevertheless some courts have held the carrier liable. The English court has thus explained the carrier's liability in case of deviation.<sup>68</sup> "The principle underlying those judgments seems to be that the undertaking not to deviate has the effect of a condition, or a warranty in the sense in which the word is used in speaking of the warranty of seaworthiness, and, if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit. It may be, no doubt, that, although that condition is broken, the circumstances are such as to give rise to an implied obligation on the part of the cargo owner to pay the shipowner the freight, and, it may be, to perform other stipulations which may be implied under the circumstances from the fact of the carriage of the cargo to its destination; but that is quite consistent with the effect of the deviation being to displace the special contract expressed in the bill of lading . . . therefore it is not necessary to trace the loss which has occurred to the deviation."<sup>69</sup> On the other hand,

63; *Copeland v. New England Ins. Co.*, 2 Met. 432, 448-450.

<sup>67</sup> Citing *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *Express Co. v. Kountze*, 8 Wall. 342, 19 L. Ed. 457; *Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160; *Grill v. General Iron Screw Co.*, L. R. 1 C. P. 600,

and L. R. 3 C. P. 476; *The Xantho*, 12 App. Cas. 503, 510, 511.

<sup>68</sup> In *Joseph Thorley, Ltd., v. Orchis Steamship Co., Ltd.*, [1907] 1 K. B. 660, 667. See also *James Morrison & Co., Lim., v. Shaw & Co.*, [1916] 2 K. B. 783.

<sup>69</sup> On the same principle the English court has held that where goods are

"the United States Supreme Court and the courts of a number of the states hold that a delay in transportation which delays the shipment in the track of an unprecedented flood is a remote and not a proximate cause of an injury to the shipment by the flood, and will not render the carrier liable for the later loss. Such courts base the exemption of the carrier from liability upon the ground that the delay was remote and that the proximate cause of the injury, to wit, the destructive act of God, could not have been foreseen or provided against as a probable result of the negligent delay. In this view the carrier is held not liable even though the injury would not have occurred but for the previous delay in transportation which caused the shipment to be in the track of the flood."<sup>90</sup> Logically, it is somewhat difficult

to ship at "owner's risk" (which is permissible in England), the carrier's contractual exemption from liability is forfeited if it ships the goods by a wrong route; *Mallet v. Great Eastern R. Co.*, [1899] 1 Q. B. 309; or by freight train instead of passenger train as agreed. *Gunyon v. South Eastern, etc., R. Co.*, [1915] 2 K. B. 370. So in *Seaboard Air Line Ry. v. Mullin*, 70 Fla. 450, 70 So. 467, 468 L. R. A. 1916 D. 982, the court said: "In *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Green-Wheeler Shoe Co. v. Chicago, etc., R. Co.*, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882; *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.*, 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. Rep. 361; *Alabama Great Southern R. Co. v. Quarles*, 145 Ala. 436, 40 So. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54; *Wald v. Pittsburg, C., C. & St. L. R. Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332, and other somewhat similar cases—the courts hold that when there is a negligent delay by a common carrier in transporting goods, and subsequently before reaching destination the goods are injured by an act of God that could not reasonably have been foreseen at

the time of the negligent delay the carrier is liable. 4 R. C. L., p. Moore on Carriers, p. 371. The holdings are presumably predicated upon the theory that the delay concurring and proximate cause of the loss or injury, or that because of the delay the law enlarges the liability of the common carrier by withdrawing the exemption from liability that usually exists when goods in transit are injured by an act of God."

<sup>90</sup> *Seaboard Air Line R. v. Mullin*, 70 Fla. 450, 70 So. 467, L. R. A. 1916 D. 982, citing: *Railroad Co. v. Reece*, 10 Wall. 176, 19 L. Ed. 909; *St. Louis I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 10 Sup. Ct. 554, 35 L. Ed. 237; *Empire State Cattle Co. v. Atchison & S. F. Ry. Co. (C. C.)*, 135 Fed. 1; *Scott v. Baltimore, etc., Steam-Boat Co. (C. C.)*, 19 Fed. 56; *Daniels v. Ballantine*, 23 Oh. St. 532, 13 Am. R. 264; *Yazoo, etc., R. Co. v. Mills*, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778, 45 S. E. 31; *Morrison v. Davis & Co.*, 20 Pa. 57, 57 Am. Dec. 695; *Rodgers v. Missouri Pac. Ry. Co.*, 75 Kans. 222, 88 P. 885, 10 L. R. A. (N. S.) 658, 121 Am.

accept the English view that the carrier's breach of contract totally displaces the contract. It is to be observed also that this reasoning is applicable only to perils excepted by contract, not to exceptions given by law. The conclusions in a recent Florida decision, on the whole, seem sound:<sup>91</sup> "In determining the liability of common carriers for goods injured or lost in transit by an act of God, the true rule is that, in order to relieve the carrier from liability, the act of God must be one that could not have been foreseen, and must be the sole proximate cause of the loss or injury. But where the carrier is otherwise without fault, and its mere delay in transportation causes the goods to be where they are injured by an act of God, the carrier is liable only when the injury resulted from the delay by ordinary natural sequence, or where the injury is of a character that is within the probable consequences of the previous negligent delay of the carrier; for otherwise the carrier's liability would be extended to losses that it is not by law required to anticipate and provide against."<sup>92</sup>

St. Rep. 416; *Sauter v. Atchison*, T. & S. F. R. Co., 78 Kans. 331, 97 Pac. 434; *Grier v. St. Louis Merchants' Bridge Terminal R. Co.*, 108 Mo. App. 565, 84 S. W. 158; *Armstrong v. Illinois Central R. Co.*, 26 Okl. 352, 109 Pac. 216, 29 L. R. A. (N. S.) 671; *Hunt v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.), 74 S. W. 69; *International & G. N. R. Co. v. Bergman* (Tex. Civ. App.), 64 S. W. 999; *Denny v. N. Y. Central R. Co.*, 13 Gray, 481, 74 Am. Dec. 645; *Moffatt Commission Co. v. Union Pacific R. Co.*, 113 Mo. App. 544, 88 S. W. 117; *Lamar Mfg. Co. v. St. Louis & S. F. R. Co.*, 117 Mo. App. 453, 93 S. W. 851; *Lightfoot v. St. Louis, etc., R. Co.*, 126 Mo. App. 532, 104 S. W. 482; *Extinguisher Co. v. Carolina, etc., R. Co.*, 137 N. C. 278, 49 S. E. 208. See also *Hecht v. Boston Wharf Co.*, 220 Mass. 397, 107 N. E. 990, L. R. A. 1915 D. 725, 1917 A. Ann. Cas. 445; *Toledo & C. Ry. v. S. J. Kibler & Bros. Co.*, 97 Ohio St. 262, 119 N. E. 733, certiorari denied 248

U. S. 569, 39 Sup. Ct. 10; *Davis v. Central Vt. R.*, 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852. Similarly a carrier was held not liable for loss of goods in its hands at their destination, caused by an unprecedented flood, though if the carrier had given prompt notice of their arrival to the consignee, they would have been removed. *Hadba v. Baltimore & C. R.*, 183 N. Y. App. D. 555, 170 N. Y. S. 769.

<sup>91</sup> *Seaboard Air Line R. v. Mullin*, 70 Fla. 450, 70 So. 467, L. R. A. 1916 D. 982.

<sup>92</sup> Citing *Merritt Creamery Co. v. Atchison, etc., R. Co.*, 139 Mo. App. 149, 122 S. W. 322, and adding, "As the injury to the goods in this case was directly caused by an admittedly unprecedented flood—an excusing act of God—to which injury the defendant did not directly contribute, and as such flood could not have been anticipated or the injury regarded as resulting by ordinary natural sequence, or as a natural and probable result of the

This is in substantial accord with 1  
United States Supreme Court, and  
ment to the Interstate Commerce  
arises under an interstate shipment  
ing to the Federal rule.<sup>93</sup> If the d  
such as flood or tempest, was foresee  
that the carrier is not excused if  
precautions to guard against the dan

### § 1097. Obligations commonly assu

Common obligations assumed by  
warranties already considered<sup>94</sup> ;  
to the time of sailing or of arrival, c  
ing. If the owner undertakes "to  
and the port named by the charter  
directions are given,<sup>95</sup> or subsequen  
the vessel, becomes unsafe,<sup>96</sup> the own  
with the contract unless another p  
charterer will not name another, m  
situation is similar where a charterer  
of destination does not do so within  
the contract gives a choice of ports, w.

preceding delay in transit, the injury      Bergn  
was not 'caused by' the defendant      999.  
within the meaning of the law, and the      671, a  
defendant is not liable."      and n

<sup>93</sup> Continental Paper Bag Co. v.      note.  
Maine Central R. Co., 115 Me. 449,      <sup>94</sup> S  
99 Atl. 259; Hadba v. Baltimore &c.      <sup>95</sup> Tl  
R., 183 N. Y. App. D. 555, 170 N. Y. S.      <sup>96</sup> Tl  
769. See *supra*, § 1073.      181.

<sup>94</sup> Jonesboro, etc., R. Co. v. Dun-      <sup>97</sup> Th  
avant, 117 Ark. 451, 174 S. W. 1187;      <sup>98</sup> In  
National Rice Milling Co. v. New      670, tl  
Orleans, etc., R. Co., 132 La. 615, 61      the cha  
So. 708. Ann. Cas. 1914 D. 1099;      alterna  
Merritt Creamery Co. v. Atchison,      was a t  
etc., Ry. Co., 139 Mo. App. 149, 122      The cl  
S. W. 322; Barnet v. New York Central,      choice  
etc., R. Co., 167 N. Y. App. D. 738,      the ow  
153 N. Y. Cent. 374; Ferguson v.      exercising  
Southern Ry. Co., 91 S. C. 61, 74 S. E.      most a  
129; International, etc., R. Co. v.      and pr

the owner has the choice, the charterer has the right and the duty to make it.<sup>90</sup> The owner after receiving cargo must take the vessel to the destined port, or as is usually provided, "so near as she can safely get." These qualifying words are not to be understood as applying to any but slight variations, and the owner does not comply with his contract (though he may be excused from liability under it) if he fails to reach at least approximately the port of destination, even though he cannot safely so do.<sup>1</sup> If the inability to reach the named port is due to usual and temporary difficulties, such as tides,<sup>2</sup> or ice,<sup>3</sup> or crowded docks,<sup>4</sup> the owner must await for a reasonable time the removal of the difficulty. A requirement to go to a "safe" spot or as near as the charterer can "safely" get, means safe or safely, for a vessel carrying a cargo and remaining with it until unloaded.<sup>5</sup> Even though the charterer assumes the expense of lighterage, the vessel cannot be required to go to a port which is not of this description.<sup>6</sup>

#### § 1098. Charterer's duty to furnish a cargo.

The primary promise of a charterer is ordinarily to furnish a full cargo complying with any stipulations in the charter party;<sup>7</sup> and "In the absence of something to qualify it the undertaking of the merchant to furnish a cargo is absolute. . . . The mere existence of circumstances beyond the control of the shipper, which makes it impracticable for him to have his cargo ready, will not relieve him from paying damages for breach of his obligation."<sup>8</sup> Presumably if the agreed cargo was specific property, its destruction prior to shipment would excuse the charterer;<sup>9</sup> but this would be an exceptional case.

<sup>90</sup> *Rae v. Hackett*, 12 M. & W. 724.

<sup>1</sup> *Metcalfe v. Britannia Ironworks Co.*, 2 Q. B. D. 423; *Castel v. Trechman*, 1 Cab. & Ellis, 276.

<sup>2</sup> *Parker v. Winslow*, 7 E. & B. 942; *Carlton Steamship Co. v. Castle Mail Co.*, [1898] A. C. 486.

<sup>3</sup> *Schilizzi v. Derry*, 4 E. & B. 873; *The Flash*, 9 Fed. Cas. No. 4,858.

<sup>4</sup> *Dahl v. Nelson*, 6 A. C. 38.

<sup>5</sup> *The Alhambra*, 6 Prob. D. 68. Cf.

*Carlton Steamship Co. v. Castle Mail Co.*, [1898] A. C. 486.

<sup>6</sup> *The Alhambra*, 6 Prob. D. 68.

<sup>7</sup> See *Isis S. S. Co. v. Bahr*, [1900] A. C. 340; *The Lloyd*, 21 Fed. 420; *McQuade v. McNaughton*, 49 Fed. 284; *Thorndike v. Rokes*, 76 Me. 396.

<sup>8</sup> *Arden Steamship Co. v. Andrew Weir & Co.*, [1905] A. C. 501, 511, 512.

<sup>9</sup> See *infra*, §§ 1946, 1948.



§ 1099. Duty to load and unload.

"In the absence of a contract or of a custom binding the parties to the contrary, it is as much the duty shipowner to load and discharge the cargo as it is to care between the loading and discharging ports. In early times the crew did the loading and discharging, but in modern times it is done, at least in large ports, by master stevedores who are independent contractors. All regular liners are so loaded and discharged. This duty of the owners as to chartered ships, whether on time charters or voyage charters, is provided the ship is not demised. Of course, when the charter is a demise, the charterer is to be treated *pro hac vice* as if the owner." <sup>10</sup>

If the obligation is assumed by the charterer in the charter party of paying for the loading and unloading, this does not of itself shift the legal duty with its consequent liability for improper performance from the shipowner.<sup>11</sup> The English courts, however, have gone a long way in recognizing a delegation of the duty upon the charterer.<sup>12</sup> The rights of the parties with reference to the prompt performance of the duty to unload the ship have been thus stated:<sup>13</sup> "Demurrage, strictly speaking, can be recovered only when it is expressly reserved by the charter or bill of lading.<sup>14</sup> But one who chartered a vessel, under a contract that is silent as to the duty of unloading and discharge, contracts by implication that he will unload and discharge her within a reasonable time or with reasonable diligence." <sup>15</sup> A supervening strike de-

<sup>10</sup> *Munson S. S. Line v. Glasgow Nav. Co.*, 235 Fed. 64, 67, 148 C. C. A. 558. See also *The Kaupanger*, 241 Fed. 702, where it is added in regard to the duty of the ship, "It is even her duty to pay for the cost of ballast."

<sup>11</sup> *Munson S. S. Line v. Glasgow Nav. Co.*, 235 Fed. 64, 68, 148 C. C. A. 558.

<sup>12</sup> *The Kaupanger*, 241 Fed. 702, 704, citing as the leading English case *Blaikie v. Stembridge*, 6 C. B. (N. S.) 894.

<sup>13</sup> In *Empire Trans. Co. v. Philadel-*

*phia & R. Coal, etc., Co.*, 77 Fed. 920, 23 C. C. A. 564, 35 L. R. A. 101.

<sup>14</sup> *Ibid.* Citing *Gage v. Morse*, 410, 90 Am. Dec. 155; *The Owen*, 54 Fed. 185, 186. See also *Franklin Transp. Co. v. Federal S. Ref. Co.*, 242 Fed. 43, 154 C. C. A. 558.

<sup>15</sup> *Ibid.* Citing *Cross v. Beard*, N. Y. 85, 89; *Fulton v. Blake*, 91 Cal. 903, 995 (No. 5, 153); *The J. Owen*, 54 Fed. 185; *Burrill v. Cross*, 16 C. C. A. 381, 35 U. S. App. 608, Fed. 747, mod'g 65 Fed. 104; *M. S. Bacon v. Erie & W. Transp. Co.*

ing performance may make a degree of delay reasonable which apart from the strike would not be.<sup>16</sup> "Where the time for the discharge of the vessel is stipulated, or is definitely fixed by the charter or bill of lading, so that it can be calculated beforehand, the charterer thereby agrees absolutely to discharge her within that time, and he takes the risk of all unforeseen circumstances. 'He bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge,'<sup>17</sup> or from frost,<sup>18</sup> or bad weather,<sup>19</sup> preventing access to the vessel; or from acts of the government of the place prohibiting export, or preventing communication with the ship.<sup>20</sup> And it is immaterial that the shipowner, also, is prevented from doing his part of the work within the agreed time, unless he is in fault. The charterer takes the risk.'"<sup>21</sup> But where demurrage is promised by the charter

3 Fed. 344; *Whitehouse v. Halstead*, 90 Ill. 95, 98; *Henley v. Brooklyn Ice Co.*, 14 Blatch. 522, Fed. Cas. No. 6,364; *Finney v. Grand Trunk Ry. Co.*, 14 Fed. 171; *Houge v. Woodruff*, 19 Fed. 136; *Fish v. One Hundred and Fifty Tons of Brown Stone*, 20 Fed. 201; *Gronn v. Woodruff*, 19 Fed. 143; *The Z. L. Adams*, 26 Fed. 655, 656; *The Elida*, 31 Fed. 420; *The William Marshall*, 29 Fed. 328; *The Mary Riley v. Three Thousand Railroad Ties*, 38 Fed. 254; *Riley v. A Cargo of Iron Pipes*, 40 Fed. 605; *Bellatty v. Curtis*, 41 Fed. 479, 480; *Taylor v. Great Northern R. Co.*, L. R. 1 C. P. 385; *Burmester v. Hodgson*, 2 Camp. 488; *Ford v. Cotesworth*, L. R. 4 Q. B. 127, L. R. 5 Q. B. 544; *Hick v. Rodocanachi*, [1891] 2 Q. B. 626, 633, 638, 646; *Hick v. Raymond* [1891] 2 Q. B. 626, [1893] A. C. 22; *Postlethwaite v. Freeland*, 5 App. Cas. 599, 621, 622. See also *Ben Franklin Transp. Co. v. Federal Sugar Ref. Co.*, 242 Fed. 43, 154 C. C. A. 665.

<sup>16</sup> *The Richland Queen*, 254 Fed. 668, 166 C. C. A. 166. The court disapproved a distinction taken by the New York Court of Appeals, according to

which a peaceable strike of a carrier's employees is no excuse for delay, *Blackstock v. New York &c. R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372, while a strike with violence is a defence, *Geismer v. Lake Shore &c. R. Co.*, 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

<sup>17</sup> *Empire Trans. Co. v. Philadelphia & Reading Coal &c. Co.*, 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; citing *Carver, Carriage by Sea*, §§ 610, 611; *Randall v. Lynch*, 2 Camp. 352; [See also *W. K. Niver Coal Co. v. Cheronea S. S. Co.*, 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126].

<sup>18</sup> *Ibid.* Citing *Carver, Carriage by Sea*, §§ 610, 611; *Barret v. Dutton*, 4 Camp. 333.

<sup>19</sup> *Ibid.* Citing *Carver, Carriage by Sea*, §§ 610, 611; *Thijs v. Byers*, 1 Q. B. D. 244.

<sup>20</sup> *Ibid.* Citing *Carver, Carriage by Sea*, §§ 610, 611; *Barker v. Hodgson*, 3 Maule & S. 267; *Blight v. Page*, 3 Bos. & P. 295, *n.*

<sup>21</sup> *Ibid.* Citing *Carver, Carriage by Sea*, §§ 610, 611; *Davis v. Wallace*, 7 Fed. Cas. 182 (No. 3,657); *Philadelphia, etc., R. Co. v. Northam*, 19 Fed.

party only for "detention by default" of the charterer, he is not liable for detention caused by *vis major* or foreign governments.<sup>22</sup> What is a reasonable time for unloading when no time is fixed by the charter frequently depends on local practice and usage at the port of discharge, but "the custom of a port can be used as a reason for delay only when, because of such custom, a vessel is deprived of an opportunity to discharge sooner; and it cannot be used as a reason for delay when such opportunity is afforded, and, merely for reasons of the charterer's convenience, the discharge is de-

Cas. 492 (No. 11,090); *Williams v. Theobald*, 15 Fed. 465, 471; *Manson v. New York, etc., R. Co.*, 31 Fed. 297; *Sixteen Hundred Tons of Nitrate of Soda v. McLeod*, 10 C. C. A. 115, 61 Fed. 849; *Burrill v. Crossman*, 16 C. C. A. 381, 35 U. S. App. 608, 69 Fed. 747, 752.

In *Tweedie Trading Co. v. New York Cent. & H. R. Co.*, 194 Fed. 281, 283, discussing the obligation of the owner of a portion of the cargo, L. Hand, J., said: "The question of law raised in this branch of the case is whether, if the cargo of a ship be in layers, the owner of the lower layer is responsible under the charter party, for demurrage, although he discharges with all reasonable dispatch, if the owner of the upper layer be delinquent in his own discharge. When the charter party engages the charterer or cargo owner to discharge by a fixed day, or in a fixed number of days, the law is now settled in England that the owner of the lower layer is responsible regardless of his own default (*Leer v. Yates*, 3 Taunt. 387; *Porteus v. Watney*, L. R. 3 Q. B. Div. 534), in spite of two rulings of Lord Tenterden to the contrary in *Rogers v. Hunter*, *Moody & Malkin*, 63, and *Dobson v. Droop*, *Moody & Malkin*, 441. Regardless of which rule is preferable, if the matter were to be decided in this case, I think the rule clearly distinguishable as being only an instance of the stringent

principle of *Thiis v. Byers*, L. R. 1 Q. B. Div. 244, that, when a charterer engages to deliver by a day certain, he assumes all risks of what may come up to prevent. The rule is the same in this country (*Empire Transportation Co. v. Philadelphia & Reading Co.*, 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623), but it is not applicable in the case at bar because the charterer did not engage to discharge the ship by a certain day, or indeed to discharge her at all, but only to receive the cargo as fast as the steamer could unload, working all hatches at once. The commissioner was clearly right under such a charter party in holding that each cargo owner was answerable only for his own default. Thus, if the cargo of A. has to be removed before that of B., B.'s only duty is to receive as fast as the steamer can unload from the time she begins to unload his cargo; and, to recover against B., the ship must show, first, that B. did not receive, and, second, that there was a period of delay caused by B.'s failure. I do not mean that, if A.'s cargo was in one hold and B.'s in another, so that each could receive independently, it would excuse B. to show that, if he had not been in default, A. would have detained the ship anyway."

<sup>22</sup> *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106; *The Olaf*, 248 Fed. 807, 813.

layed.”<sup>23</sup> The rules in regard to the promptness with which loading must be done by the party charged with that duty are analogous to those governing the duty to unload.<sup>24</sup> The common provisions in charter parties in regard to demurrage of different sorts have been classified as follows: “A charter-party in dealing with demurrage may do one of three things: first, it may provide for a fixed number of days for demurrage. Thus, assuming that under the charter-party there are five lay days and five days for demurrage, and instead of taking ten days for loading the vessel takes eleven days, the ship-owner will be entitled on the eleventh day to damages for detention. Secondly, the charter-party may provide that there shall be so many lay days and a reasonable number of demurrage days. In such a case, in default of agreement it is for the Court to say what is a reasonable number of days, and then all days in excess of that number will be detention days. But there may be, thirdly, a charter-party which neither fixes the number of demurrage days, nor provides that there shall be a reasonable number of days for demurrage, but merely says that a certain rate shall be paid for demurrage.”<sup>25</sup> In the first of these cases if the charterer delays beyond the number of days allowed for demurrage by the terms of the contract, and in the second and third cases if he delays beyond a reasonable number of demurrage days, the owner may withdraw the vessel.<sup>26</sup> But if he fails to do this and allows the charterer to load at a later day, damages for detention in the first two classes of cases will be based on actual damage; while in the third class of cases,

<sup>23</sup> *Leonard v. William G. Barker Co.*, 214 Fed. 325, 327; citing *Lindsay v. Cusimano* (D. C.), 10 Fed. 302; *Id.* (C. C.), 12 Fed. 503, 504.

<sup>24</sup> In *Kearon v. Pearson*, 7 H. & N. 386, the court said: “The defendants, by charter-party, engaged to load on board the plaintiff’s ship a cargo of coals. ‘To be loaded with usual dispatch.’ The defendants commenced loading by bringing the coal in boats along a canal to the dock where the plaintiff’s ship was, but before the

cargo was completed a severe frost rendered the canal unnavigable, and the ship was detained thirty-four days. Held, that the expression ‘usual dispatch’ meant ‘usual dispatch of persons who have a cargo ready for loading and that the defendants were responsible for the delay.’” See to the same effect *Atlantic &c. S. S. Co. v. Gugenheim*, 123 Fed. 330.

<sup>25</sup> *Sankey, J.*, in *Iverkip Steamship Co. v. Bunge*, [1917] 1 K. B. 31, 35.

<sup>26</sup> *Ibid.*

the damages will be determined by the rate fixed in the contract for demurrage.<sup>27</sup>

### § 1100. When lay-days begin.

A charter party usually allows a certain number of lay-days for loading and provides for the payment of demurrage for delay beyond the stipulated lay-days. The lay-days ordinarily begin when the ship is an "arrived ship" at the disposal of the charterer. Two situations must be distinguished in determining when a ship has arrived.

1. When the place named in the charter party as the place of loading is a port or other wide district the lay-days begin when the ship is ready within the port or district though she may not be at a wharf or dock to which the charterer may properly require her to go.<sup>28</sup>

2. If the charter party names a definite wharf or spot in the port or dock as the place for arrival, or gives the charterer in express terms the right to order the ship to such a definite loading spot, the lay-days will not begin until the ship has reached that spot.<sup>29</sup> It must be admitted that the distinction is rather thin between a charter party giving in express terms the right to name a particular wharf, and a charter party which merely names the port, the right of the charterer to name the berth in the port to which the vessel is to go being only implied. The tenuity of the distinction is emphasized by the fact that the custom of a port may prevent a ship from being "arrived" as soon as she is within the limits of the port though the charter party makes no more specific statement of destination.<sup>30</sup>

### § 1101. Freight or hire.

Under a charter which amounts to a demise of the vessel the obligation of the charterer to pay the agreed hire of the vessel must be regarded as given in return for the use of the

<sup>27</sup> *Ibid.*

<sup>28</sup> *Leonis Steamship Co. v. Rank*, [1908] 1 K. B. 499.

<sup>29</sup> *Ibid.* *Tapscott v. Balfour, L. R.* 8 C. P. 46.

<sup>30</sup> *Brereton v. Chapman*, 7 Bing. 559; *Thijs v. Byers*, 1 Q. B. D. 244; *Leonis Steamship Co. v. Rank*, [1908] 1 K. B. 499, 520.

vessel. So long, therefore, as the charterer retains control of the vessel, even though breach of contract by the owner would justify him in cancelling the charter, he is liable for hire. As in the case of a lease of real property, the only way of avoiding payment is by surrendering the use of the hired property. Even though the vessel is useless for the purpose of the charterer, if he is still the lessee in control of it, he will be bound to pay hire.<sup>31</sup> Under a charter which is not a demise of the vessel freight is the payment due for the carriage and delivery of goods.<sup>32</sup> No freight, therefore, is earned if the goods are lost,<sup>33</sup> or cannot be carried because of impossibility,<sup>34</sup> unless the loss or impossibility is due to the shipper's fault, or a special provision in the contract provides otherwise.<sup>35</sup> But even though the value of the goods has been wholly lost by decay or damage due to a peril either excepted by law or by the terms of the contract, the carrier is entitled to full freight if they are delivered at their destination. "The consideration for the freight, is the carriage of the article shipped on board, and the state or condition of the article at the end of the voyage has nothing to do with the obligation of the contract."<sup>36</sup>

Sometimes part of the freight is paid or promised to be

<sup>31</sup> *Work v. Leathers*, 97 U. S. 379, 380, 24 L. Ed. 1012. "The owner is liable for the breach of his contract, but the stipulation of seaworthiness is not so far a condition precedent that the hirer is not liable in such case for any of the charter-money. If he uses her, he must pay for the use to the extent to which it goes. 1 Pars. Adm. 265; 3 Kent. Com. 205; Abbott, Shipp. (5th Am. ed.), 340."

<sup>32</sup> *Kirchner v. Venus*, 12 Moore, P. C. 361, 391; *Dakin v. Oxley*, 15 C. B. (N. S.) 646, 665.

<sup>33</sup> *Dakin v. Oxley*, 15 C. B. (N. S.) 646, 664.

<sup>34</sup> *Scottish Nav. Co. v. Souter*, [1917] 1 K. B. 222.

<sup>35</sup> Charters or bills of lading frequently provide for the payment of freight whether the ship is lost or not.

*Allanwilde Transport Co. v. Vacuum Oil Co.*, 248 U. S. 377; 39 S. Ct. 147; *The Gracie D. Chambers*, 248 U. S. 387, 39 S. Ct. 149; *Standard Varnish Works v. The Bris*, 248 U. S. 392, 39 S. Ct. 150. Such a clause is construed as covering only losses through excepted perils. *Great Indian, etc., Ry. Co. v. Turnbull*, 53 L. T. 325. But the fact that the ship has never broken ground will not deprive the carrier of its right. *The Gracie D. Chambers*, 248 U. S. 387, 39 S. Ct. 149.

<sup>36</sup> *Griswold v. Insurance Co.*, 3 Johns. 321, 329 (per Kent, C. J.), 3 Am. Dec. 490. See also *Dakin v. Oxley*, 15 C. B. (N. S.) 646; *Duthie v. Hilton*, L. R. 4 C. P. 138; *Seaman v. Adler*, 37 Fed. 268; *Steelman v. Taylor*, 3 Ware, 52; *M'Gaw v. Ocean Ins. Co.*, 23 Pick. 405.

paid in advance. This has been held in England upon the shipper the risk of the voyage to that effect; therefore if the goods are lost without fault on the part of the carrier, after the day when the partial payment or was due, the advanced freight if paid may, nevertheless, be retained;<sup>37</sup> and if unpaid may be recovered by the shipper. In the United States, however, it is recognized that though paid or promised in advance, freight is the consideration for carrying goods, and if they are not carried for whatever cause, there is a failure of consideration and the recovery of any payment made, and the refusal of any advance promised but not made,<sup>38</sup> unless the contract provides in effect that the payment is made in consideration of the chance of the goods being safely carried.<sup>39</sup>

If the contract of carriage is repudiated,<sup>40</sup> or if the goods are destroyed before reaching their destination, no portion of the agreed freight can be recovered.<sup>41</sup> If goods are safely discharged before the port of destination is reached, there can be no recovery of such a portion, unless the owner makes a new contract to pay freight, though the cause for the ship's failure to reach its destination was an excepted peril.<sup>42</sup> It seems to be assumed that

<sup>37</sup> *DeSilvale v. Kendall*, 4 M. & S. 37; *Saunders v. Drew*, 3 B. & Adol. 445; *Byrne v. Schiller*, L. R. 6 Exch. 319; *Allison v. Bristol Ins. Co.*, 1 A. C. 209, 226.

<sup>38</sup> *Oriental S. S. Co. v. Tylor*, [1893] 2 Q. B. 518; *Weir v. Girvin*, [1900] 1 Q. B. 45; *Coker v. Limerick S. S. Co.*, 34 Times L. R. 296 (House of Lords).

<sup>39</sup> *The Gracie D. Chambers*, 248 U. S. 387, 39 S. Ct. 149; *Pitman v. Hooper*, 3 Sumner, 50; *Burn Line, Ltd. v. Steamship Co.*, 162 Fed. 298, 89 C. C. A. 278; *National &c. Co. v. International Paper Co.*, 241 Fed. 861, 862, 154 C. C. A. 563; *Reina v. Cross*, 6 Cal. 29; *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; *Phelps v. Williamson*, 5 Sandf. (N. Y.) 578..

See also *Porter v. Tull*, 6 W. & A. Pac. 965, 22 L. R. A. 613, 18 Rep. 172.

<sup>40</sup> *National Steam Nav. Co. v. International Paper Co.*, 241 Fed. C. C. A. 563, and see *supra*, p. 11.

<sup>41</sup> *Newsom v. Bradley*, [1893] 1 B. 271.

<sup>42</sup> *British, etc., Ins. Co. v. Pacific Co.*, 72 Fed. 285, 18 U. S. App. 561, 38 U. S. App. 243.

<sup>43</sup> *Liddard v. Lopes*, [1909] 1 Q. B. D. 613; *St. Enoch Co. v. Phosphate Mining Co.*, K. B. 624; *The Columbian v. Catlett*, 12 Wheat. 383, 6 L. Ed. 406; *The Propellor Mohawk*, 8 U. S. 19 L. Ed. 406; *Merchants' Co. v. Butler*, 20 Md. 41; *R. v. Young*, 38 Pa. St. 169.

owner of the cargo voluntarily accepts the goods or agrees to pay freight when his goods are delivered at some point short of their destination, a contract is formed upon which he will be liable.<sup>43</sup> But the hypothesis is that the shipowner is justified in not carrying the goods to their destination, and unless the delivery of the goods was requested by the owner of the cargo at one port rather than at another possible point, it is difficult to find valid consideration to support a promise. He has an absolute right to the delivery of his goods, and giving him what he is entitled to have without payment cannot support a promise.<sup>44</sup> It is difficult to make out a contract unless some other choice is offered the owner of the goods than the alternative of accepting his goods at the intermediate port or going without them altogether. On the other hand, it seems clear on principle that there should be quasi-contractual liability measured by the benefit which the owner of the cargo derives from the partial transportation, and that this obligation should arise in spite of his wishes to the contrary.<sup>45</sup>

**§ 1102. Effect of breach of promise in a charter party.**

The effect of a failure of one party or the other to keep his promise in a charter-party is to be determined according to the general principles governing the law of contracts. Damages commensurate with the breach are of course recoverable; and if the breach is sufficiently material, further performance by the injured party will be excused. Part performance on either side will involve the consequence that a more serious breach than might otherwise be necessary to excuse further performance will be required. Unless the breach can fairly be regarded as material in view of all

<sup>43</sup> In *Metcalf v. Britannia Ironworks Co.*, 2 Q. B. D. 423, 426, Lord Coleridge summarising the opinion of Parke, B., in *Vlierboom v. Chapman*, 13 M. & W. 230, 238, said: "To justify a claim for pro rata freight there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was in-

tentionally dispensed with. That must mean 'dispensed with by some one who had authority from the original consignor.' "

<sup>44</sup> See *supra*, § 130.

<sup>45</sup> See *infra*, § 1973, in regard to the rights of parties where complete performance is prevented by excusable impossibility; and other analogous cases are referred to, *supra*, § 1479.



the circumstances, failure of one party to perform will excuse the other.<sup>46</sup> If the breach frustrates the object of the contract the injured party will be excused even though the breach was due to no fault, and under the terms of the contract the party gives rise to no liability.<sup>47</sup> Where the obligation imposed by the charter is simply to exercise reasonable diligence it is obvious that if performance is prevented by unforeseen difficulties, no liability may arise.<sup>48</sup>

### § 1103. When an excepted peril discharges a contract entered into

The effect of an excepted peril may be merely to modify

<sup>46</sup> *Freeman v. Taylor*, 8 Bing. 124; *MacAndrew v. Chapple*, L. R. 1 C. P. 643, and see cases in the following note.

<sup>47</sup> *Hudson v. Hill*, 43 L. J. C. P. 273. In *Giuseppe v. Manufacturers' Export Co.*, 124 Fed. 663, 666, the court said: "Where there is no express stipulation in a charter party as to time, the law implies a stipulation that there shall be no unreasonable or unusual delay in commencing the voyage, or, if it has been commenced, in the performance of it; and if the purposes of the charter party were altogether frustrated by the delay it is a defence to an action for nonperformance by the charterers. *Olsen v. Hunter-Benn & Co.* (D. C.), 54 Fed. 530."

In *Thebideau v. Cairns*, 171 Fed. 233, 236, the court said: "The implied requirement was that she should proceed there with reasonable dispatch, the dangers of the seas and navigation excepted. Unavoidable delay arising from these causes would not discharge the charterers from their covenant to load the vessel, unless the delay was so great as to frustrate the voyage or deprive the freighter of the benefit of his contract."

In *Schooner Mahukona Co. v. Charles Nelson Co.*, 142 Fed. 615, 616, the court said: "Nor do I think such contract was dissolved, as contended by defendant, by reason of the fact

that the *Mahukona* was 60 days due when she reached Everett port where she was to receive her cargo. This long delay did not put an end to the contract, as it did not defeat the object for which the vessel had been chartered." See also §§ 842 *et seq.*

<sup>48</sup> In *Schooner Mahukona Co. v. Charles Nelson Co.*, 142 Fed. 615, the court said: "It is conceded that the late arrival of the *Mahukona* at the port where she was to take her cargo was caused by storms and adverse winds, and was not due to fault upon the part of the vessel or her navigation. This being so, it seems to be well settled that the vessel is not responsible for the damage to the cargo. The defendant may have sustained the reason of her tardy arrival. The charter party did not fix any time within which she was to arrive to receive her cargo. The obligation of the ship, therefore, was to make reasonable efforts to enter as speedily as practicable upon the performance of the voyage named in the charter; having made such efforts, the vessel owner is not responsible for any delay sustained by the charterer, by reason of the fact that without fault on the part of her owner or crew the vessel was delayed by storms and adverse winds in reaching the port where she was to receive her cargo."

future performance of the contract or to excuse it altogether. If the peril does not totally or permanently prevent performance, it may happen either that the owner of the goods asserts a right to determine the contract or that the carrier asserts such a right. Express provisions in the contract may settle such disputes, but in the absence of such provisions,<sup>49</sup> the materiality of the failure to fulfil the contract caused by the excepted peril must furnish the test. If continuance of performance will throw a heavy and unanticipated burden on the carrier, it need not perform.<sup>50</sup> If the object of the contract will be frustrated from the standpoint of the shipper

<sup>49</sup> In *Brown v. Turner*, [1912] A. C. 12 the Court of Appeal had held under a provision in a time charter party providing that "the owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented" by (among other things), strikes, that the charterers must pay the charter hire though a strike prevented them from loading a cargo of coal at a port to which they had ordered the vessel to proceed. The House of Lords affirmed the decision but Lord Shaw said: "I may say, my Lords, that I do not see my way in terms to agree with the view which has been reached by the Court of Appeal on the construction of the words 'mutually absolved,' which occur in this contract. It does not appear to me to be sound to say that the liability of the charterers was merely to pay rent, and that, as the strike had not prevented them doing that, therefore the absolving clause does not apply. I think that a strike with its consequence of preventing the use of the vessel as a carrier (which is indeed the sole or main consequence which the parties must have had in view) was an occasion when on the one hand the charterer might not be able to use his vessel, and on the other the owner should not be entitled to his rent, and in my opinion

the term 'mutually absolved' ought to be construed so as to meet this case and as covering the liabilities on both sides of a mutual or reciprocal character.

"But on the other hand, my Lords, I think the same result as that arrived at by the Court of Appeal is reached by reason of the fact that the charterers were not in fact prevented by the strike from the use of the vessel during the period in question, but themselves chose, as I have explained, to keep it lying in the strike area."

<sup>50</sup> *The Progreso*, 50 Fed. 835. "A vessel, having by charter agreed to be at a certain port by the 1st of October, 'restraint of princes, rulers, and people excepted,' and having been prevented from going there during October by quarantine regulations at such port, was held bound to have been at the port on the 1st of November, when she knew the quarantine would be raised." *Karran v. Peabody*, 145 Fed. 166, 76 C. C. A. 136. "A general provision in a charter party, excepting 'all and every the dangers and accidents of the seas,' has no application to a prior specific provision giving the charterers the right to cancel should the vessel not arrive in good order at the port of loading on or before a specified date, so as to extend such date in case arrival is delayed by sea perils."

even though in the future, the performance is accurately carried out, he is excused.<sup>51</sup>

Sometimes the contract contains an express power to the charterer to cancel the charter party in case of delay beyond a specified day, or for other cause. The charterer cannot be compelled before the happening of the contingency to say whether he will exercise the power or not. The right to judge at the ultimate day whether it is desirable to do so is his contractual privilege.<sup>52</sup>

**§ 1104. When a common carrier's liabilities for goods begin and end.**

As the liability of a common carrier is more stringent than that of an ordinary bailee for hire, it is important to determine at what moment a carrier becomes liable as such, and for how long his liability continues. He becomes liable as such as soon as goods are delivered to him for immediate transportation;<sup>53</sup> and this is true though the goods are placed in a freight warehouse because no car is available, provided shipment is to be made as soon as possible.<sup>54</sup> In order to bind the carrier, delivery must be made to some one authorized to receive the goods, unless by custom the carrier has allowed the public to leave them at a particular place of deposit when no employee of the carrier was there to receive them.<sup>55</sup>

<sup>51</sup> *Jackson v. Union Marine Ins. Co.*, L. R. 10 C. P. 125; *Tully v. Howling*, 2 Q. B. D. 182; *Assicurazioni Generali v. Steamship, etc., Co.*, [1892] 1 Q. B. 571, 577; *Porteous v. Williams*, 115 N. Y. 116, 21 N. E. 711.

<sup>52</sup> *Karran v. Peabody*, 145 Fed. 166, 76 C. C. A. 136. "A charterer, given the right by the charter party to cancel in case vessel does not arrive at the loading port by a specified date, is not required to exercise his option until her arrival, and his right to cancel is not lost by his refusal to state his election on request of the owners, after such date had passed, and when the vessel was in a distant port, and the time when she would arrive was unknown."

<sup>53</sup> *Boehm v. Combe*, 2 M. & S. 172; *The Gracie D. Chambers*, 253 Fed. 182, affd. 248 U. S. 387, 39 S. Ct. 149; *Railway Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202; *Illinois Central R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *Gregory v. Wabash Ry. Co.*, 46 Mo. App. 574; *Clarke v. Needles*, 25 Pa. 358.

<sup>54</sup> *Canadian Pac. R. Co. v. Wieland*, 226 Fed. 670, 141 C. C. A. 426; *Meloche v. Chicago, etc., R. Co.*, 116 Mich. 69, 74 N. W. 301; and see cases in the preceding note.

<sup>55</sup> *Converse v. Norwich, etc., Transportation Co.*, 33 Conn. 166; *Green v. Milwaukee, etc., R. Co.*, 41 Iowa, 410; *Whitehurst v. Texas &c. R. Co.*, 131 La. 139, 59 So. 42. See also *Arthur v.*

The domestic and export bills of lading prescribed by the Interstate Commerce Commission in 1919 provide expressly that "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels."<sup>55</sup> The carrier, moreover, may receive goods as a warehouseman not to be forwarded immediately or until other instructions are received. In such a case the carrier's liability is that of warehouseman until the time for immediate transportation arrives.<sup>56</sup> At the point of destination the carrier is not bound to seek the consignee and make personal tender of delivery to him, if the carrier's regular means of carriage involve the use of fixed routes or termini. A vessel cannot go to the consignee's place of business, nor a railroad company move its cars except upon its tracks. Accordingly such carriers are not bound to deliver personally.<sup>57</sup> Express companies, on the other hand, must make personal delivery.<sup>58</sup> Where personal delivery is not required, the rule is clear that carriers by water must give notice that the vessel has arrived and that the goods are ready for delivery, and that a reasonable time after such notice must elapse before the carrier by storing the goods for the owner can reduce his responsibility to that of a warehouseman, or by putting them in a place of safety be freed altogether from liability.<sup>59</sup> There is much conflict,

Texas &c. R. Co., 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590, and 32 L. R. A. (N. S.), 313, and note, L. R. A. 1916 C. 606, and note. Cf. Gulf Coast Trans. & Co. v. Howell, 67 Fla. 508; Packard v. Getman, 6 Cow. 757, 16 Am. Dec. 475.

<sup>55</sup> See *Bianche v. Montpelier &c. R. Co.* (Vt.), 104 Atl. 144, where a somewhat similar provision was enforced.

<sup>56</sup> *Murray v. International Steam-Co.*, 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290; *Chas. W. Shepherd Cotton Co. v. New Orleans &c. Co.*, 118 Miss. 464, 78 So. 193; *Moses v. Boston & Maine R. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Rogers v. Wheeler*,

52 N. Y. 262; *Schmidt v. Chicago, etc., Ry. Co.*, 90 Wis. 504, 63 N. W. 1057.

<sup>57</sup> *Hyde v. Trent, etc., Navigation Co.*, 5 T. R. 389; *Union Steamboat Co. v. Knapp*, 73 Ill. 506; *Jarrett v. Great Northern Ry. Co.*, 74 Minn. 477, 77 N. W. 304.

<sup>58</sup> *American Merchants', etc., Express Co. v. Wolf*, 79 Ill. 430; *Packard v. Earle*, 113 Mass. 280; *Bullard v. American Express Co.*, 107 Mich. 695, 65 N. W. 551, 33 L. R. A. 66, 61 Am. St. Rep. 358; *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Hutchinson v. United States Express Co.*, 63 W. Va. 128, 159 S. E. 949.

<sup>59</sup> *The Eddy*, 5 Wall. 481, 18 L. Ed.

however, as to the duty of carriers by land. I hold that after arrival of the goods and their place suitable for their delivery to the consignee liability becomes that of a warehouseman tho to the consignee of their arrival has been given cisions, however, require notice to the consign carrier ceases to be liable as such;<sup>61</sup> and even notice is required by the general law, custom & carrier to the requirement.<sup>62</sup> Still other cases carrier remains an insurer until the consignee has able time within which to remove the goods.<sup>63</sup>

486; *The Titania*, 131 Fed. 230, 65 C. C. A. 215; *Sonia Cotton &c. Co. v. Red River*, 106 La. 46, 30 So. 305; *Rosenstein v. Vogemann*, 184 N. Y. 330, 77 N. E. 626, 6 Ann. Cas. 13. *Cf. Constable v. National S. S. Co.*, 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062; and see note 6 Ann. Cas. 16.

<sup>60</sup> *Georgia & A. Ry. Co. v. Pound*, 111 Ga. 6, 36 S. E. 312; *Schumacher v. Chicago, etc., R. Co.*, 207 Ill. 199, 206, 20, 69 N. E. 825; *Chicago, etc., R. Co. v. Reyman (Ind.)*, 73 N. E. 587; *Mohr v. Chicago, etc., R. Co.*, 40 La. 579; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433. (But if consignees are expected to unload directly from the cars, notice is necessary. *Bachant v. Boston, etc., R. Co.*, 187 Mass. 392, 73 N. E. 642; *Garvan v. New York, etc., R. Co.*, 210 Mass. 275, 96 N. E. 717), *Herf, etc., Co. v. Lackawanna Line*, 100 Mo. App. 164, 73 S. W. 346; *National Line Steamship Co. v. Smart*, 107 Pa. St. 492; *Moyer v. Pennsylvania R. Co.*, 31 Pa. Super. 559.

<sup>61</sup> *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256-260; *Chapman v. Great Western Ry. Co.*, 5 Q. B. D. 278; *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390, 16 So. 140 (*cf. Tallassee Falls Mfg. Co. v. Western Ry. Co.*, 128 Ala. 167, 29 So. 203); *Railway Co. v. Nevill*, 60 Ark. 375, 30 S. W. 425. 28 L. R. A. 80, 46 Am. St. 208; *Caval-*

*laro v. Texas, etc., R. Co.*, 348, 42 Pac. 918, 52 Atl. Coast Line 1918), 78 So. 667; *W. etc., Ry. Co.*, 139 Mich. 745; *Railroad Co. v. Burr*, 490, 36 So. 449; *Burr v. Co.*, 71 N. J. L. 263, 58 *plin v. Erie R. Co.*, 9 Atl. 807; *Pelton v. R. Co.*, 54 N. Y. 214, 1 *Faulkner v. Hart*, 82 Am. Rep. 574; *Dis Island R. Co.*, 62 N. Y. Misc. 444; *Railroad C Ohio St.* 408, 39 N. E. *Co. v. Naive*, 112 Ten. 124, 64 L. R. A. 443 *Ry. Co. v. Haynes*, 7 S. W. 398; *Richards Pac. R. Co.*, 19 Ont. knowledge by the con sufficient in *Rosenbat Pac. Ry. Co.*, 101 Was 238.

<sup>62</sup> *Herf &c. Co. v. La* 100 Mo. App. 164, 73 *Tallassee Falls Mfg. Ry. Co.*, 128 Ala. 167, 2

<sup>63</sup> *Missouri Pac. Ry berger*, 67 Kan. 846 *Jeffersonville R. Co. Bush*, 468; *Lewis v. Lo ville R. Co.*, 135 Ky. ; *New Orleans &c. R. C*

The Interstate Commerce Commission has now held itself empowered, by the Congressional legislation controlling it, to settle the conflicting rules on the subject by a provision in the prescribed uniform bills of lading,<sup>64</sup> and the following is part of section 1 of the conditions on the back of the domestic bill. "The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of property upon consignee's order, has been made."<sup>65</sup>

**§ 1105. Initial carrier made liable by statute for default of subsequent carrier.**

It has been customarily provided in bills of lading for through transportation that the carrier should not be liable for loss or damage which did not occur on its own line. The Carmack amendment to the Interstate Commerce Acts,<sup>66</sup> however, made the original carrier directly liable for any loss on a through interstate shipment, and invalidated any agreement or regulation to the contrary.<sup>67</sup> It is still possible, however, for any carrier but the initial carrier to take advantage of a provision in the contract or in the common law limiting its liability to losses occurring on its own line.<sup>68</sup>

333, 335; *Moses v. Boston & Maine R. Co.*, 32 N. H. 523; *Welch v. Concord R.*, 68 N. H. 206; *Winslow v. Vermont & Mass. R.*, 42 Vt. 700, 705; *Berry v. West Va. & P. R. Co.*, 44 W. Va. 538, 30 S. E. 143, 67 Am. St. 781; *Backhaus v. Chicago & N. W. Ry. Co.*, 92 Wis. 393, 395, 66 N. W. 400.

<sup>64</sup> In the Matter of Bills of Lading, 52 Interstate Com. Com. 671, 695-702.

<sup>65</sup> The condition in the Uniform Export Bill is identical except that the last clause reads "after placement of the property for delivery at the port

of export, or tender of delivery of the property to the party entitled to receive it has been made."

<sup>66</sup> Act of June 29, 1906.

<sup>67</sup> See *Atlantic R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.

<sup>68</sup> *Southern Ry. Co. v. Lewis & Adcock Co.*, 139 Tenn. 37, 201 S. W. 131, L. R. A. 1918 C. 976. See also *Southern Ry. Co. v. Morris*, 147 Ga. 729, 95 S. E. 284; *Gillikin v. Norfolk & Southern R.*, 174 N. Car. 137, 93 S. E. 469.

The provisions of the Carmack Amendment, moreover applicable only to transportation in the United States, the Uniform Export Bill of Lading prescribed by the Interstate Commerce Commission in 1919 contains the provision that "no carrier shall be liable for loss, damage, or injury not occurring on its own road or its own water line or any portion of the through route, nor after said property has been delivered to the next carrier."<sup>69</sup>

### § 1106. Statutory limitation of liability.

By statute passed for the encouragement of shipping the United States limited the liability of a shipowner to such an amount as his share of the vessel bears to the loss, and the aggregate liability may not exceed the value of the vessel and freight. This legislation covers all liability in tort and in contract incurred without fault or personal negligence on the part of the owner.<sup>71</sup> But it does not limit the owner's liability upon such contracts as he may make personally.<sup>72</sup> By the Harter Act of 1893,<sup>73</sup> the owner's liability for the negligence of his servants is in some cases to be excluded, not merely limited. But the owner is prohibited from unduly limiting by contract his liability. The Harter Act, which applies to all vessels travelling between an American and a foreign port or from one American port to another,<sup>74</sup> provides in section 1, that "it is unlawful for any vessel transporting merchandise to insert in any bill of lading or shipping document any clause relieving it from liability

<sup>69</sup> In the Matter of Bills of Lading, 52 Interstate Com. Com. 671.

<sup>70</sup> Act of June 26, 1884, 23 U. S. Stat. 57, c. 121.

<sup>71</sup> *Richardson v. Harmon*, 222 U. S. 96, 222 L. Ed. 110, 32 Sup. Ct. 27. The legislation protects foreign owners in United States court from liability beyond the statutory amount. *The Bourgogne*, 210 U. S. 95, 52 L. Ed. 973, 28 Sup. Ct. 664.

<sup>72</sup> *Great Lakes Towing Co. v. Mills Transportation Co.*, 155 Fed. 11, 16, 83 C. C. A. 607, 612, 22 L. R. A. (N. S.) 769; *The Loyal*, 204 Fed. 930, 123

C. C. A. 252. Where the mariner or owner signed a charter party as a partner in a partnership of which he was a member, there was no limitation of liability. *Pendleton v. Benner*, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770.

<sup>73</sup> 27 U. S. Stat. 445, 3 U. S. Stat. (1901), p. 2946.

<sup>74</sup> *The Germanic*, 196 U. S. 51, 50 L. Ed. 610, s. c. *sub. nom.* *The Steam Navigation Co. v. Aitken*, 107 U. S. 321, 34 L. Ed. 317; *Re Piper Aden Gulf Co.*, 86 Fed. 670.

'for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all merchandise or property committed to its . . . charge.' By the terms of section 2 of the Act, the owners, or agents, cannot insert in any bill of lading or shipping document, any clause lessening, weakening, or avoiding the obligations of the owners, to exercise due diligence to properly equip, man, provision, and outfit the vessel. Section 3 of the Act exempts vessels from liability for loss or damage resulting from faults or errors in navigation or in the management of the vessel, or from losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or inherent defect in the thing carried, [seizure under legal process, attempting to save life or deviating for that purpose] etc., provided the owner shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied."<sup>75</sup> Section 2 evidently "deals not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by contract, when the particular conditions exacted by the statute obtain. Because the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence."<sup>76</sup> The third section not only codifies certain exemptions from liability allowed by the admiralty and common law, but frees the owners entirely in the other cases stated in the statute.<sup>77</sup>

<sup>75</sup> *The Jeannie*, 225 Fed. 178, 184.

<sup>76</sup> *The Carib Prince*, 170 U. S. 655, 660, 42 L. Ed. 1181, 18 S. C. Rep. 753, 755, quoted in *The Jeannie*, 225 Fed. 178, 185. See also *Herman v. Compagnie Générale Transatlantique*, 242 Fed. 859, 155 C. C. A. 447.

<sup>77</sup> In *The Silvia*, 171 U. S. 462, 466, 19 Sup. Ct. 7, 43 L. Ed. 241, the court said: "This case does not require a comprehensive definition of the words

'navigation' and 'management' of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in



### § 1107. A carrier may limit its liability by contract.

The right of a private carrier to limit its liability is subject to the same qualification as the right of a warehouseman.<sup>78</sup> The narrower power of a common carrier to do so has been thus stated: "Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged—unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."<sup>79</sup> Contracts may thus exclude liability for

not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good v. London Steamship Owners' Association*, L. R. 6 C. P. 563; *The Warkworth*, 9 Prob. Div. 20, 145; *Carmichael v. Liverpool Shipowners' Association*, 19 Q. B. D. 242; *Canada Shipping Co. v. British Shipowners' Association*, 23 Q. B. D. 342; *The Ferro* (1893), Prob. 38; *The Glenochil*, [1896] Prob. 10."

In *Hanson v. Haywood Bros., etc.*, Co., 152 Fed. 401, 402, 81 C. C. A. 527, the court said: "The departure from Charlevoix on the voyage to Chicago was an exercise of the master's prerogative in the management and navigation of the vessel, and we are of opinion that it was plainly within the terms and intent of the foregoing limitation of liability for faults or errors therein. Assuming (without deciding) that it was the duty of the master, not only to

ascertain the full import of the reports at the signal station, but to rely upon such general warnings, rather than his own observation and judgment, and discontinue his voyage—when it was his belief that the signal as displayed meant favorable wind without serious danger—such obligation on his part was due alike to vessel and cargo. Under the express terms of the statute, the assumed fault in prosecuting the voyage is not attributable to the seaworthy vessel or her owners, as it relates alone to the management and navigation of the vessel. *The Silvia*, 171 U. S. 462, 466, 19 Sup. Ct. 7, 46 L. Ed. 241; *The Wildcroft*, 130 Fed. 521, 65 C. C. A. 145, affirmed 201 U. S. 373, 26 Sup. Ct. 467, 50 L. Ed. 794; *The Etona*, 71 Fed. 895, 38 U. S. App. 50, 18 C. C. A. 380, aff'g 64 Fed. 880; *The Guadeloupe* (D. C.), 92 Fed. 670."

<sup>78</sup> See *supra*, § 1046, *ad fin.*

<sup>79</sup> *Liverpool, etc., S. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 441, 32 L. Ed. 788, 9 Sup. Ct. 469. See also *New*

fire;<sup>80</sup> loss by theft,<sup>81</sup> by strikes or violence,<sup>82</sup> by perils of the sea,<sup>83</sup> or by leakage or breakage.<sup>84</sup> In the uniform bill of lading recommended in 1908 by the Interstate Commerce Commission<sup>85</sup> and thereafter in general use on railroads in the northern and western parts of the United States both for interstate and intrastate shipments, it is agreed in consideration of a lower rate than that chargeable for carriage under common-law liability that "No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damages thereto, by causes beyond its control; or by floods or by fire; or by quar-

*Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *Williams v. Central R. Co.*, 183 N. Y. 518, 76 N. E. 1116, affirming without opinion 93 N. Y. App. Div. 582, 88 N. Y. S. 434; *Martin v. Central R. Co.*, 121 N. Y. App. Div. 552, 106 N. Y. S. 226; *Feldman v. Old Dominion S. S. Co.*, 107 N. Y. Misc. 221, 176 N. Y. S. 183; *Homer v. Oregon Short Line R. Co.*, 42 Utah, 15, 128 Pac. 522; *Black v. Atlantic Coast Line R. Co.*, 82 S. C. 478, 64 S. E. 418, and see cases in the following notes.

<sup>80</sup> *Constable v. National Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903; *Rand v. Merchants' Transportation Co.*, 59 N. H. 363; *Louisville, etc., Ry. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314. This exception covers injury by smoke and by water used to extinguish a fire. *The Diamond*, [1906] p. 282.

<sup>81</sup> *The Saratoga*, 20 Fed. 869.

<sup>82</sup> *Richardson v. Samuel*, [1898] 1 Q. B. 261; *Gulf, etc., Ry. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. 918.

<sup>83</sup> Such an exception does not protect a shipowner from liability for damage primarily caused by original unseaworthiness of the vessel or by negligence in its management or loading, *the Glenfruin*, 10 P. D. 103; *The Glendaroch*, [1894] p. 226, or by an explosion in the vessel bursting open

the ship and admitting sea water. *The G. R. Booth*, 171 U. S. 450, 43 L. Ed. 234, 19 Sup. Ct. Rep. 9. Proof of injury by sea water raises no presumption that the loss was due to perils of the sea. *The Folmina*, 212 U. S. 354; *Herman v. Compagnie Générale Transatlantique*, 242 Fed. 859, 155 C. C. A. 447.

<sup>84</sup> Though this exception does not protect the carrier from the consequences of negligence in loading or otherwise which results in leakage or breakage, *Philips v. Clark*, 2 C. B. (N. S.) 156, the burden is upon the owner of the goods to establish that leakage or breakage when proved was caused by such negligence. *Czech v. General Steam Co.*, L. R. 3 C. P. 14; *The Henry B. Hyde*, 90 Fed. 114, 32 C. C. A. 534; *The Lennox*, 90 Fed. 308. The difference between such a case where the fact of the injury brings the case within the exception in the absence of other evidence, and a case like that of wetting by sea water, where the injury being equally likely to have been caused in any one of several ways, no presumption is raised that it was caused by a peril of the seas, is pointed out in *The Folmina*, 212 U. S. 354, 53 L. Ed. 546, 29 Sup. Ct. Rep. 363.

<sup>85</sup> In the Matter of Bills of Lading, 14 Interstate Com. Com. Rep. 346.

antine; or by riots, strikes or stoppage of labor; or by leakage, chafing loss in weight, changes in weather, frost, wet, or decay; or from any cause if it be necessary usual to carry such property upon open cars." In the Commission prescribed a form for domestic bills and for export bills.<sup>86</sup> In Section 1 of the conditions in the domestic bill it is provided: "No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, or delay caused by act of God, the public enemy, the authority of law, or act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawful in force (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly given, or given, and after placement of the property for delivery at destination, or tender of property upon consignee's order has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton or from delay caused by riots or strikes." The elaborate provision in regard to delay or damage by quarantine then follows. The export bill contains provisions identical with the words quoted above, except that instead of the words "after placement of the property for delivery at destination, or tender of property upon consignee's order" the export bill reads, "after placement of the property for delivery at the port of export, or tender of property to the party entitled to receive it." In the export bill also the words "delay caused by" in the last line of the quoted paragraph are omitted, with the effect of excusing the carrier

<sup>86</sup> In the Matter of Bills of Lading, 52 Interstate Com. Com. Rep. 67

from any damage caused by riots or strikes and not simply such damage as is due to delay.

An exception to the general rule has been made by statutes or Constitutions in a few States which prohibit common carriers from limiting their common-law liability as insurers.<sup>87</sup> These provisions, however, have no longer any force so far as interstate shipments are concerned, since the Supreme Court of the United States has held that the Carmack Amendment of 1906 to the Interstate Commerce Acts has taken from the States the power to make rules governing the validity of contracts for interstate shipments.<sup>88</sup>

An exception preventing the carrier from being liable in damages does not necessarily preclude a shipper or charterer from discontinuing performance of the contract because of the carrier's non-performance. It is possible, however, to provide that the charterer must continue performance in spite of non-performance in some respect on the part of the carrier due to excepted perils, or it may in terms be provided that in such an event the parties are mutually absolved.<sup>89</sup> A carrier may also require as a condition of its liability that certain methods shall be used by the owner of goods in regard to their transportation. At common law the fact that the owner of goods was present or sent his servant to look after goods in transit did not limit the liability of the carrier.<sup>90</sup> But when the system of checking baggage and carrying it in a separate car was developed, a passenger who failed to take advantage of the provision thus afforded him, and carried his property with him in a passenger coach, could hold the carrier liable only by showing negligence of the carrier or misconduct of its servants.<sup>91</sup>

<sup>87</sup> See *Railway Co. v. Sherlock*, 59 Kans. 23, 51 Pac. 899; *The City of Clarksville*, 94 Fed. 201; *Lucas v. Burlington, etc., Ry. Co.*, 112 Ia. 594, 84 N. W. 673; *Pennsylvania Co. v. Kennard, etc., Co.*, 59 Neb. 435, 81 N. W. 372; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323.

<sup>88</sup> See *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314; *American Express Co.*

*v. United States Horseshoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990, and cases cited.

<sup>89</sup> See *supra*, § 1103.

<sup>90</sup> *Robinson v. Dunmore*, 2 B. & P. 416; *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455; *Borden v. New York Central R.*, 98 N. Y. Misc. 574, 575, 162 N. Y. S. 1099.

<sup>91</sup> *Bernheim v. G. W. Railway Co.*, 3 C. P. D. 221; *Henderson v. Louis-*

**§ 1108. Carrier's right to stipulate for insurance.**

A common carrier may not provide that it shall not be liable unless the shipper insures the goods for its benefit. It may, however, provide that if the shipper has insured at the time of the loss which he can make available for the carrier, or which he has collected unconditionally, the carrier may claim the benefit of the insurance;<sup>93</sup> and the form domestic and export bills of lading prescribed in 1916 by the Interstate Commerce Commission contain the clause: "Any carrier or party liable on account of loss or damage to any of said property, shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided*, that the carrier reimburse the claimant for the premium paid thereon."

**§ 1109. A carrier may not stipulate for freedom from liability for negligence**

In most of the United States it is held unreasonable for a carrier to stipulate against liability for losses caused by negligence of itself or of its servants. Therefore, where a contract of a carrier provides in general terms that its liability for losses from specified perils is excluded or limited, an exception to this limitation is implied of losses from specified causes where the negligence of the carrier contributed to the loss; and even though the contract specifically provides for freedom from or limitation of liability for losses which the negligence of the carrier or of its servants or agents

ville, etc., R. Co., 20 Fed. 430, 123 U. S. 61, 31 L. Ed. 92, 8 Sup. Ct. Rep. 60; *Defrier v. Nicaragua*, 81 Fed. 745; *Cohen v. Frost*, 2 Duer, 335, 341; *Weeks v. New York, N. H. & H. R. Co.*, 9 Hun, 669, 671; *Carpenter v. New York, N. H. & H. R. Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; *Knieriem v. New York, C. & H. R. Co.*, 109 N. Y. App. Div. 709, 96 N. Y. S. 602. In *Borden v. New York Central R. Co.*, 98 N. Y. Misc. 574, 162 N. Y. S. 1099, the

plaintiff lost jewelry which she was carrying with her. The court held in view of a notice of the railroad company forbidding the passengers to carry jewelry in the baggage turned over to the carrier for its exclusive custody, the common-law rule applicable to jewelry carried personally and the carrier was liable as an insurer.

<sup>93</sup> *Inman v. South Carolina Ry. Co.*, 129 U. S. 128, 139, 9 Sup. Ct. 243, 1 L. Ed. 612.

<sup>94</sup> *Ibid.*

contributed, the provision is generally invalid as contrary to public policy.<sup>94</sup> In England, however, it is held that by a clearly expressed contract a carrier may exempt itself from liability for its own negligence or that of its servants.<sup>95</sup>

This rule is followed in Canada,<sup>96</sup> and in New York.<sup>97</sup> In

<sup>94</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 37 Sup. Ct. 499; *Thomas v. Wabash, etc., Ry. Co.*, 63 Fed. 200; *Louisville, etc., R. Co. v. Cowherd*, 120 Ala. 51, 23 So. 793; *Little Rock, etc., Ry. Co. v. Talbot*, 39 Ark. 523, 47 Ark. 97, 14 S. W. 471; *Union Pacific R. Co. v. Rainey*, 19 Col. 225, 34 Pac. 986; *Denver & Rio Grande R. Co. v. Teufel*, (Colo. 1918), 172 Pac. 1060; *Central, etc., Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; *Chicago & Northwestern Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Insurance Co. v. Lake Erie, etc., R. Co.*, 152 Ind. 333, 53 N. E. 382; *Kansas City, etc., R. Co. v. Simpson*, 30 Kans. 645, 2 Pac. 821, 46 Am. Rep. 104; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush, 688; *Fisher v. Boston, etc., R. Co.*, 99 Me. 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. Rep. 283; *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, 11 So. 104, 30 Am. St. Rep. 534; *Hill Mfg. Co. v. New Orleans &c. R. Co.*, 117 Miss. 548, 78 So. 187, certiorari denied, 248 U. S. 571, 39 Sup. Ct. 11; *Stanard, etc., Co. v. White Line, etc., Co.*, 122 Mo. 258, 26 S. W. 704; *Merrill v. American Express Co.*, 62 N. H. 514; *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442, 57 Atl. 139; *Branch v. Wilmington, etc., R. Co.*, 88 N. C. 573; *McNeill v. Durham, etc., R. Co.*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227, 242, 243;

*Union Express Co. v. Graham*, 26 Oh. St. 595; *Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184, 30 Atl. 498, 27 L. R. A. 228, 45 Am. St. Rep. 674; *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Fort Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Nevius v. Chicago, etc., Ry. Co.*, 124 Wis. 313, 102 N. W. 489, 109 Am. St. Rep. 935.

<sup>95</sup> *Price v. Union Lighterage Co.*, [1904] 1 K. B. 412; *Pyman S. S. Co. v. Hull, etc., R. Co.*, [1904] 2 K. B. 788; *Baxter's Leather Co. v. Royal, etc., Packet Co.*, [1908] 2 K. B. 626; *The Marriott v. Yeoward*, [1909] 2 K. B. 987; *Shepard v. Midland R. Co.*, 140 L. T. 89.

<sup>96</sup> *Spettigue v. Great Western Ry. Co.*, 15 Up. Can. C. P. 315; *Hamilton v. Grand Trunk Ry. Co.*, 23 Up. Can. Q. B. 600.

<sup>97</sup> *Ulrich v. New York, etc., R. Co.*, 108 N. Y. 80, 15 N. E. 60, 2 Am. St. 369; *Zimmer v. New York, etc., R. Co.*, 137 N. Y. 460, 33 N. E. 642. In *Gardiner v. New York Central R. Co.*, 201 N. Y. 387, 391, 94 N. E. 876, 34 L. R. A. (N. S.) 826, Ann. Cas. 1912 B. 281, the court said: "That a clause simply releasing a carrier from liability for loss of goods will not include a case . . . of its own negligence unless such exemption is expressly and plainly stated," but "that a clause in consideration of reduced rates properly and reasonably limiting the liability of a carrier to a specified valuation of the goods received by it will include a case of loss or damage arising from its own negligence without express mention thereof." See also

a few States, though exemption from liability for gross negligence cannot be stipulated for, liability for ordinary negligence may be.<sup>98</sup> A distinction is taken between services for which the carrier receives compensation and services rendered gratuitously. As to the latter, the carrier may everywhere contract for freedom from liability for negligence. Therefore a gratuitous pass providing that a passenger riding thereon exempts from liability the carrier for injuries caused by the negligence of the carrier is enforced according to its terms.<sup>99</sup> It is important to observe, however, that transportation is not necessarily gratuitous because no payment is directly made for it. Thus where an employee is given a pass as part of his compensation,<sup>1</sup> or a caretaker of animals is given a pass as part of a transaction involving transportation of the

*Tewes v. North German Lloyd S. S. Co.*, 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199; *Heuman v. M. H. Powers Co.*, 226 N. Y. 205, 123 N. E. 373.

<sup>98</sup> *Cooper v. Raleigh, etc., R. Co.*, 110 Ga. 659, 36 S. E. 240; *Wabash, etc., R. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Chicago, etc., R. Co. v. Calumet, etc., Co.*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447, 24 N. W. 618.

<sup>99</sup> *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. 408; *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S. 442, 48 L. Ed. 742, 24 Sup. Ct. 515; *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Payne v. Terre Haute, etc., R. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; *Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133; *Rogers v. Kennebec, etc., Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby v. Boston & Maine R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Kinney v. Central R. Co.*, 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265; *Anderson v. Erie R. Co.*, 223 N. Y. 227, 119

N. E. 557; *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901, 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848. But see *Mobile & Ohio R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Gulf, Colorado, etc., Ry. Co. v. McGown*, 65 Tex. 640.

In *Anderson v. Erie R. Co.*, 223 N. Y. 277, 119 N. E. 557, the court held that an agreement in consideration of the sale of a ticket for a reduced price, to exempt the carrier from liability for negligence was valid, relying on the cases of passes. The decision is in line with the English and New York cases (*supra*, n. 95, 97), relating to negligent loss of goods, but as the prevailing American rule is opposed to those cases, it is not probable that the Anderson decision will be generally followed.

<sup>1</sup> *Doyle v. Fitchburg R. Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417; *Dugan v. Blue Hill St. Ry. Co.*, 193 Mass. 431, 79 N. E. 748.

animals for hire,<sup>2</sup> the passenger is carried for compensation, and the carrier cannot exempt itself from liability for the consequences of its own negligence. It will be remembered throughout this discussion that since the Carmack Amendment to the Interstate Commerce Statutes, the Federal rule in regard to the creation and the validity of any contracts relating to interstate shipments is imposed on all persons irrespective of State statutes or of decisions of State courts in which enforcement of rights is sought;<sup>3</sup> but the prohibition of free passes in the Interstate Commerce Act expressly excepts necessary caretakers of livestock, poultry and fruit; and though it might seem from the wording of the statute that passes given such persons were "free passes," the Supreme Court has held that the previously "settled rule of policy" that such a person was a passenger for hire "must be considered unmodified" by the statute.<sup>4</sup>

**§ 1110. Limitation of the amount for which a carrier shall be liable.**

Instead of seeking entire exemption from liability for certain kinds of losses, or in addition to such an attempt, a carrier frequently enters into a contract with a shipper by which it is agreed that the liability of the carrier for any loss shall be limited to an agreed sum. If this sum represents a reasonable attempt of the parties to fix a fair value of the property in question the agreement is in effect one for liquidating damages and is unquestionably valid.<sup>5</sup> Often, however, the sum limited is an arbitrary one and it has been said: "An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more

<sup>2</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 37 Sup. Ct. 499, 61 L. Ed. 1131.

<sup>3</sup> See *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314; *American Express Co. v. United States Horse Shoe Co.*, 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990.

<sup>4</sup> *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 37 Sup. Ct. 499.

<sup>5</sup> *Kuhnhold v. Compagnie Générale*, 251 Fed. 387; *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; *Brehme v. Dinsmore*, 25 Md. 328; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 10 N. E. 836; *Zimmer v. New York, etc., Ry. Co.*, 137 N. Y. 460, 33 N. E. 642.



valid because it rests upon a consideration than if it was without consideration.”<sup>6</sup> It has been held, however, by the Supreme Court of the United States,<sup>7</sup> that, though a stipulation to limit liability for the consequences of negligence might be invalid as such, an agreement as to the valuation of property is valid, and that the carrier’s liability will be restricted, even for losses due to negligence, to that valuation not by virtue of a contract to limit the liability, but by virtue of an estoppel. And this principle has been insisted upon in recent decisions of the court.<sup>8</sup> On general principles it seems that if a carrier is deceived as to the value of goods intrusted to it, the owner should be precluded from recovering more than the apparent value of the goods even though no agreement fixing a value is made;<sup>9</sup> but the carrier can hardly assert that it has been deceived unless it makes inquiry of the shipper in regard to the value of the goods, or unless the exterior appearance of the goods is such as to amount to a representation that they are different in kind or value from what is actually the case.<sup>10</sup> The carrier may go one step further. If the value of goods is not apparent because they are in closed packages, no violation is done to the rule forbidding a carrier to contract against the consequences of its own negligence if it is allowed to stipulate in the contract that in the absence of a statement by the shipper the value will be assumed to be such a stated sum as might, so far as facts appear, to be the value of the property. This is merely liquidating damages, and a provision that in the absence of a declaration by the shipper, the carrier in case of loss will be liable only for such a stipulated sum has been held, without

<sup>6</sup> *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 650, 57 L. Ed. 683, 33 Sup. Ct. 391.

<sup>7</sup> *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151.

<sup>8</sup> *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 476, 33 Sup. Ct. 267, 57 L. Ed. 600. See also *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 651, 57 L. Ed. 683, 33 Sup. Ct. 391.

<sup>9</sup> But an innocent misdescription of furs as “dry goods” for which a lower rate was chargeable was held not to preclude recovery for their loss. *New York Central R. v. Goldberg*, 250 U. S. 85, 39 Sup. Ct. 402.

<sup>10</sup> *Merchants Transportation Co. v. Bolles*, 80 Ill. 473; *Baldwin v. Liverpool, etc., Ry. Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *Brown v. Camden, etc., R. Co.*, 83 Pa. 316.

perhaps too great a strain on the general principle prohibiting a contract to limit liability for negligence, to be in effect the same thing. The qualification should be made that the shipper must have freedom of choice whether he will enter into such an agreement and some consideration, such as a lower rate, be given him for so doing.<sup>11</sup> In effect, the principles which have just been stated often enable a carrier to limit the amount of its liability even for negligently caused losses, and in recent years courts have not been disposed to examine in particular cases whether an estoppel or a reasonable attempt to liquidate damages existed. Rather, on whatever reasoning, the courts have almost universally allowed the carrier to notify the shipper that it assumes as the value of goods intrusted to it what would be a reasonable amount in the average case, for the purpose of limiting its liability for the consequences even of negligent loss or injury.<sup>12</sup> That is, the reasonableness of the amount seems rather to be considered with reference to the habitual or customary reasonableness of such an amount than with reference to its reasonableness in the particular case.<sup>13</sup> Indeed the United States Supreme Court while refusing to allow a limitation of liability for negligence on any other basis than the assumed value of the goods,<sup>14</sup> has allowed the utmost freedom of

<sup>11</sup> *Arthur v. Texas & P. R. Co.*, 139 Fed. 127, 71 C. C. A. 391; *Pacific Express Co. v. Wallace*, 60 Ark. 100, 29 S. W. 32; *Illinois Central R. Co. v. Craig*, 102 Tenn. 298, 52 S. W. 164.

<sup>12</sup> *Henderson v. Stevenson*, L. R. 2 H. L. (Sc.) 470; *Richardson v. Rowntree*, [1894] A. C. 217; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 S. Ct. 351; *Cincinnati, etc., R. Co. v. Rankin*, 241 U. S. 319, 327, 60 L. Ed. 1022, 38 Sup. Ct. 555; *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915 B. 450, Ann. Cas. 1915 D. 593, *rev'd*, S. C. 209 Mass. 598, 95 N. E.

945, Ann. Cas. 1912 B. 669; *Tribble v. Southern Express Co.*, 248 U. S. 582, 39 S. Ct. 287. *In re Released Rates*, 13 Interstate Com. Rep. 88; *Gardiner v. New York, etc., R. Co.*, 201 N. Y. 387, 34 L. R. A. (N. S.) 826.

<sup>13</sup> In *Boston & Maine R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915 B. 450, Ann. Cas. 1915 D. 593, it was found as a fact by the lower court that any reasonable person would have inferred from the outward appearance of the plaintiff's baggage, when tendered to the defendant for transportation, that the value largely exceeded one hundred dollars, but the recovery, was, nevertheless, limited to \$100.

<sup>14</sup> *Boston & Maine R. v. Piper*, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820.

limitation on that basis. Though both parties agree that a valuation bears no relation to the actual value, the agreement based on a filed tariff that the tariff value shall be taken as the actual value is effectual.<sup>15</sup> The parties have only, have refused to allow limitations of value

A limitation is effectual as long as the service in connection with the shipment continue, limits the liability of the carrier as warehouseman, the goods are held at destination for the person to whom they are delivered. Where a limitation is permitted, in common law it was required that in the absence of a contract based on the shipper's misrepresentation, the carrier could not make a contract with the shipper fixing the limitation of liability. The regulation of the carrier even with notice to the shipper was not sufficient unless assented to by him.<sup>17</sup> How a statement in a bill of lading or receipt will bind the carrier to a contract with a shipper, has been considered in a previous chapter. But the requirement of a contract and the effect of such a contract or of local statutes has been in great measure done away with by the Carmack Amendment of the Interstate Commerce Act, so far as interstate shipments are concerned.<sup>20</sup> The power of a carrier to limit his liability was taken away and it was subjected to liability

<sup>18</sup> In *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 S. Ct. 351, the defendant accepted for transportation a carload of automobiles, necessarily knowing that they were of great value under an agreement in which the value was stated to be limited to \$50. The provision was upheld.

<sup>18</sup> *Pennsylvania Railroad v. Hughes*, 191 U. S. 477 (Pennsylvania), 48 L. Ed. 268, 24 Sup. Ct. Rep. 132; *Adams Express Co. v. Green*, 112 Va. 527, 72 S. E. 102, and see statutes referred to *supra*, § 1107, forbidding any variation of carrier's liability.

<sup>17</sup> *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 36 S. Ct. 177, 60 L. Ed. 453.

<sup>18</sup> In *Henderson v. Stevenson*, L. R.

2 H. L. (Sc.) 470, 47  
ford said: "I think t  
clusion of liability  
cannot be establishe  
clear evidence of th  
been brought to the l  
passenger and of his  
assented to it." See al  
166 U. S. 375, 41 L. E  
v. Boston & Maine R.  
600, 95 N. E. 945.  
Maine R. v. Hooker,  
Sup. Ct. 526, 58 L. 1  
L. R. A. 450, Ann. Cas

<sup>19</sup> See *supra*, § 90.

<sup>20</sup> Boston & Maine  
233 U. S. 97, 34 Sup  
Ed. 868, 1915 B. L.  
Cas. 1915 D. 593.

value of any property lost, notwithstanding any agreement as to value, by the first Cummins Amendment to the Interstate Commerce Act enacted March 4, 1915, subject to the proviso, however, that if the goods are hidden by wrapping, boxing or otherwise and their character is not disclosed to the carrier, the shipper may be required to state in writing the value of the goods and the carrier's liability shall not exceed that amount. By the second Cummins Amendment, enacted August 9, 1916, this proviso was repealed and the full liability imposed by the first Amendment was also abolished (except as to ordinary live stock) so far as concerns property for the transportation of which the Interstate Commerce Commission has authorized rates dependent on the value declared in writing by the shipper or agreed upon in writing as the released value of the property.<sup>21</sup>

#### § 1111. Liability may be measured at place of shipment.

A stipulation is contained in the Uniform Bill of Lading that a carrier's liability for loss shall be measured by the value of the goods at the time and place of shipment.<sup>22</sup> It has been said *obiter* by the Supreme Court of the United States that such a stipulation fixes the measure of the carrier's liability;<sup>23</sup> and this or a similar stipulation has been held valid in a number of States.<sup>24</sup> But by the rule of the common

<sup>21</sup> See *In re Cummins Amendment*, 33 Interstate Com. Com. 682; *In re Bills of Lading*, 52 *id.* 671, 683, 708.

<sup>22</sup> "The amount of any loss or damage for which any carrier becomes liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence."

<sup>23</sup> *Phoenix Insurance Co. v. Erie, etc., Transportation Co.*, 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 750, 1176. See also *The Koan Maru*, 251 Fed. 384.

<sup>24</sup> *Inman v. Seaboard Airline Ry. Co.*, 159 Fed. 960; *Pierce v. So. Pacific Co.*, 120 Calif. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; *Denver & Rio Grande R. Co. v. A. Peterson & Co.*, 59 Colo. 125, 147 Pac. 663; *Central of Georgia R. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Tibbitts v. Rock Island, etc., Ry. Co.*, 49 Ill. App. 567; *Davis v. N. Y., O., etc., Ry. Co.*, 70 Minn. 37, 72 N. W. 823; *Rogan v. Wabash Ry. Co.*, 51 Mo. App. 665; *Gratiot Street Warehouse Co. v. Missouri &c. Ry. Co.*, 124 Mo. App.

law the measure of damages is the market value at their destination with interest from the time should have arrived, less any unpaid transportation and if it can be assumed in any case that the place of shipment is necessarily less than the destination, the provision is in effect a limitation of liability, and the case on principle is like a case where the amount of the carrier's liability is by contract limited to an amount known by the parties to be less than the actual value.

On this assumption the provision was held invalid in *States*; <sup>26</sup> and though the Interstate Commerce Commission approved its insertion in the Uniform Bill of Lading when it first recommended; <sup>27</sup> it subsequently has announced as to domestic bills the situation has been changed by the Cummins Amendments, <sup>28</sup> and that now, "the rule being superfluous so far as concerns the transportation of property shipped under rates dependent upon agreed values, and unlawful and void in respect to property, we condemn it and direct its complete removal from the" new uniform bills of lading prescribed by the Commission. <sup>29</sup> The provision is, however, retained in the prescribed export bill.

### § 1112. Requirement of prompt assertion of claim against carriers.

It is a common provision in bills of lading that the claim against the carrier for loss or damage to the goods must be asserted promptly.

545, 102 S. W. 11; *Spada v. Pennsylvania R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Grubbs v. Atlantic Coast Line R. Co.*, 101 S. Car. 210, 85 S. E. 405.

<sup>26</sup> *O'Hanlon v. Railway Co.*, 6 Best & S. 484; *Rodocanachi v. Milburn*, 18 Q. B. D. 67; *Mobile & Montgomery R. Co. v. Jurey*, 111 U. S. 584, 28 L. Ed. 527, 4 Sup. Ct. R. 566.

<sup>27</sup> *St. Louis, Iron Mountain & Co. R. Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108, Am. St. 21, 3 Ann. Cas. 582; *Illinois Central R. Co. v. Bogard*, 78 Miss 11, 27 So. 879;

*Ruppel v. Allegheny Valley R. Co.*, 166, 31 Atl. 478; *Southern R. Co. v. D'Arcais*, 27 Tex. 64 S. W. 813.

<sup>28</sup> In the Matter of Bill of Lading, 14 Interstate Com. Com.

<sup>29</sup> The provision was held invalid in the Cummins Amendments (*supra*, § 1110, *ad fin.*), *Densmore Co. v. Chicago*, 252 Fed. 664.

<sup>30</sup> In the Matter of Bill of Lading, 52 Interstate Com. Com. 708—711.

must be made within a specified short limit of time.<sup>30</sup> If the time allowed is reasonable such a provision is valid.<sup>31</sup> Aside from the restrictions imposed on contracts for interstate carriage by the Interstate Commerce Act, the carrier may waive the benefit of limitations in its contract of carriage limiting the time for making claim, and such a waiver may be implied from conduct as well as from express language; for instance, inducing the shipper to delay making a claim within the stipulated time.<sup>32</sup> And any other conduct of the carrier the

<sup>30</sup> The Uniform bill of lading in use prior to 1919 provided, "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make the delivery within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." The bills of lading prescribed by the Interstate Commerce Commission in 1919 alter this provision. The domestic bill provides: "Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property (or in case of export traffic within nine months after delivery at port of export), or in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed. Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." The export bill allows nine months for making claims.

<sup>31</sup> *Southern Express Co. v. Caldwell*,

21 Wall. 264, 22 L. Ed. 556; *Missouri, etc., Ry. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Keeney v. Chicago, etc., R. Co.* 183 Iowa, 522, 167 N. W. 475; *Mets Co. v. Boston & Maine R.*, 227 Mass. 307, 116 N. E. 475; *Spada v. Pennsylvania R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Murray v. Atlantic Coast Line*, 108 S. Car. 88, 93 S. E. 387; *Houston, etc., Ry. Co. v. Houston Packing Co.* (Tex. Civ. App.), 203 S. W. 1140. Numerous decisions as to what limit of time is reasonable are collected in L. R. A., 1916 D. pages 335-352. That of four months established in the old uniform bill of lading in general use until 1919 has been upheld. *Georgia, etc., R. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 S. Ct. 541; *Higgins v. Boston & Maine R.*, 78 N. H. 609, 102 Atl. 533. See also *Chesapeake, etc., R. v. McLaughlin*, 242 U. S. 142, 61 L. Ed. 207, 37 S. Ct. 40.

<sup>32</sup> *St. Louis, etc., Ry. Co. v. Jacobs*, 70 Ark. 401, 68 S. W. 248; *Soper v. Pontiac, etc., R. Co.*, 113 Mich. 443, 71 N. W. 853; *Banks v. Pennsylvania R. Co.*, 111 Minn. 48, 126 N. W. 410; *Merrill v. American Express Co.*, 62 N. H. 514; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; *St. Louis, etc., R. Co. v. James*, 36 Okla. 196, 123 Pac. 279; *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267, 60 Atl. 781, 107 Am. St. Rep. 571.

natural effect of which is to induce the shipper to fail to make a claim or bring suit within the stipulated time, as he might otherwise have done, is a waiver.<sup>33</sup> It has been held further that even though the time limited has expired so that the shipper's right has been lost, it will be revived by any conduct on the part of the carrier which treats the claim as still valid.<sup>34</sup>

Though a few decisions distinguish between an alleged waiver before the expiration of the time fixed in the contract and conduct after the expiration of that time,<sup>35</sup> the analogy of new promises to pay a debt barred by the Statute of Limitations is so strong that there seems no reason why the same exception to general principles should not be applied here, but it should be remembered that one of the requirements in regard to the Statute of Limitations is that the facts must disclose what clearly amounts to a new promise, if not in express language at least by implication. These principles have less frequent application than formerly, for now the right to waive conditions prior to their breach or to revive claims which have been lost by breach of condition is abolished, so far as contracts of interstate carriage are concerned, by the Interstate Commerce Acts.<sup>36</sup>

<sup>33</sup> *Wabash Ry. Co. v. Brown*, 152 Ill. 484, 39 N. E. Rep. 273; *Soper v. Pontiac, etc., R. Co.*, 113 Mich. 443, 71 N. W. 853; *Galveston, etc., Ry. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298; *Norfolk, etc., Railway Co. v. Reeves*, 97 Va. 284, 33 S. E. 606.

<sup>34</sup> *St. Louis, etc., R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933; *Post v. Atlantic Coast Line R. Co.*, 138 Ga. 763, 76 S. E. 45; *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550; *Peninsula Produce Exchange v. New York, etc., R. Co.*, 122 Md. 231, 89 Atl. 437; *Wallace v. Lake Shore, etc., R. Co.*, 133 Mich. 633, 95 N. W. 750; *McFall v. Wabash R. Co.*, 117 Mo. App. 477, 94 S. W. 570; *Vencill v. Quincy, etc., R. Co.*, 132 Mo. App. 722, 112 S. W. 1030; *A. C. Cheney Piano Co. v. New York, etc., Co.*, 85 N. Y. Misc. 157, *affd.* 166 N. Y. App. Div. 706; *Isham v. Erie R.*

*Co.*, 112 N. Y. App. Div. 612, 98 N. Y. S. 609, *affd.* without opinion 191 N. Y. 547, 85 N. E. 1111; *Sauls-Baker Co. v. Atlantic Coast Line R. Co.*, 98 S. C. 300, 82 S. E. 418. See further for collection of cases on waiver of time in contracts of carriers, L. R. A. 1916 D. 1046, and note 1049.

<sup>35</sup> *Gamble-Robinson Co. v. Northern Pac. R. Co.*, 119 Minn. 40, 137 N. W. 19; *Atlantic Coast Line v. Bryan*, 109 Va. 523, 65 S. E. 30; *Old Dominion Steamship Co. v. Flanary*, 111 Va. 816, 69 S. E. 1107.

<sup>36</sup> *Phillips v. Grand Trunk Ry.*, 236 U. S. 662, 667, 59 L. Ed. 774, 35 Sup. Ct. 444. "The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right

### § 1113. Liability of carriers for their passengers' safety.

The obligation of a carrier to a passenger for his safe carriage is usually dealt with as an obligation imposed by the law of torts rather than as one assumed by contract; and properly, for the obligation is wider than any that could be based on mutual assent. The carrier does not insure the passengers' safe carriage, but is liable only for negligence.<sup>37</sup> The duty imposed is to use the utmost diligence or the highest degree of care.<sup>38</sup> But how far the duty of the carrier in this respect differs from that of any one who for business purposes invites others on his premises may be questioned.<sup>39</sup> Besides the duty of avoiding negligent misconduct, the carrier is under an absolute duty to protect his passengers from the misconduct of its servants or agents.<sup>40</sup> The decisions are

of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defences open to the carrier." See also *Georgia &c. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 197, 36 Sup. Ct. 541, 60 L. Ed. 948; *Metz Co. v. Boston & Maine R.*, 227 Mass. 307, 116 N. E. 475.

<sup>37</sup> *Readhead v. Midland Railway Co.*, L. R. 2 Q. B. 412, 4 *id.* 379; *The Oregon*, 133 Fed. 609, 68 C. C. A. 603.

<sup>38</sup> Numerous cases are collected in 2 *Hutchinson, Carriers*, §§ 895, 896.

<sup>39</sup> See 31 *Harv. L. Rev.* 306.

<sup>40</sup> In *Dwinelle v. New York Cen. & Hud. R. Co.*, 120 N. Y. 117, 122, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, the court said: "As we have seen, the defendant owed the plaintiff the duty to transport him to New York, and during its performance to care for his comfort and safety. The duty of protecting the personal safety of the passenger, and promoting by every reasonable means the accomplishment of his journey, is continuous, and embraces other attentions and services than the occasional service required in giving the passenger a seat or some temporary accommodation. Hence whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveller, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it." To the same effect are the following: *Pittsburg, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202, 214, 2 Am. Rep. 39; *Chamberlain v. Chandler*, 3 Mason, 242, 245, Fed. Cas. No. 2,575; *Pendleton v. Kinsley*, 3 Cliff. 416, 417, Fed. Cas. No. 10,922;



often rested on the ground that the action of or agent was within the scope of his employment; in many cases this may be true, but when the act had no relation to the carrier's business and though in the carrier's vehicle or station was due wholly to the interests or motives of the servant, the carrier must be rested on the broader ground previously in connection with innkeepers.<sup>42</sup> The carrier mu

*Bryant v. Rich*, 106 Mass. 180, 188, 8 Am. Rep. 311; *Chicago & Eastern R. Co. v. Flexman*, 103 Ill. 546, 548, 42 Am. Rep. 33; *So. Kan. Ry. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

"In *Clancy v. Barker*, 131 Fed. 161, 166, 66 C. C. A. 469, the court said: "In *Dwinelle v. New York Central, etc., R. Co.*, 120 N. Y. 117, 126, 127, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, the porter of a sleeping car, who had taken up a ticket of a passenger, was held to be acting within the scope of his employment when he struck the passenger during an altercation between them relative to the return of the ticket.

"In *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588, 591, 43 Am. Rep. 185, the court declared the limit of the company's liability to be 'to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger,' and held that a driver of a street car, who was also the conductor, and who beat a passenger in the car, was within the scope of his employment to carry the passenger safely when he committed the assault.

"In *Goddard v. Grand Trunk Railway*, 57 Me. 202, 203, 2 Am. Rep. 39, a brakeman, who had authority to collect tickets, and who, after collecting one from a passenger, demanded another of him, and grossly insulted him because he declined to pay for his pas-

sage again, was held to be acting within the scope of his employment and the company was charged with the damages he inflicted.

"So in *Croaker v. Chicago & Western Ry. Co.*, 36 Wis. 2d 504, 4 Am. Rep. 504, a conductor was held to be a passenger; in *Pendleton v. Chicago & N. W. Ry. Co.*, 3 Cliff. 416, 427, 428, 10, 922, the clerk of a sleeping car assaulted a passenger while collecting his fare; in *Chicago & Eastern R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33, a brakeman was held to be a passenger because during a lost watch he said he was a brakeman had it; in *Terrell v. Indianapolis R. Co.*, 7 Jac. 19, 22, a conductor or brakeman who drenched a passenger with water was held liable; in *Campbell v. Palace Car Co.*, 485, a porter of a sleeping car made indecent proposals to a passenger; in *Williams v. Pullman Car Co.*, 40 La. Ann. 417, 85, 8 Am. St. Rep. 538, a Pullman car who assaulted a passenger and in *Dickson v. Waldron*, 507, 34 N. E. 506, 24 L. R. A. 11, 11 Am. St. Rep. 440, the ticket collector, a special policeman of a Pullman car, in endeavoring to sell the ticket to the customer, assaulted him—to be, and undoubtedly was, within the scope of their employment when they inflicted injuries for which the defendant was held liable.

<sup>42</sup> See *supra*, § 1070.

the same reasonable care to protect a passenger from injury by third persons, that is required of it in the general performance of its business.

### § 1114. Telegraph companies.

Telegraph companies are not common carriers.<sup>43</sup> Such a company is a public service corporation,<sup>44</sup> but does not insure the success of the performance which it undertakes. The obligation implied or imposed is to use due care to transmit a message correctly,<sup>45</sup> and to use such care to deliver messages with reasonable promptness.<sup>46</sup> It is common for telegraph companies to attempt to limit their liabilities by provisions, on blanks furnished for messages, to the effect that unless the message is repeated (for which an additional charge is made), the company shall not be liable beyond the price received for sending the message. Such a stipulation is held valid, except for defaults due to willfulness or gross

<sup>43</sup> *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 301, 18 Am. Rep. 485; *Birkett v. Western Union Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 33 L. R. A. 404; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 463, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917. There are contrary decisions, but they often mean no more than that a telegraph company is under the duties of a public service corporation. The following decisions relate to telephone companies, but it is assumed or stated that the law regarding telegraph companies is the same. *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Gwynn v. Citizens' Telephone Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111; *State v. Cumberland Tel. & Tel. Co.*, 114 Tenn. 194, 86 S. W. 390. By the Mississippi Constitution, telegraph companies are declared common carriers. *Postal Tel. &*

*Cable Co. v. Wells*, 82 Miss. 733, 35 So. 190.

<sup>44</sup> *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561; *Chesapeake, etc., Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *Nebraska Telephone Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113. It is so far engaged in interstate commerce as to be subject to federal regulation through the Interstate Commerce Commission. 36 U. S. Stat. 544, § 7.

<sup>45</sup> *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Breese v. U. S. Telegraph Co.*, 48 N. Y. 132, 8 Amer. Rep. 526; *Pinckney v. Western Union Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765.

<sup>46</sup> *Western Union Tel. Co. v. Elliott*, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. (N. S.) 761; *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

negligence, in England,<sup>47</sup> Candaa,<sup>48</sup> and many of the United States.<sup>49</sup> Many States, however, hold the stipulation opposed to public policy and void.<sup>50</sup> Whether the amendment of June 18, 1910 to the Interstate Commerce Acts, involves the invalidity of state rules and the substitution of a uniform federal rule has not yet been definitely decided.<sup>51</sup> In some jurisdictions a distinction is taken between errors which

<sup>47</sup> *McAndrew v. Electric Tel. Co.*, 17 C. B. 3.

<sup>48</sup> *Baxter v. Dominion Tel. Co.*, 37 U. C. Q. B. 470.

<sup>49</sup> *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Amer. Dec. 519; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 125, 83 N. E. 313; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Jacob v. Western Union Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Halsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. (N. S.) 1021; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; *Williams v. Postal &c. Tel. Co.*, 122 Va. 675, 95 S. E. 436.

<sup>50</sup> *American Union Tel. Co. v. Daughtery*, 89 Ala. 191, 7 So. 660; *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *Des Arc Oil Mill v. Western Union Tel. Co.*, 132 Ark. 335, 201 S. W. 273; *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Amer. Rep. 136; *Western Union Tel. Co. v. Milton*, 53 Fla. 484, 43 So. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279 [see also as to Illinois law, *Stone v. Postal Tel. Cable Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180]; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; *Harkness v. Western Union Tel. Co.*

73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Western Union Tel. Co. v. Crall*, 38 Kans. 679, 17 Pac. 309, 5 Am. St. Rep. 795; *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; *LaGrange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; *Postal Tel., etc., Co. v. Wells*, 82 Miss. 733, 35 So. 190; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; *Western Union Tel. Co. v. Longwill*, N. Mex. 308, 21 Pac. 339; *Williamson v. Postal Tel. Cable Co.*, 151 N. C. 223, 65 S. E. 974 (but see *Meadows v. Postal &c. Tel. Co.*, 173 N. C. 240, 91 S. E. 1009); *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Blackwell Milling, etc., Co. v. Western Union Tel. Co.*, 17 Okla. 376, 89 Pac. 235; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Postal Tel. Cable Co. v. Sunset Construction Co.*, 102 Tex. 148, 114 S. W. 98; *Western Union Tel. Co. v. Piper*, (Tex. Civ. App. 1916), 191 S. W. 817; *Wertz v. Western Union Tel. Co.*, 7 Utah, 446, 13 L. R. A. 510, 27 Pac. 172; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; *Fox v. Postal Tel. Cable Co.*, 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490 (statutory).

<sup>51</sup> See 18 Col. L. Rev. 612.

would not have been prevented by repetition and mistakes in the wording of the message which would have been thus prevented. Even admitting the validity of the stipulation generally, some courts assert that it protects the company only in the latter class of cases.<sup>52</sup> But most of the jurisdictions that uphold the stipulation enforce it in any case, whatever the character of the breach of duty, if there was neither gross negligence or wilful default. A distinction also has been suggested in regard to cipher messages, or those so written as to be obscure in meaning.<sup>53</sup>

Where a limitation of damages to the cost of the message is held invalid, stipulations limiting the amount to a multiple of the cost, such as ten times, are equally invalid.<sup>54</sup> But a distinction seems certainly possible between an agreement to liquidate possible damages at a reasonable amount and an agreement to limit damages to a nominal sum. It is also usually provided that a claim for damage must be presented within a fixed time, such as sixty days from the time when the message was filed for transmission. This is valid.<sup>55</sup> In

<sup>52</sup> *Box v. Postal Tel. Cable Co.*, 165 Fed. 139, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 520, 7 So. 419; *Barnes v. Western Union Tel. Co.*, 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

<sup>53</sup> In *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 28, 38 L. Ed. 883, 14 Sup. Ct. 1098, the court held that a provision limiting liability in regard to such messages was valid. The distinction is, however, repudiated in *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; *Postal Tel. Co. v. Wells*, 82 Miss. 733, 35 So. 190.

<sup>54</sup> *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672 (ten times); *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky.

L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711 (fifty times); *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211, (ten times); *Fox v. Postal Tel. Cable Co.*, 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490 (fifty times).

<sup>55</sup> *Western Union Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 So. 117; *Western Union Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *Western Union Tel. Co. v. Wazelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; *Webbe v. Western Union Tel. Co.*, 64 Ill. App. 331; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Free v. Western Union Tel. Co.*, 135 Iowa, 69, 110 N. W. 143; *Russell v. Western Union Tel. Co.*, 57 Kan. 230, 45 Pac. 598; *Western Union Tel. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313; *Cole v. Western Union Tel. Co.*, 33 Minn.

a few cases <sup>56</sup> it has been held that such a provision generally valid would not be enforced where the party was not aware of the company's negligence until after the stipulated time had elapsed, and if the plaintiff's failure to discover the facts was not culpable. These decisions are supported as a relief from a penal effect of the provision but a few decisions have extended the stipulation by construction so as to permit lapse of the stipulated number of days from the plaintiff's acquisition of knowledge of the facts.<sup>57</sup> Such a construction imposes too violent a strain on the language, and there are contrary and better decisions <sup>58</sup> denying any extension of the plaintiff's right where there still remained, after discovery of the right, an ample time to make a claim within the stipulated sixty

#### § 1115. Legislation regarding bills of lading.

An attempt has been made to codify the law governing bills of lading. The primary object of those seeking to do this about was to procure uniformity in regard to the enforceability of order bills of lading—a matter in regard to which the mercantile custom and the custom law were in conflict. In the decisions of some States, adopting to a greater or less degree

227, 22 N. W. 385; *Hartzog v. Western Union Tel. Co.*, 84 Miss. 448, 36 So. 539, 105 Am. St. Rep. 459; *Thorp v. Western Union Tel. Co.*, 118 Mo. App. 398, 94 S. W. 554; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Sykes v. Western Union Tel. Co.*, 150 N. C. 431, 64 S. E. 177; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387 (cf. *Conrad v. Western Union Tel. Co.*, 162 Pa. 204, 29 Atl. 888.); *Smith v. Western Union Tel. Co.*, 77 S. C. 378, 58 S. E. 6; *Kirby v. Western Union Tel. Co.*, 4 S. D. 105, 55 N. W. 759, 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 612, 621, 624, 46 Am. St. Rep. 765, *Western Union Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525; *Phillips v. Western Union Tel. Co.*, 95 Tex. 638, 69 S. W.

63; *Brooks v. Western Union Tel. Co.*, 26 Utah, 147, 72 Pac. 499; *Heath v. Western Union Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

<sup>56</sup> In *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 888, and *Conrad v. Western Union Tel. Co.*, 162 Pa. 204, 29 Atl. 888. See also *Johnson v. Western Union Tel. Co.*, 33 Fed. 362.

<sup>57</sup> *Postal Telegraph Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. 16 L. R. A. (N. S.) 870; *Sherrill v. Western Union Tel. Co.*, 109 Wis. 527, 14 S. E. 94.

<sup>58</sup> *Stone v. Postal-Telegraph Cable Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795, 35 R. I. 498, 87 Atl. 46 L. R. A. (N. S.) 180; *Heim v. Western Union Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

mercantile custom, treated order bills of lading (those in which the carrier agrees to deliver goods to the order of the consignee) as negotiable. Other courts refused to do this. The importance of negotiability it should be observed relates not only to the ownership of the goods of which the bill of lading is a symbol, but to the contractual obligations of the carrier; since the carrier may become liable to the holder of the bill not only as owner of the goods but also as entitled to enforce the promissory undertaking of the bill of lading, if it is negotiable. With these matters in mind, the Commissioners for Uniform State Laws recommended in 1909 a uniform codification of the law governing bills of lading, and this statute has been enacted in a number of States.<sup>59</sup>

#### § 1116. Federal legislation on bills of lading.

It became evident from the decisions of the Supreme Court of the United States after the passage of the Carmack Amendment in 1906,<sup>60</sup> that the subject of bills of lading for the interstate transportation of goods was one of which the federal government had assumed the regulation, and that the validity and effect of such documents must be determined by Federal law.<sup>61</sup> Whether this principle invalidates not only

<sup>59</sup> It has been enacted in Alaska, Connecticut, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin.

<sup>60</sup> See *supra*, § 1073.

<sup>61</sup> In *Atchison, etc., Ry. v. Harold*, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050, a carrier had issued a bill of lading before goods had actually come into its hands, in exchange for another bill of lading which had been issued by a connecting carrier. The second bill of lading was sold to the plaintiff who sued the railroad for failure to deliver the goods within a reasonable time after the date on which the bill of lading stated that the goods had been

received. The Kansas court allowed recovery, holding the railroad estopped in a suit by an innocent purchaser to deny that it had received the goods on the day stated in its bills of lading. The United States Supreme Court reversed the decision holding that under federal law the purchaser of the bill acquired no greater rights than the shipper who originally received it from the railroad and who, of course, had knowledge of the facts. The court said: "Whether in the absence of legislation by Congress the attributing to an interstate bill of lading of the exceptional and local characteristic applied by the court below in conflict with the general commercial rule constituted a direct burden on interstate commerce and

state regulation of the contractual obligations of the carrier, but also such regulation of the effect of a bill of lading as a transfer of the title to goods behind it under a contract between buyer and seller, neither of whom perhaps was a party to the original contract of shipment, remains the only question of difficulty.<sup>62</sup> But as no change in title to the goods while in transit can be effected without a change at least in the person to whom the carrier's obligation is owing, it seems probable that an interstate bill of lading is under the control of the federal government even regarding its effect as a symbol of title. Accordingly an effort which was finally success-

was therefore void, need not now be considered. This is so because irrespective of that question, and indeed without stopping to consider the general provision of the Act to Regulate Commerce it is not disputable that what is known as the Carmack Amendment to the Act to Regulate Commerce (act of June 29, 1906, c. 3591, § 7, 34 Stat. 593) was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading and the responsibilities thereunder, which in the nature of things excluded state action. *Adams Express Co. v. Croninger*, 228 U. S. 491, 505-506, 33 Sup. Ct. 148, 57 L. Ed. 314; *Missouri, etc., Ry. Co. v. Harriman*, 227 U. S. 657, 671-672, 57 L. Ed. 690; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 110, 34 Sup. Ct. 528, 58 L. Ed. 868, 1915 B. L. R. A. 450, Ann. Cas. 1915 D. 593; *Atchison, Topeka & Santa Fe Ry. v. Robinson*, 233 U. S. 173, 180, 34 Sup. Ct. 556, 58 L. Ed. 90; *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. Ed. 453; *Georgia, F. & A. Ry. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

"Indeed in the argument it is frankly conceded that as the subject of a carrier's liability for loss or damage to goods moving in inter-

state commerce under a bill of lading is embraced by the Carmack Amendment, state legislation on that subject has been excluded. It is insisted, however, that this does not exclude liability for error in the bill of lading purporting to cover an interstate shipment because 'Congress has legislated relative to the one, but not relative to the other.' But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack Amendment that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading,—a purpose which would be wholly frustrated if the proposition relied upon were upheld." In *United States v. Fenger*, 250 U. S. 199, 207, 39, S. Ct. 445, 447, it was held that Congress had jurisdiction to enact criminal penalties for the forgery of bills of lading (see *infra*, § 1131) though, since the bills were based on no actual shipment, interstate commerce was involved only because of the general desirability of protecting bills of lading as instruments of commerce.

<sup>62</sup> In *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 100 N. E. 1025, it was held that the purchaser in Massachusetts of a foreign bill of lading acquired the rights given by the Massachusetts statute.

ful was made to secure the enactment of a Federal law substantially identical with the uniform state law except that it was limited to interstate commerce. This Act, called the Pomerene Act, was enacted in 1916. It has no application to bills of lading originating abroad. In regard to such bills and in regard to intrastate bills, local statutes and the common law are controlling.

### § 1117. The Pomerene Act.

As the Pomerene Act codifies the main principles governing bills of lading, it is here inserted. It differs in some particulars from the Uniform State law, and attention is called in the notes to these differences. The sections of the statutes imposing criminal penalties are not here inserted. The opening section defines the scope of the Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this Act.<sup>63</sup>

### § 1118. Kinds of bills of lading which may be issued.

Section 2.—[STRAIGHT BILL DEFINED.] That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Section 3.—[ORDER BILL DEFINED.] That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regula-

<sup>63</sup> The Uniform State bill purports to cover all bills of lading issued by common carriers, and has been held to control the effect of a negotiation in Massachusetts of a bill originating in a foreign country. *Roland M. Baker Co. v. Brown*, 214 Mass. 196,

100 N. E. 1025. But it seems that the Federal Statute must have exclusive effect on all bills of lading within its terms. *Atchison &c. R. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, 36 Sup. Ct. Rep. 665.



tion, or tariff that it is non-negotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper.<sup>64</sup>

Section 4.—[SETS OF ORDER BILLS PROHIBIT INTERSTATE SHIPMENTS.] That order bills issued by a carrier for the transportation of goods to any place in the United States on the Continent of North America, except Alaska, Panama, and Hawaii, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part or parts thereof in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one or more of the other parts: Provided, however, That nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.<sup>65</sup>

Section 5.—[DUPLICATE ORDER BILL MUST BE SO MARKED.] That when more than one order bill is issued by a carrier for the same goods to be transported to any place in the United States on the Continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: Provided, however, That nothing contained in this section shall in such cases be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.<sup>66</sup>

<sup>64</sup> See Williston on Sales, §§ 411, 412.

<sup>65</sup> See Williston on Sales, § 441.

<sup>66</sup> See Williston on Sales, § 441.

**Section 6.—[STRAIGHT BILL IS “NON-NEGOTIABLE” AND MUST BE SO MARKED.]** That a straight bill shall have placed plainly upon its face by the carrier issuing it “non-negotiable” or “not negotiable.”

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

**Section 7.—[“ORDER-NOTIFY” BILL IS NEGOTIABLE.]** That the insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.<sup>67</sup>

**§ 1119. Carrier's duty to deliver and effect of delivery.**

**Section 8.—[CARRIER'S DUTY TO DELIVER GOODS.]** That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.<sup>68</sup>

**Section 9.—[PROPER DELIVERY RELEASES CARRIER.]** That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

<sup>67</sup> See Williston on Sales, § 287.

<sup>68</sup> See Williston on Sales, §§ 235, 424.

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

Section 10.—[WHEN DELIVERY DOES NOT RELEASE CARRIER.] That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.<sup>69</sup>

#### § 1120. Cancellation or alterations of bills of lading.

Section 11.—[CANCELLATION OF ORDER BILL REQUIRED ON DELIVERY OF THE GOODS.] That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier

<sup>69</sup> See Williston on Sales, § 421.

and notwithstanding minor variations in the person entitled thereon.

**Section 12.—**~~THE FOLLOWING MUST BE NOTED OR BILL LAUNCHED~~ ~~There shall be noted in section twenty-six, and every order issued by any process,~~ if a carrier delivers part of the goods in which an order bill had been issued and ~~in which~~—

a To ~~note up and launch the bill~~ it

b To place ~~any~~ ~~part~~ ~~thereof~~ ~~that~~ a portion of the goods has been ~~delivered with~~ ~~exception~~ which may be in general terms either if the ~~goods~~ ~~or~~ ~~packages~~ that have been so delivered or if the ~~goods~~ ~~or~~ ~~packages~~ which still remain in the carriers possession. ~~It shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases or receives such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier and notwithstanding such delivery was made to the person named thereon.~~

**Section 13.—**~~ALTERATION OF BILL WITHOUT CARRIER'S AUTHORITY IS VOID.~~ That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same ~~either in writing or noted on the bill~~, shall be void. ~~Whenever in the nature and purpose of the change, and the bill shall be unenforceable according to its original tenor.~~

#### § 1121. Lost bills of lading and duplicates.

**Section 14.—**~~LOSS OF ORDER BILL WILL NOT EXCUSE CARRIER FROM DELIVERING THE GOODS IF INDEMNIFIED.~~ That where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction; and upon the giving of a bond with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any

<sup>70</sup> See Williston on Sales, § 424; *Babbitt v. Grand Trunk Western Ry. Co.*, 209 Ill. App. 183, 285 Ill. 267, 120 N. E. 803.

<sup>71</sup> See Williston on Sales, § 443.

This section is taken from a stipulation in the Uniform bill of lading adopted by the Interstate Commerce Commission.

liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: Provided: a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Section 15.—[DUPLICATE BILL.] That a bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly, shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.<sup>72</sup>

§ 1122. Adverse claims to the goods.

Section 16.—[CARRIER CANNOT ASSERT TITLE TO GOODS SHIPPED.] That no title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.<sup>73</sup>

Section 17.—[CARRIER MAY REQUIRE ALL PERSONS WHO CLAIM GOODS TO INTERPLEAD.] That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Section 18.—[CARRIER ENTITLED TO A REASONABLE TIME TO ASCERTAIN VALIDITY OF ADVERSE CLAIMS.] That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of

<sup>72</sup> See Williston on Sales, § 441.

the corresponding provisions of the

<sup>73</sup> See *supra*, §§ 1036, 1037. Also Warehouse Receipts Act, *supra*, § 1054.

and notwithstanding delivery was made to the person entitled thereto.<sup>70</sup>

**Section 12.—[PART DELIVERY MUST BE NOTED OR BILL CANCELED.]** That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carriers possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

**Section 13.—[ALTERATION OF BILL WITHOUT CARRIER'S AUTHORITY IS VOID.]** That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.<sup>71</sup>

#### § 1121. Lost bills of lading and duplicates.

**Section 14.—[LOSS OF ORDER BILL WILL NOT EXCUSE CARRIER FROM DELIVERING THE GOODS IF INDEMNIFIED.]** That where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction; and upon the giving of a bond with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any

<sup>70</sup> See Williston on Sales, § 424; *Babbitt v. Grand Trunk Western Ry. Co.*, 209 Ill. App. 183, 285 Ill. 267, 120 N. E. 803.

<sup>71</sup> See Williston on Sales, § 443.

This section is taken from a stipulation in the Uniform bill of lading adopted by the Interstate Commerce Commission.

liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: Provided: a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Section 15.—[DUPLICATE BILL.] That a bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly, shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.<sup>72</sup>

§ 1122. Adverse claims to the goods.

Section 16.—[CARRIER CANNOT ASSERT TITLE TO GOODS SHIPPED.] That no title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.<sup>73</sup>

Section 17.—[CARRIER MAY REQUIRE ALL PERSONS WHO CLAIM GOODS TO INTERPLEAD.] That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Section 18.—[CARRIER ENTITLED TO A REASONABLE TIME TO ASCERTAIN VALIDITY OF ADVERSE CLAIMS.] That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of

<sup>72</sup> See Williston on Sales, § 441.

the corresponding provisions of the

<sup>73</sup> See *supra*, §§ 1036, 1037. Also Warehouse Receipts Act, *supra*, § 1054.

the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.<sup>74</sup>

**Section 19.—[CARRIER CANNOT REFUSE DELIVERY EXCEPT FOR CAUSES SPECIFIED.]** That except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

§ 1123. Effect of "shipper's weight, load and count" clause.

**Section 20.—["SHIPPER'S WEIGHT, LOAD, AND COUNT" CLAUSE—WHEN PROHIBITED.]** That when goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.<sup>75</sup>

**Section 21.—["SHIPPER'S WEIGHT, LOAD, AND COUNT" CLAUSE—EFFECT OF WHEN RIGHTFULLY INSERTED.]** That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them

<sup>74</sup> See *The Idaho*, 93 U. S. 575, 23 L. Ed. 978; *Atchison & Co. R. v. International & Co.*, 247 Fed. 265, 267, 159 C. C. A. 359.

<sup>75</sup> This section is not found in the Uniform State Act, but was inserted in the Federal statute to meet practices complained of by shippers.



and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.<sup>77</sup>

**§ 1125. Creditors' rights against goods shipped under an order bill of lading.**

**Section 23. [ATTACHMENT NOT ALLOWED OF GOODS FOR WHICH AN ORDER BILL HAS BEEN ISSUED.]** That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter,

<sup>77</sup> See Williston on Sales, § 418. The section in the Uniform State law corresponding to sections 21 and 22 of the Federal law is as follows: Section 23.—[LIABILITY FOR NON-RECEIPT OR MISDESCRIPTION OF GOODS.] If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to (a) The consignee named in a non-negotiable bill, or

(b) The holder of a negotiable bill,

Who has given value in good faith relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them, or by a

statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill.

while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.<sup>78</sup>

**Section 24.—[ORDER BILL MAY BE ATTACHED.]** That a creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

#### § 1126. Carrier's lien.

**Section 25.—[CARRIER HAS LIEN FOR WHAT CHARGES.]** That if an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.<sup>79</sup>

**Section 26.—[IF GOODS LAWFULLY SOLD TO SATISFY LIEN CARRIER IS NOT LIABLE.]** That after goods have

<sup>78</sup> Applied in *Brimberg v. Hartenfeld Bag Co.* 89, N. J. Eq. 425, 105 Atl. 68. See further *Williston on Sales*, §§ 438, 439.

<sup>79</sup> The corresponding section in the Uniform State Act is as follows:

**Section 26.—[NEGOTIABLE BILL MUST STATE CHARGES FOR WHICH LIEN IS CLAIMED.]** If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those

goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill.

§ 1127. How bills of lading may be negotiated or transferred.

Section 27.—[WHEN ORDER BILL MAY BE NEGOTIATED BY DELIVERY.] That an order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.<sup>80</sup>

Section 28.—[ORDER BILLS NEGOTIATED BY INDORSEMENT.] That an order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.<sup>81</sup>

Section 29.—[TRANSFER OF STRAIGHT BILL.] That a bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill cannot be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.<sup>82</sup>

Section 30.—[PERSONS WHO MAY NEGOTIATE ORDER BILLS.] That an order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.<sup>83</sup>

<sup>80</sup> See Williston on Sales, § 408.

<sup>81</sup> See Williston on Sales, § 409.

<sup>82</sup> See Williston on Sales, § 413.

<sup>83</sup> See Williston on Sales, § 414.

to communicate with the agent or agents having actual possession or control of the goods.<sup>85</sup>

Section 33.—[INDORSEMENT OF ORDER BILL MAY BE COMPELLED IF TRANSFERRED WITHOUT.] That where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.<sup>86</sup>

§ 1129. Warranties on negotiation or transfer of bill of lading.

Section 34.—[WARRANTIES IMPLIED ON NEGOTIATION OR TRANSFER OF BILL.] That a person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

- (a) That the bill is genuine;
- (b) That he has a legal right to transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the bill;
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable of fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.<sup>87</sup>

Section 35. — [INDORSER IS NOT LIABLE FOR DEFAULT OF PREVIOUS INDORSER OR CARRIER.] That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.<sup>88</sup>

Section 36. — [PLEDGE OF BILL WHO RECEIVES PAYMENT OF HIS CLAIM DOES NOT WARRANT VALIDITY OF BILL OR CHARACTER OF THE GOODS.] That a mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a

<sup>85</sup> See Williston on Sales, § 427.

<sup>86</sup> See Williston on Sales, § 429.

<sup>87</sup> See Williston on Sales, § 431.

<sup>88</sup> See Williston on Sales, § 433.

draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.<sup>39</sup>

§ 1130. Bona fide purchaser protected in spite of defects in the title of his vendor.

Section 37.—[WHEN TITLE OF INNOCENT PURCHASER TO ORDER BILL NOT IMPAIRED.] That the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value there for in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Section 38.—[A SELLER OR PLEDGOR IN POSSESSION OF ORDER BILL MAY EFFECTIVELY NEGOTIATE.] That where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

§ 1131. What encumbrances on goods can be asserted against the holder of an order bill of lading; criminal offenses.

Section 39.—[LIEN OF SELLER OF GOODS OR OF STOPPAGE IN TRANSITU BY CONSIGNOR CANNOT BE ASSERTED AGAINST PURCHASER OF ORDER BILL] That where an order bill has been issued for goods no seller's

<sup>39</sup> See Williston on Sales, § 435.

lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Section 40.—[WHAT LIENS ARE VALID AGAINST HOLDER OF ORDER BILL.] That, except as provided in section thirty-nine, nothing in this Act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this Act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Section 41.—[CRIMINAL OFFENSES.] That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States, or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely uttered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or both.<sup>90</sup>

<sup>90</sup> This section has been held constitutional though the forged bill in question related to no actual shipment. *United States v. Fenger*

## § 1132. Definitions, etc.

**Section 42.—[DEFINITIONS OF TERMS.]** First. That in this Act, unless the context of subject-matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Bill” means bill of lading governed by this Act.

“Consignee” means the person named in the bill as the person to whom delivery of the goods is to be made.

“Consignor” means the person named in the bill as the person from whom the goods have been received for shipment.

“Goods” means merchandise or chattels in course of transportation or which have been or are about to be transported.

“Holder” of a bill means a person who has both actual possession of such bill and a right of property therein.

“Order” means an order by indorsement on the bill.

“Person” includes a corporation or partnership, or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee and to take as pledgee.

“State” includes any Territory, District, insular possession, or isthmian possession.<sup>91</sup>

## § 1133. Final sections.

**Section 43.—[THIS ACT NOT APPLICABLE TO OUTSTANDING BILLS.]** That the provisions of this Act do not apply to bills made and delivered prior to the taking effect thereof.

**Section 44.—[IF PARTS ARE DECLARED UNCONSTITUTIONAL.]**

250, U. S. 199, 207, 39 S. Ct. 445, 447.

<sup>91</sup> The definition of “State” is not in the Uniform State Law, which contains, however, the following definitions which are not included in the Federal Act.

“Owner” does not include mortgagee or pledgee.

“Purchaser” includes mortgagee and pledgee.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

(2) A thing is done “in good faith,” within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

**TUTIONAL OTHER PARTS STAND.]** That the provisions and each part thereof and the sections and each part thereof of this Act are independent and severable, and the declaring of any provision or part thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof.<sup>22</sup>

**Section 45.—[TIME WHEN THE ACT TAKES EFFECT.]** That this Act shall take effect and be in force on and after the first day of January next after its passage.

**§ 1134. Additional provisions in state law.**

Three sections of the Uniform State Law which were not re-enacted in the Federal Statute are here appended.

**Section 10.—[ACCEPTANCE OF BILL INDICATES ASSENT TO ITS TERMS.]** Except as otherwise provided in this act, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy.<sup>23</sup>

**Section 40.—[FORM OF THE BILL AS INDICATING RIGHTS OF BUYER AND SELLER.]** Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows:

(a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

(b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods.

<sup>22</sup> This section is not in the Uniform State Law.

<sup>23</sup> See *supra*, § 90b, for the common law upon this section.



But if, except for the form of the bill, the property have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be on the purpose of securing performance by the buyer of his obligations under the contract.

(c) Where by the bill the goods are deliverable in the order of the buyer or of his agent, but possession of the goods is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(d) Where the seller draws on the buyer for the price of the goods and transmits the draft and bill together to the buyer to obtain acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. However, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein or of the goods, without notice of the facts making the transaction wrongful.

**Section 41.—[DEMAND, PRESENTATION OR SIGHT DRAFT MUST BE PAID, BUT DRAFT ON MORE THAN THREE DAYS' TIME MERELY ACCEPTED, BEFORE BUYER IS ENTITLED TO THE ACCOMPANYING BILL.]**  
Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested in the goods shall be justified in assuming:

(a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive and retain the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order.<sup>94</sup>

<sup>94</sup> At common law a time draft attached to a bill of lading indicated, in the absence of instructions that the bill of lading was to be surrendered on acceptance of the draft; but if a demand draft was thus attached the

bill of lading was not to be surrendered until the draft was paid. See *National Bank of Commerce v. Merchants' Bank*, 91 U. S. 92, 23 L. Ed. 208; *Walters v. Western R. R.*, 63 Fed. 391, 392; *Williston, Sales*, § 290.

## CHAPTER XXXIII

### BILLS OF EXCHANGE AND PROMISSORY NOTES

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### § 1135. Law governing negotiable instruments.

A bill of exchange or a promissory note constitutes a formal contract or set of contracts. An instrument in order to come within the principles which govern the subject, must be made in conformity with certain precise rules. Otherwise it is a simple contract in writing and merely evidence of such intangible rights as may have been created by the assent of the parties. If, however, the rules are duly observed the document is itself the contract. It is a mercantile specialty.<sup>1</sup>

<sup>1</sup>See *supra*, § 221. The word that lack of consideration or value "specialty" contains no implication may not be a defence to the instrument.

A bill or note may be negotiable or non-negotiable, but it is especially in regard to negotiable bills and notes that the custom of merchants and the law based thereon becomes applicable. The custom of merchants is sometimes spoken of as if it was something distinct from the common law, but in fact the particular customs governing negotiable instruments have become part of the common law and only to the extent that customs of merchants are adopted into the common law can they have any legal importance.

Most of the principles governing negotiable instruments can be stated in the form of precise rules. Hence the subject lends itself readily to codification and it has been codified both in England and the United States. The Bills of Exchange Act which was passed in 1882, codifies the law of England; and the Uniform Negotiable Instruments Law, so called, has been enacted in almost every one of the United States.<sup>2</sup> This statute does not apply to non-negotiable bills and notes.<sup>3</sup> It does, however, apply to negotiable bonds,<sup>4</sup> for the rule of the common law denying the possibility of negotiability to an instrument under seal<sup>5</sup> has been repealed by the statute. The text of the statute is here appended as a statement of the law governing negotiable instruments. In some States variations have been made in the statute as originally drafted, and the more important of these are indicated in the notes. As the statute is intended in the main as a codification of previously existing common law, it will be construed, unless a contrary intention appears, as restating that law.

Annotations to the various sections and comment upon them will illustrate and amplify the words of the statute.

There are numerous possible personal defences (see *infra*, § 1158) and lack of consideration or value is one of them.

<sup>2</sup> It has not yet been enacted in Georgia.

<sup>3</sup> See *Windsor Cement Co. v. Thompson*, 86 Conn. 511, 86 Atl. 1; *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23.

<sup>4</sup> *Montvale v. People's Bank*, 74 N. J. L. 464, 67 Atl. 67.

<sup>5</sup> This rule had previously been broken in upon by judicial decision, holding bonds payable to bearer negotiable. *Goodwin v. Roberts*, L. R. 10 Ex. 337; *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Chase Nat. Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164, 35 L. R. 605.

**§ 1136. The Uniform Negotiable Instruments Law—general rules governing form of instrument.**

**TITLE I**

**NEGOTIABLE INSTRUMENTS IN GENERAL**

**ARTICLE I**

**FORM AND INTERPRETATION**

**Section 1.—[FORM OF NEGOTIABLE INSTRUMENT.]**  
An instrument to be negotiable must conform to the following requirements:—

- (1) It must be in writing and signed by the maker or drawer;<sup>6</sup>
- (2) Must contain an unconditional promise or order to pay a sum certain in money;<sup>7</sup>
- (3) Must be payable on demand, or at a fixed or determinable future time;
- (4) Must be payable to order or to bearer; and
- (5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.<sup>8</sup>

<sup>6</sup> It may be signed in pencil or by mark or symbol. *Brown v. Butchers'*, etc., Bank, 6 Hill, 443.

<sup>7</sup> In a few States promises to deliver a stated quantity of goods are by statute made negotiable, and in many States warehouse receipts and bills of lading (which in effect contain promises to redeliver specific bailed goods) are by statute negotiable if made out to order or bearer.

<sup>8</sup> In the Wisconsin Act the following is added to this section: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by an officer thereof or any other person, and no obligation nor

instrument made by any such corporation or any officer thereof, unless expressly authorized by law to be made negotiable, shall, or shall be deemed to be negotiable, according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words 'not negotiable' shall not be plainly written, printed or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

§ 1137. Explanation of meaning of requirements stated in the preceding section.

Section 2.—[CERTAINTY AS TO SUM; WHAT CONSTITUTES.] The sum payable is a sum certain within the meaning of this act, although it is to be paid:—

- (1) With interest; or <sup>9</sup>
- (2) By stated instalments; or <sup>10</sup>
- (3) By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or <sup>11</sup>
- (4) With exchange, whether at a fixed rate or at the current rate; or
- (5) With costs of collection or an attorney's fee, in case payment shall not be made at maturity.<sup>12</sup>

Section 3.—[WHEN PROMISE IS UNCONDITIONAL.] An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:—

- (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or <sup>13</sup>
- (2) A statement of the transaction which gives rise to the instrument.

There can be no doubt that a mere statement of executed consideration for the instrument does not impair its negotiability.<sup>14</sup> But if the payment of a note is in terms con-

<sup>9</sup> See as to the effect of a provision diminishing the rate of interest from the date of the note if the note is paid at maturity. *Union Nat. Bank v. Mayfield*, (Okl. 1917), 169 Pac. 626.

<sup>10</sup> *First Nat. Bank v. Barrett*, 52 Mont. 359, 157 Pac. 951.

<sup>11</sup> In the Acts of Idaho, Iowa and North Carolina the words, "Or of interest" are omitted. See *Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

<sup>12</sup> See *supra*, § 786. In Nebraska, North Carolina and South Dakota, there are express provisions that nothing in the Act shall be construed as authorizing the enforcement of a stipulation for attorney's fees.

<sup>13</sup> See *In re Boyse*, 33 Ch. D. 612; *Union Bank v. Spies*, 151 Iowa, 178, 130 N. W. 928; *First Nat. Bank v. Lightner*, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 50 Am. Rep. 316; *Hanna v. McCrory*, 19 N. Mex. 183, 141 Pac. 996; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; *Van Tassel v. McGrail*, 93 Wash. 380, 160 Pac. 1053; *Brown v. Cow Creek Sheep Co.*, 21 Wyo. 1, 126 Pac. 886.

<sup>14</sup> *Slaughter v. Bank of Bisbee*, 17 Ariz. 484, 154 Pac. 1040; *Newbury v. Wentworth*, 218 Mass. 30, 105 N. E. 626 ("value received, per terms of

ditional on the performance of an executory promise or requested act, in consideration of which the note was given, the note seems clearly non-negotiable.<sup>14a</sup> A majority of courts hold that negotiability of the instrument is not affected by the mere fact that it recites an executory consideration without any statement that payment is conditional on the subsequent performance of the executory consideration; and that such recital will not deprive the indorsee of the character of a holder in due course unless he also has notice of the breach of the executory agreement before acquiring the note, in which event he cannot recover.<sup>14b</sup> A note reciting that it was given for a chattel, title to which is reserved by the payee until payment, is negotiable.<sup>14c</sup>

contract"); *Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643; *Merchants Bank v. Santa Maria Sugar Co.*, 162 N. Y. App. Div. 248, 147 N. Y. S. 498, ("for the amount of the second instalment agreed on of a crane purchased this date"); *Waterbury-Wallace Co. v. Ivey*, 99 N. Y. Misc. 260, 163 N. Y. S. 719; *First Nat. Bank v. Sullivan*, 66 Wash. 375, 119 Pac. 820, Ann. Cas. 1913 C. 930. See also *Postal Telegraph-Cable Co. v. Citizens' Nat. Bank*, 228 Fed. 601; *Val Plats Brewing Co. v. Interstate Ice, etc. Co.*, 161 Mo. App. 531, 143 S. W. 542.

<sup>14a</sup> *Equitable Trust Co. v. Harger*, 258 Ill. 615, 102 N. E. 209 (cf. *Equitable Trust Co. v. Taylor*, 146 N. Y. App. D. 424, 131 N. Y. S. 475); *Pope v. Lumber Co.*, 162 N. C. 206, 76 S. E. 65. ("This note is for part of the purchase price of timber conveyed . . . by deed of even date herewith . . . and is subject to the provisions of the deed.")

<sup>14b</sup> *Porter v. Steel Co.*, 122 U. S. 267, 30 L. Ed. 1210, 7 Sup. Ct. 1206; *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Jennings v. Todd*, 118 Mo.

296, 24 S. W. 148, 40 Am. St. Rep. 373; *Rublee v. Davis*, 33 Neb. 779, 51 N. W. 135, 29 Am. St. Rep. 509. A few decisions hold the contrary. Thus in *Sumter County State Bank v. Hays*, 68 Fla. 473, 67 So. 109, where a negotiable note was given and indorsed by the payee to plaintiff bank and it appeared from extrinsic facts that it was given in consideration of an executory promise and the bank acquired the note with knowledge of this, but before there was a breach of the promise, it was held that the indorsee was not a holder in due course, even though the indorsee did not know of the subsequent breach. And in *Heard v. Shedden*, 113 Ga. 162, 38 S. E. 387, where the consideration was an insurance policy not yet issued, a purchaser who took the note with notice that policy had not yet been issued, was held to take the risk of possible failure of the company to issue such a policy as was applied for. See further, *infra*, § 1157, n. 44 a. See also *Sacred Heart Church Bg. Comm. v. Manson* (Ala.), 82 So. 498; *Continental Bank &c. Co. v. Times Pub. Co.*, 142 La. 209, 76 So. 612, L. R. A. 1918 B. 632.

<sup>14c</sup> *Ex parte Bledsoe*, 180 Ala. 586, 61 So. 813; *Citizen's Nat. Bank v. Bucheit*,



But an order or promise to pay out of a particular fund is not unconditional.<sup>15</sup>

**Section 4.—[DETERMINABLE FUTURE TIME; WHAT CONSTITUTES.]** An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:—

- (1) At a fixed period after date or sight; or
- (2) On or before a fixed or determinable future time specified therein; or<sup>16</sup>

14 Ala. App. 511, 71 So. 82; Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214. But see Worden Grocer Co., v. Blanding, 101 Mich. 254, 126 N. W. 212, which followed the Massachusetts case (decided before the enactment of the Negotiable Instruments Law) of Sloan v. McCarty, 134 Mass. 245, holding such a note non-negotiable. See also Fleming v. Sherwood, 24 N. Dak. 144, 139 N. W. 101, 43 L. R. A. (N. S.) 945; Reynolds v. Vint, 73 Oreg. 528, 144 Pac. 526; Western Farquhar Mach. Co. v. Burnett, 82 Oreg. 174, 161 Pac. 384.

<sup>15</sup> See National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428. Such an order is in effect an assignment. See *supra*, § 425.

<sup>16</sup> See State Bank v. Bilstad, 162 Ia. 433, 136 N. W. 204, 49 L. R. A. (N. S.) 132; Des Moines Savings Bank v. Arthur, 163 Ia. 205, 143 N. W. 556, Ann. Cas. 1916 C. 498; Fisher v. O'Hanlon, 93 Neb. 529, 141 N. W. 157; Empire Nat. Bank v. High Grade Oil Ref. Co., 260 Pa. 255, 103 Atl. 602; Bright v. Offield, 81 Wash. 442, 143 Pac. 159. But cf. Pierce v. Talbot, 213 Mass. 330, 100 N. E. 553, where the court failed to give effect to what seems the natural meaning of the statute.

A note payable in five years and adding "due if ranch is sold or mortgaged" is not rendered non-negotiable

by these words, which are not self-executing, but give the holder an option. Nickell v. Bradshaw (Oreg.), 183 Pac. 12.

In speaking of provisions in notes providing for their extension at maturity, the court in Cedar Rapids Nat. Bank v. Weber, 180 Iowa, 966, 164 N. W. 233, 235, L. R. A. 1918 A. 432, after citing numerous decisions, said: "We gather from the great weight of authority that, where the provision of the note amounts to an agreement by the parties to the note for an extension to an indefinite time, the negotiability of the instrument is thereby destroyed. The language of the note in suit contains a provision by which the maker, payee, sureties, indorsers, and guarantors consent to an extension of time of payment. This language is binding upon the payee, the holder, and the maker. If the maker demands an extension of time, by the terms of the instrument the payee has consented thereto. The failure of the parties to fix a time to which the payment might be extended renders the same uncertain. The language used is not susceptible of any other interpretation. Certainty is required by the Negotiable Instruments Law, and by the exigencies and usages of commercial business. While the rule adopted by the Supreme Court of New Mexico, and possibly in some other jurisdictions, although none of the other cases cited *supra* so

(3) On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.<sup>17</sup>

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.<sup>18</sup>

hold, is *contra*, we believe that the language and spirit of the statute can be applied in the case at bar only by holding the instruments in question uncertain as to the time of payment and non-negotiable.

"The conflict in the holdings of the several courts in the several cases cited is more apparent than real. In most of them in which the note was held negotiable it was quite apparent that the language used was not sufficient to make out a binding obligation upon the payee or holder to grant an extension."

"Thus a note payable a fixed time after death of a named person may be negotiable. *McClenathan v. Davis*, 149 Ill. App. 654; *Keeler v. Hiles' Est.* (Neb.), 172 N. W. 363. Otherwise of a note payable a fixed time after an event not certain to happen. *Rice v. Rice*, 43 N. Y. App. Div. 458, 60 N. Y. S. 97. It has been held by two courts that a note containing a stipulation that the indorsers thereon consent to an extension of time of maturity prevents negotiability. *Union Stock Yards Nat. Bank v. Bolan*, 14 Ida. 87, 93 Pac. 508, 125 Am. St. Rep. 146; *Roseville State Bank v. Heslet*, 84 Kans. 315, 33 L. R. A. (N. S.) 738. The contrary decisions, however, seem clearly sound, *Longmont Nat. Bank v. Loukonen*, 53 Col. 489, 127 Pac. 947, Ann. Cas. 1914 B. 208; *Stitzel v. Miller*, 157 Ill. App. 390; *Farmer v. Bank of Graettinger*, 130 Ia. 469, 107 N. W. 170; *First Nat. Bank v. Buttery*, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878; *DeGroat v. Focht*, 37 Okl. 267, 131 Pac. 172; since the

stipulation does not of itself change the date of maturity in the instrument.

A stipulation permitting the holder to enter judgment whether a note is due or not, has been held to make uncertain its time of maturity. *Volk v. Shoemaker*, 229 Pa. 407, 78 Atl. 933; *First Nat. Bank v. Russell*, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913 A. 203; *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678. See also *Iowa Nat. Bank v. Carter*, 144 Ia. 715, 123 N. W. 237 (*cf.* *Des Moines Sav. Bank v. Arthur*, 163 Ia. 205, 143 N. W. 556, Ann. Cas. 1916 C. 498); *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912 D. 1; *Reynolds v. Vint*, 73 Oreg. 528, 144 Pac. 526; *Western Farquhar Mach. Co. v. Burnett*, 82 Oreg. 174, 161 Pac. 384; *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 870. Even such a note, however, seems within the broad language of the Statute since it is payable "before a fixed . . . future time," and apart from the implied prohibition in Sec. 5 (2) of a stipulation allowing confession of judgment before maturity, might be thought to be negotiable. See *Smith v. Nelson Land & Co.*, 212 Fed. 56, 128 C. C. A. 512; *Schmidt v. Pegg*, 172 Mich. 159, 137 N. W. 524; *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159.

<sup>18</sup> See *Berenson v. London, etc., Ins. Co.*, 201 Mass. 172, 87 N. E. 687; *Tisdale Lumber Co. v. Piquet*, 153 N. Y. App. Div. 266, 137 N. Y. S. 1021. In the Wisconsin Act instead of the last paragraph, the following

§ 1138. Possible additions or omissions.

**Section 5.—[ADDITIONAL PROVISIONS NOT AFFECTING NEGOTIABILITY.]** An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.<sup>19</sup> But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:—

(1) Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or <sup>20</sup>

(2) Authorizes a confession of judgment if the instrument be not paid at maturity; or

(3) Waives the benefit of any law intended for the advantage or protection of the obligor; or

(4) Gives the holder an election to require something to be done in lieu of payment of money.<sup>21</sup>

But nothing in this section shall validate any provision or stipulation otherwise illegal.<sup>22</sup>

is inserted: “(4) At a fixed period after the date or sight, though payable before then on a contingency. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, except as herein provided.”

<sup>19</sup> *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828 (*Cf. National Salt Co. v. Ingraham*, 143 Fed. 805, 74 C. C. A. 479); *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159.

<sup>20</sup> Provisions in collateral notes by which the maker engages to deposit additional collateral, have been held to destroy negotiability. *Holliday State Bank v. Hoffman*, 85 Kans. 71, 35 L. R. A. (N. S.) 390; *Hibernia Bank v. Dresser*, 132 La. Ann. 532, 61 So. 561; *Empire Nat. Bank v. High Grade Oil Ref. Co.*, 260 Pa. 255, 103 Atl. 602. Contrary decisions are: *Kobey v. Hoffman*, 229 Fed. 486, 143 C. C. A. 554; *Finley v. Smith*, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915 F. 777. See also *Kennedy v. Brod-*

*erick*, 216 Fed. 137, 132 C. C. A. 381; On the one hand it seems clear that there is an additional promise in such a note, but on the other hand it may be urged that the promise is subsidiary and in aid of the object of securing payment at maturity.

<sup>21</sup> *Pratt v. Higginson*, 230 Mass. 256, 119 N. E. 661.

<sup>22</sup> In the Illinois Act, the words “under this Act,” are added at the end of the first sentence. The effect of this insertion is that the peculiar law previously in force in Illinois allowing negotiability to promises for the delivery of other things than money still remains in force after the enactment of the Negotiable Instruments Law. In the Illinois Act, also the words “if the instrument be not paid at maturity,” are omitted from subsection (2). In the Kentucky Act subsection (3) is omitted. In the Wisconsin Act the words: “or authorize the waiver of exemptions from execution,” are added at the end of the section.

**Section 6.—[OMISSIONS; SEAL; PARTICULAR MONEY.]** The validity and negotiable character of an instrument are not effected by the fact that:—

- (1) It is not dated; or <sup>23</sup>
- (2) Does not specify the value given, or that any value has been given therefor; or
- (3) Does not specify the place where it is drawn or the place where it is payable; or
- (4) Bears a seal; or
- (5) Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.<sup>24</sup>

<sup>23</sup> *Bank of Houston v. Day*, 145 Mo. App. 410, 122 S. W. 756; *Church v. Stevens*, 56 N. Y. Misc. 572, 107 N. Y. S. 310.

<sup>24</sup> In the Illinois Act the following words are inserted at the beginning of subsection (5): "Is payable in current funds: or," and that Act also does not contain the final paragraph of the section. Prior to the passage of the Negotiable Instruments Law there was considerable litigation on the question whether an instrument payable in currency or in current funds was negotiable. Some courts held that currency or current funds meant the money or legal tender that was current, and therefore, that the instrument was negotiable. *Bull v. Bank of Kaason*, 123 U. S. 105, 31 L. Ed. 97, 8 Sup. Ct. 62, *Hatch v. First Nat. Bank*, 94 Me. 348, 47 Atl. 908; *Keith v. Jones*, 9 Johns. 120. Other courts held that currency or current funds meant, what was current as money (that is, used as such) whether, in fact, it was money or not. *Huse v. Hamblin*, 29 Iowa, 501. The former meaning is supported by the weight of authority, but this is probably due chiefly to the unfortunate practical consequences of

a contrary holding, for the latter meaning seems the true sense of the words, and under that meaning if it is requisite that a negotiable instrument shall be payable in money, an instrument payable in currency or current funds is not negotiable. *Wright v. Hart's Adm.*, 44 Pa. 454. It is probable that the Negotiable Instruments Law was meant to settle this controversy when it provided that an instrument is negotiable though it designates a particular kind of current money in which payment is to be made. But it cannot be said that those words do settle the controversy. Undoubtedly a note payable in a particular kind of current money, *e. g.*, gold coin, is negotiable; *Chrysler v. Renois*, 43 N. Y. 209; but the words "current money" do not seem the equivalent of "currency or current funds," if the latter words are understood to mean what is used as money whether it is really money or not. The Supreme Court of Iowa, indeed, following earlier authorities, has held that a check payable in current funds is not payable in money and is therefore not negotiable. *Dille v. White*, 132 Ia. 327, 109 N. W. 909,

§ 1139. When payable on demand, to order, or to be

Section 7.—[WHEN PAYABLE ON DEMAND.]  
Instrument is payable on demand—(1) Where it is expressed to be payable on demand or at sight, or on presentation;  
(2) In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

An instrument payable "on demand after date" is payable on demand.<sup>26</sup>

Section 8.—[WHEN PAYABLE TO ORDER.]  
Instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order; or may be drawn payable to the order of:

- (1) A payee who is not maker, drawer, or drawee;
- (2) The drawer or maker; or
- (3) The drawee; or
- (4) Two or more payees jointly; or
- (5) One or some of several payees; or <sup>27</sup>
- (6) The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.<sup>28</sup>

10 L. R. A. (N. S.) 510. Contrary decisions under the statute are: *Millikan v. Security Trust Co.*, (Ind. 1918), 118 N. E. 568; *Merchants' Nat. Bank v. Santa Maria Sugar Co.*, 162 N. Y. App. D. 248, 147 N. Y. S. 498. The amendment in Illinois makes the matter clear and might well be adopted elsewhere.

<sup>26</sup> By the common law a sight-draft was entitled to three days of grace, *Daniel, Neg. Inst.*, § 617; a demand draft was not. The Negotiable Instruments Law by abolishing days of grace (section 85) destroys any distinction between demand paper and sight paper, and therefore classifies sight paper as a kind of demand

paper. By amendment to the statute, however, in Massachusetts, Hampshire and North Carolina, sight draft with days of grace has been restored as a separate instrument.

<sup>27</sup> *O'Neil v. Wagner*, 81 C. 22 Pac. 876; *Fenno v. Gay*, 14 118, 15 N. E. 87; *Schlesinger v. Schultz*, 110 N. Y. App. D. 383. But see *Harrison v. Dixon*, 77 N. Y. App. D. 241, 7 S. 1061.

<sup>28</sup> See *supra*, § 325.

<sup>29</sup> In the Illinois Act after section (6) is inserted: "(7) An instrument payable to the order of a deceased person shall be

**Section 9.—[WHEN PAYABLE TO BEARER.]** The instrument is payable to bearer:

- (1) When it is expressed to be so payable; or
- (2) When it is payable to a person named therein or bearer; or
- (3) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
- (4) When the name of the payee does not purport to be the name of any person; or
- (5) When the only or last indorsement is an indorsement in blank.<sup>29</sup>

The English Statute does not contain the words in subsection three of the American section nine—"and such fact was known to the person making it so payable;" and under the English cases the drawer's ignorance of the fiction is immaterial.<sup>30</sup> But if the drawer intends the instrument to be payable to a real person of the name stated in the instrument the further fact that the payee so named had no interest in the instrument will not make the instrument payable to bearer.<sup>31</sup> In the United States prior to the enactment of the Negotiable Instruments Law, the decisions had held that knowledge by the drawer of the fiction was essential in order

payable to the order of the administrator or executor of his estate." The final sentence of the section seems to qualify the general statement in Sec. 14, so far as concerns the filling in of a blank left for the name of the payee in an instrument payable to order. See *Tower v. Stanley*, 220 Mass. 429, 107 N. E. 1010. The English Bills of Exchange Act makes paper in legal effect payable to order, though the word *order* is not contained therein, unless words prohibiting transfer are contained in the instrument. This change of the common law was not adopted in the American Statute.

<sup>29</sup> In the Illinois Act subsections (3) and (5) are as follows: "(3) When

it is payable to the order of a person known by the drawer or maker to be fictitious or nonexistent, or of a living person not intended to have any interest in it." "(5) When, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

<sup>30</sup> *Clutton v. Attenborough* [1897] A. C. 90.

<sup>31</sup> *Vinden v. Hughes* [1905] 1 K. B. 795; *North & South Wales Bank v. Macbeth*, [1908] A. C. 137; *Town, etc., Co. v. Provincial Bank*, [1917] 2 Ir. Rep. 421. See also *Vagliano v. Bank of England*, 23 Q. B. D. 243; *Bank of England v. Vagliano*, [1891] A. C. 107.

to make the instrument payable to bearer,<sup>32</sup> and under the statute the same requirement is preserved.<sup>33</sup>

**Section 10.—[TERMS WHEN SUFFICIENT.]** The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

**§ 1140. Date of negotiable instrument.**

**Section 11.—[DATE, PRESUMPTION AS TO.]** Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

**Section 12.—[ANTE-DATED AND POST-DATED.]** The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.<sup>34</sup>

<sup>32</sup> *Boles v. Harding*, 201 Mass. 103, 87 N. E. 481; *Jordan v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; *Shipman v. Bank of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Armstrong v. National Bank*, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; *Chism v. Bank*, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863.

<sup>33</sup> *Los Angeles Inv. Co. v. Home Sav. Bank (Cal.)*, 182 Pac. 293; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. (N. S.) 499; *Egner v. Corn Exchange Nat. Bank*, 42 N. Y. Misc. 552, 86 N. Y. S. 107; *Jones v. People's Bank Co.*, 95 Ohio, 253, 116 N. E. 34; *Weishaas v. Pendleton*, 73 Oreg. 190, 144 Pac. 401. As to what is a fictitious payee, see *United States v. Chase Nat. Bank*, 250 Fed. 105, 162 C.

C. A. 277; *Soekland v. Storch*, 123 Ark. 253, 185 S. W. 262, Ann. Cass. 1918 A. 668, 250; *Bartlett v. First Nat. Bank*, 247 Ill. 490, 93 N. E. 337; *Jordan v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) Trust Company of Am. v. Hamilton Bank, 127 N. Y. App. D. 515, 112 N. Y. S. 84; *Hartford v. Greenwich Bank*, 157 N. Y. App. D. 448, 142 N. Y. S. 387, 215 N. Y. 726, 109 N. E. 1077; *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 599, 78 Atl. 876, 128 Am. St. Rep. 780; *Litchfield Shuttle Co. v. Cumberland Valley Nat. Bank*, 134 Tenn. 379, 183 S. W. 1006.

<sup>34</sup> A post-dated instrument may be negotiated before its date, and one who so takes it for value and in good faith is not thereby put on inquiry and is a holder in due course. *Triphonoff v. Sweeney*, 65 Oreg. 299, 130 Pac. 979; *Albert v. Hoffman*, 64 N. Y. Misc. 87, 117 N. Y. S. 1043. See also *Royal*

**Section 13.—[WHEN DATE MAY BE INSERTED.]**  
Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.<sup>35</sup>

**§ 1141. Filling blanks in instruments.**

**Section 14.—[BLANKS; WHEN MAY BE FILLED.]**  
Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.<sup>36</sup>

*Bank v. Tottenham*, [1894] 2 Q. B. 715; *Hitchcock v. Edwards*, 60 L. T. 636; *American Agricultural Chem. Co. v. Scrimger*, 130 Md. 389, 100 Atl. 774, L. R. A. 1917 F. 394. But a bank which pays before its date a post-dated check drawn by a depositor, is acting without authority, and will be liable to its customer if it dishonors other checks drawn by him presented before the date of the post-dated check, if there would have been sufficient funds

had the post-dated check not been paid. *Smith v. Maddox-Rucker Banking Co.*, 135 Ga. 151, 68 S. E. 1031.

<sup>35</sup> See *Bank of Houston v. Day*, 145 Mo. App. 410, 122 S. W. 756; *Holman v. Higgins*, 134 Tenn. 387, 183 S. W. 1008, L. R. A. 1916 F. 1263, Ann. Cas. 1917 E. 515.

<sup>36</sup> In the Illinois Act the words "issued or" are inserted before "negotiated" in the last sentence. In the Wisconsin Act the words "prior to



The right given by this section where an instrument is wanting "in any material particular" covers a case where an instrument wanting in many material particulars is made complete in form,<sup>36a</sup> and the right is not confined to the filling of such blanks as may be necessary to make the paper a negotiable instrument, but includes the filling of any blank with appropriate words.<sup>37</sup> Prior to the passage of the Negotiable Instruments Law it was open to question in the United States whether a purchaser in good faith of an incomplete instrument might not recover if he filled out the note in accordance with the statement of authority made by the person from whom he bought the instrument even though such statement was false. There is no doubt, however, now, that the purchaser must find out at his peril the authority of the person in possession of the incomplete instrument.<sup>38</sup> On the other hand, if the instrument is completed though fraudulently and without authority, the statute makes it clear that a holder in due course may recover.<sup>39</sup> The case where the holder takes the instrument after the blanks have been filled in but knowing there had been blanks is not expressly covered by the statute. So far as the decisions go, however, they seem to indicate that the purchaser knowing of the previous existence of blanks is bound at his peril to ascertain the limits of his authority to fill them in.<sup>40</sup>

This seems an undesirable result, and one not required by

negotiation" are inserted before the words "by filling;" and the words "prima facie" in the middle of the section are omitted.

<sup>36a</sup> *Linthicum v. Bagby*, 131 Md. 644, 102 Atl. 997.

<sup>37</sup> *Howard Nat. Bank v. Arbuckle*, (Vt. 1917), 102 Atl. 477 ("four months" inserted in a blank before "after date").

<sup>38</sup> *Herdman v. Wheeler*, [1902] 1 K. B. 361 (cp. *Lloyds Bank v. Cooke*, [1907] 1 K. B. 794); *Vander Ploeg v. Van Zuuk*, 135 Ia. 350, 112 N. W. 236, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275; *In re Philpott's Est.*, 169 Ia. 555, 151 N. W. 825, Ann. Cas.

1917 B. 839; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. 426; *Stone v. Sargent*, 220 Mass. 445, 107 N. E. 1014; *Hartington Nat. Bank v. Breslin*, 88 Neb. 47, 128 N. W. 659; *Hunter v. Allen*, 127 N. Y. App. Div. 572, 111 N. Y. S. 820; *Equitable Trust Co. v. Lyons*, 72 N. Y. Misc. 49, 129 N. Y. S. 79.

<sup>39</sup> See, e.g., *Johnston v. Knipe*, 260 Pa. 504, 103 Atl. 957.

<sup>40</sup> *Smith v. Prosser*, [1907] 2 K. B. 735; *Dunbrow v. Gill*, 130 N. Y. S. 182, 72 N. Y. Misc. 400. Cf. *Business Men's League v. Sragow*, 153 N. Y. S. 231.

the words of the statute. The purchaser is justified in supposing that whoever filled the blank had authority to fill it as he did, since the statute gave the person in possession of the instrument *prima facie* authority to fill the blanks. Therefore the purchaser may well come within the statutory definition of a holder in due course.

The statute limits the authority of the holder to fill in a blank to a reasonable time,<sup>41</sup> but unless circumstances have made it inequitable, the writing may be reformed after the lapse of a reasonable time, so that it shall express the intention of the parties.<sup>42</sup> When the authority has once been exercised by filling in the blanks it has been held that even before negotiation of the instrument by the person authorized, an alteration of the words filled in is unauthorized and avoids the instrument.<sup>43</sup>

#### § 1142. Delivery.

**Section 15.—[INCOMPLETE INSTRUMENT NOT DELIVERED.]** Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.<sup>44</sup>

<sup>41</sup> See *Howard Nat. Bank v. Arbuckle*, (Vt. 1917), 102 Atl. 477.

<sup>42</sup> *Farmers' L. & T. Co. v. Brown*, 182 Ia. 1044, 165 N. W. 70.

<sup>43</sup> *First Nat. Bank v. Wood*, 109 S. C. 70, 95 S. E. 140. Two judges dissented, and the decision is criticised in 18 Col. L. Rev. 606, 27 Yale L. J. 951. It is opposed to the decision, made under the common law, of *Douglass v. Scott*, 8 Leigh, 43.

<sup>44</sup> This section (which is not in the English Statute) was presumably based on *Baxendale v. Bennett*, 3 Q. B. D. 525, which holds that a bona fide purchaser for value could not recover from one from whose possession a bill which he had accepted in blank had been stolen. To the same effect is

the case of *Linick v. Nutting*, 140 N. Y. App. Div. 285, 125 N. Y. S. 93 where a check signed in blank was stolen, the blanks filled, and the check negotiated to a holder in due course. In *Baxendale v. Bennett*, there seems to have been negligence, but *Bramwell, L. J.*, drew the distinction that "the defendant here has not voluntarily put into any one's hands the means, or part of the means for committing a crime." Under the American statute also, one who signs a number of blank checks and leaves them, however carelessly, in an unlocked drawer will apparently not be liable even to a holder in due course. One who entrusts such checks to another even though merely for safe-keeping, however, will be liable if the

**Section 16.—[DELIVERY: WHEN EFFECTUAL: WHEN PRESUMED.]** Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.<sup>45</sup>

This section changes the rule of the common law in providing that as against a holder in due course lack of delivery is no defence.<sup>46</sup> But as between the immediate parties or those having the same rights, it may be shown that there was no intention to transfer the property in a note made payable to the person to whom its possession was delivered, or to do so only upon a condition which has not happened.<sup>47</sup> A payee

checks are filled out and negotiated to a holder in due course; for delivery is defined in the statute (section 191) as any transfer of possession. See further on this section: *Polizzotto v. People's Bank*, 125 La. 770, 51 So. 843, 30 L. R. A. (N. S.) 206; *Holtzman v. Teague*, 172 N. Y. App. D. 75, 158 N. Y. S. 211; *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192.

<sup>45</sup> In the North Carolina Act the word "accepting" is omitted from the second sentence. In the Kansas and South Dakota Acts, the third sentence of the section is omitted, and in the latter a substituted provision is inserted. An executed note not delivered

found among the maker's effects after his death creates no obligation. *In re Bean's Est. (Pa.)*, 107 Atl. 671.

<sup>46</sup> See *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923; *Montvale v. People's Bank*, 74 N. J. L. 464, 67 Atl. 67; *Schaeffer v. Marsh*, 90 N. Y. Misc. 307, 153 N. Y. S. 96.

<sup>47</sup> *Jenkins v. National Bank (Md.)*, 106 Atl. 174; *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831; *Niblock v. Sprague*, 200 N. Y. 390, 93 N. E. 1105; *Lee v. Benjamin*, 40 R. I. 567, 102 Atl. 713; *Seattle Nat. Bank v. Becker*, 74 Wash. 431, 133 Pac. 613; *United States Ins. Co. v. Epley*, 164 Wis. 438, 160 N. W. 175.

who takes for value in good faith is not an immediate party within the meaning of the section.<sup>48</sup>

§ 1143. Ambiguous instruments.

Section 17.—[CONSTRUCTION WHERE INSTRUMENT IS AMBIGUOUS.] Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

(1) Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

(2) Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

(3) Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

(4) Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

(5) Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

(6) Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser; <sup>49</sup>

(7) Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.<sup>50</sup>

<sup>48</sup> *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N. E. 605, L. R. A. 1915 B. 144. See *infra*, § 1157; also *Ex parte Goldberg*, 191 Ala. 356, 67 So. 839, L. R. A. 1915 F. 1155.

<sup>49</sup> See *Iron City Nat. Bank v. Rafferty*, 207 Pa. 238, 56 Atl. 445; *Moore v. Carey*, 138 Tenn. 332, 197 S. W. 1093, L. R. A. 1918 D. 963; *Germania*

*Nat. Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

<sup>50</sup> See *Lewenstein v. Forman*, 223 Mass. 325, 111 N. E. 962, also *supra*, § 324. In the North Carolina Act, subsection (2) is omitted. In the Wisconsin Act is added: "(8) Where several writings are executed at or about the same time, as parts of the

§ 1144. Signature.

Section 18.—[LIABILITY OF PERSON SIGNING IN TRADE OR ASSUMED NAME.] No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.<sup>51</sup>

Section 19.—[SIGNATURE BY AGENT; AUTHORITY; HOW SHOWN.] The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.<sup>52</sup>

Section 20.—[LIABILITY OF PERSON SIGNING AS AGENT, ETC.] Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.<sup>53</sup>

The purpose of this section seems to be to change (if the signer was duly authorized and his principal disclosed on the instrument) the law by which signatures of those who sign in a representative character have been held in many cases to bind the signers personally even though they were authorized to sign on behalf of another,<sup>54</sup> and the courts seem generally disposed to construe the section as effecting this change.<sup>55</sup>

same transactions, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

<sup>51</sup> See *First Nat. Bank v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582; *New York L. Ins. Co. v. Martindale*, 75 Kans. 142, 88 Pac. 559, 121 Am. St. 362; *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 86 Pac. 845, 117 Am. St. 1064.

<sup>52</sup> See *In re Chismore's Est.*, 166 Ia. 217, 147 N. W. 297; *Grant County*

*State Bank v. Northwestern Land Co.*, 28 N. Dak. 479, 150 N. W. 736. In the Kentucky Act instead of this section it is provided that: "The signature of any party may be made by an agent duly authorized in writing." See *Finley v. Smith*, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915 F. 777.

<sup>53</sup> In the Virginia Act after the word "capacity" the words "without disclosing his principal" are inserted.

<sup>54</sup> See *supra*, §§ 298, 299, 311, 312.

<sup>55</sup> *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878; *Chelsea Exch. Bank v.*

The words "if he was duly authorized" seem to carry the implication that if unauthorized the agent is not merely liable for breach of a non-negotiable warranty,<sup>56</sup> but liable on the instrument itself.<sup>57</sup>

**Section 21.—[SIGNATURE BY PROCURATION; EFFECT OF.]** A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.<sup>58</sup>

**§ 1145. Voidable or void signatures.**

**Section 22.—[EFFECT OF INDORSEMENT BY INFANT OR CORPORATION.]** The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.<sup>59</sup>

This provision presumably does not change the rule of the common law. It is not stated whether or not the transfer of the instrument may be rescinded by the corporation or infant, but in view of Section 196 of the statute the infant doubtless still retains his right of rescission.<sup>60</sup>

First &c. Church, 89 Misc. 616, 152 N. Y. S. 201; Chatham Nat. Bank v. Gardner, 31 Pa. Super. 135; Wilson v. Clinton Chapel, 138 Tenn. 398, 198 S. W. 244; Citizens' Nat. Bank v. Ariss, 68 Wash. 448, 123 Pac. 593. But see Briel v. Exchange Nat. Bank, 172 Ala. 475, 55 So. 808; Schumacher v. Dolan, 154 Ia. 207, 134 N. W. 624; Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811, 27 Yale L. J. 686.

<sup>56</sup> See *supra*, § 282; Miller v. Reynolds, 92 Hun, 400.

<sup>57</sup> Jump v. Sparling, 218 Mass. 324, 326, 105 N. E. 878. See also Daniel v. Glidden, 38 Wash. 556, 563, 80 Pac. 811, 813; Citizens' Nat. Bank v. Ariss, 68 Wash. 448, 451, 123 Pac. 593, 594. Cf. Riordan v. Thornsby, 178 Ky. 324, 198 S. W. 920; Phelps v. Weber,

84 N. J. L. 630, 87 Atl. 469; Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738; Birmingham Iron Foundry v. Regnery, 33 Pa. Super. 54, 27 Yale L. J. 686.

<sup>58</sup> See Bryant v. Banque du Peuple, [1893] A. C. 170; Morison v. London &c. Bank, [1914] 3 K. B. 356.

<sup>59</sup> In North Carolina the words "or married woman" are inserted after the word infant.

<sup>60</sup> This was so held in Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917 B. 1172. In Roach v. Woodall, 91 Tenn. 206, 18 S. W. 407, it was suggested, prior to the enactment of the statute, that an infant's indorsement was void. The statute at least makes it clear that the indorsement of an infant or of a corporation acting *ultra vires* is not absolutely void.

**Section 23.—[FORGED SIGNATURE; EFFECT OF.]**

When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Whether a forgery can subsequently be ratified or adopted without estoppel or new consideration is a question to which judicial answers are hopelessly conflicting. It is pointed out that since the forgery did not purport to be made on behalf of the person whose name was forged, there can be no ratification. This criticism is sound. The person whose signature it is may indeed adopt it, but adoption involves no fictitious relation, and to sustain recovery after adoption either consideration or estoppel should be requisite.<sup>61</sup> Called by whatever name the doctrine may be, the vital question is whether the enforcement of the instrument without this basis should be permitted.<sup>62</sup>

The right of recovery is clear not only when consideration

<sup>61</sup> See *Capps v. Hensley*, 23 Okl. 311, 100 Pac. 515; *Edwards v. Heralds of Liberty*, 263 Pa. 548, 107 Atl. 324.

<sup>62</sup> Enforcement was allowed in *Union Bank v. Middlebrook*, 33 Conn. 95; *Living v. Wiler*, 32 Ill. 387; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Fay v. Slaughter*, 194 Ill. 157, 167, 62 N. E. 592, 56 L. R. A. 564, 88 Am. St. Rep. 148; *Casco Bank v. Keene*, 53 Me. 103; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass. 157; *Central Bank v. Copp*, 184 Mass. 328, 68 N. E. 334; *Fitzpatrick v. School Commrs.*, 7 Humph. 224, 46 Am. Dec. 76; *Marks v. Schram*, 109 Wis. 452, 84 N. W. 830. See also *Campbell v. Campbell*, 133 Cal. 33, 65 Pac. 134; *Ofenstein v. Bryan*, 20 App. D. C. 1; *Smith v. Tramel*, 68 Ia. 488, 27 N. W.

471; *Myer v. Wegener*, 114 Ia. 74, 86 N. W. 49; *Carthage Bank v. Butterbaugh*, 116 Ia. 657, 88 N. W. 954; *Forsythe v. Bonta*, 5 Bush, 547. On the other hand, the adoption was held invalid in *Brook v. Hook*, L. R. 6 Ex. 89; *Barry v. Kirkland*, 6 Ariz. 1, 52 Pac. 771; *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613 (but see *Neal v. First Bank*, 26 Ind. App. 503); *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754; *Workman v. Wright*, 33 Oh. St. 405, 31 Am. Rep. 546; *McHugh v. County of Schuylkill*, 67 Pa. 391, 5 Am. Rep. 445; *Shisler v. Vandike*, 92 Pa. 447, 37 Am. Rep. 702; *Henry, etc., Assoc. v. Walton*, 181 Pa. 201, 37 Atl. 261.

is given, but also when the acknowledgement of the forged signature takes place before the purchase of the instrument in question, and is an inducement to such purchase. Here there is an assertion of fact and an estoppel to deny it.<sup>63</sup>

Other circumstances besides the purchase of the forged instrument on the faith of a representation may afford ground for an estoppel. Thus where a customer of a bank has negligently failed for a long period to examine cancelled checks and discover a forgery, as he would have by such examination, he is estopped afterwards to assert his claim against the bank which has been deprived of the means to protect itself by recovery over against another.<sup>64</sup> Under the statute "precluded" perhaps fairly implies that something in the nature of an estoppel is necessary.<sup>65</sup>

## § 1146. Consideration and value.

### ARTICLE II

#### CONSIDERATION

##### Section 24.—[PRESUMPTION OF CONSIDERATION.]

Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.<sup>66</sup>

<sup>63</sup> As to the circumstances sufficient to create an estoppel, see *Terry v. Bissell*, 26 Conn. 23, 41; *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 45 N. E. 923, 36 L. R. A. 539, 57 Am. St. Rep. 458; *Crout v. DeWolf*, 1 R. I. 393; *Pettyjohn v. National Exchange Bank*, 101 Va. 111, 43 S. E. 203.

<sup>64</sup> *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. Ed. 811, 6 Sup. Ct. 657; *California Vegetable Union v. Crocker Nat. Bank*, (Calif. 1918), 174 Pac. 920. Cf. *Hamblins Wisard Oil Co. v. United States Express Co.*, 265 Ill. 156, 106

N. E. 623, and see 32 Harv. L. Rev. 287.

<sup>65</sup> See *Catskill Nat. Bank v. Leasher*, 84 N. Y. Misc. 523, 147 N. Y. S. 641; *Gluckman v. Darling*, 85 N. J. L. 457, 89 Atl. 1016; *Olgard v. Lemke*, 32 N. Dak. 551, 156 N. W. 102; *Denison v. Gholson Dry Goods Co.*, 135 Tenn. 60, 185 S. W. 723.

<sup>66</sup> A renewal note is no more binding than the original note if that was not supported by valuable consideration. *Seager v. Drayton*, 217 Mass. 571, 105 N. E. 461, and see *supra*, § 115.



In this and the following sections the statute includes with identical treatment two questions not previously regarded as identical by the common law:—

(1) How far consideration is necessary to support the several promises on negotiable instruments; and when consideration is necessary what is its essence?

(2) What "value" must be given by the transferee of an instrument in order to constitute him a purchaser for value, or holder in due course?

The law prior to the statute was perfectly clear in regard to the first question. Between immediate parties the same kind of consideration was necessary as is essential to support any contractual promise.<sup>67</sup> On the second question, however, the law was in conflict as will appear from the comment on the following section of the statute.

**Section 25.—[CONSIDERATION, WHAT CONSTITUTES.]** Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.<sup>68</sup>

An obvious purpose of this section was to settle the conflict of decisions in regard to the value essential to constitute a transferee a purchaser for value or holder in due course. Prior to the enactment of the statute it was held in New York that one to whom negotiable paper was transferred either in payment of, or as security for an antecedent debt was not a purchaser for value; and a minority of States followed this rule, especially where the instrument was given only for security.<sup>69</sup> The statute clearly adopts the rule of the greater number of

<sup>67</sup> See *supra*, § 108.

<sup>68</sup> See *supra*, § 108. In the Wisconsin Act the words "discharged, extinguished or extended" are inserted after the word "debt," and at the end of the section is added: "But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agree-

ment at the time of delivery, by the maker, does not constitute value." The definition of value in the Negotiable Instruments Law is adopted in substance in the subsequent Uniform Commercial Acts on Sales, Bills of Lading and Warehouse Receipts.

<sup>69</sup> See 1 Ames, Bill and Notes, 650, n. 667 n.; Daniel Neg. Inst., §§ 184, 820.

courts prior to its enactment so far as concerns the discharge of an antecedent debt,<sup>69</sup> and though it is not clearly stated that taking as security for an antecedent debt is also giving value, where neither extension nor forbearance is promised by the creditor, the decisions under the statute seem to treat a transferee as giving value regardless of whether he takes the instrument in payment of, or as security for an antecedent debt.<sup>70</sup>

If, however, the same rule is to be applied to the enforcement of the promises between immediate parties to an instrument, a note given as security for the unmatured debt of another, or an indorsement on the unmatured note of another after its discount by the holder, is supported by sufficient consideration—a result certainly at variance with the law as it existed before the enactment of the statute.<sup>71</sup> Whether the courts will accept this conclusion is perhaps not yet wholly clear, but from such decisions as have been made it seems very unlikely.<sup>72</sup>

<sup>69</sup> The New York Court of Appeals recognizes this change in the law of New York. *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364.

<sup>70</sup> *Scherer v. Everest*, 168 Fed. 822, 94 C. C. A. 346; *Melton v. Pensacola Bank*, 190 Fed. 126, 111 C. C. A. 166; *Vogler v. Manson*, (Ala. 1917), 76 So. 117; *Crystal River Lumber Co. v. Consolidated Naval Stores Co.*, 63 Fla. 119, 58 So. 129; *Voss v. Chamberlain*, 139 Ia. 569, 179 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331; *State Bank v. Bilsted*, 162 Ia. 433, 136 N. W. 204, 49 L. R. A. (N. S.) 132; *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1; *Burnes v. New Mineral Fertilizer Co.*, 218 Mass. 300, 105 N. E. 1074; *Graham v. Smith*, 155 Mich. 65, 118 N. W. 726; *Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643; *First Nat. Bank v. McGrath*, 111 Miss. 872, 72 So. 701; *Central Bank v. Lyda*, (Mo. App. 1916), 191 S. W. 245; *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364; *King v.*

*Bowling Green Trust Co.*, 145 N. Y. App. Div. 398, 402, 129 N. Y. S. 977. *Brewster v. Shrader*, 26 N. Y. Misc. 480, 57 N. Y. S. 606; *Manufacturing Co. v. Summers*, 143 N. C. 102, 55 S. E. 522; *Smathers v. Toxaway Hotel Co.*, 162 N. C. 346, 78 S. E. 224; *Second Nat. Bank v. Werner*, 19 N. Dak. 485, 126 N. W. 100; *Crane v. Hall* (Tenn.), 213 S. W. 414; *Helper State Bank v. Jackson*, 48 Utah, 430, 160 Pac. 287; *American Bank v. McComb*, 105 Va. 473, 54 S. E. 14; *German-American Bank v. Wright*, 85 Wash. 460, 145 Pac. 769, Ann. Cas. 1917 D. 381. For the cases deciding whether taking chattel property as payment or security for an antecedent debt is a taking for value, see *Williston, Sales*, § 620.

<sup>71</sup> See *supra*, § 108.

<sup>72</sup> In the following cases where the Negotiable Instruments Law was applicable, the promise was held *nudum pactum*. *Zadek v. Forcheimer*, (Ala. App. 1918), 77 So. 941; *American Multigraph Sales Co. v. Grant*, 135

Whatever may ultimately be decided where the merely accepts an instrument or signature as security agreement to forbear or to extend the time of pay the debt of another is unquestionably sufficient consideration to support a promise on a negotiable instrument,<sup>73</sup> as it would be sufficient to support an informal promise;

Minn. 208, 160 N. W. 676; *Schaus v. Henry*, 89 N. J. L. 607, 99 Atl. 188; *Roseman v. Mahony*, 86 N. Y. App. D. 377, 83 N. Y. S. 749; *Rogowski v. Brill*, 131 N. Y. S. 589; *Wetmore & Morse Granite Co. v. Ryle* (Vt.), 107 Atl. 109. In *Holmes v. Webb*, 166 Wis. 280, s. c. *sub nom.* *Holmes v. Wisconsin Grain & Co.*, 164 N. W. 1007, though a majority of the court held that lack of consideration had not been proved since it did not appear that the antecedent debt had not been extended, they implied that otherwise recovery could not be allowed. The words of the Wisconsin statute, however, differ from the standard form of the Uniform Law.

In *Widger v. Baxter*, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436, a note signed by husband and wife for an antecedent debt due from the husband, which had been discharged in insolvency, was held without consideration as against the wife, the court saying, at page 132: "A wife's note, given to a third person in payment of her husband's debt, is for a valuable consideration; but a note given as security for such a debt, previously existing, is not. To make a note of the latter kind valid there must be a new consideration." The Negotiable Instruments Law though then recently enacted and applicable to the case was not cited.

In *Lowell v. Bickford*, 201 Mass. 543, 88 N. E. 1, a subsequent note given as security for an earlier indebtedness was enforced but there was clear consideration for the later note in a promise of forbearance by the

creditor. Thus the distinction in the previous case was obvious; the court made the unnecessary statement that in *Widger v. Baxter*, 130, 76 N. E. 509, 3 L. R. A. 436, "there was no preexisting debt in existence when the wife's note was given."

In *Neal v. Wilson*, 213 Mass. 100, 100 N. E. 544, a check was made good on an overdraft of a person and the drawer of the check was held liable. Here the court clearly given in satisfaction of an antecedent debt not merely as security for it, but the court said: "The defendant for the accommodation of the debtor and without consideration of his note or check to a creditor in payment of or as security for the debt due from the debtor to the creditor, he is liable to the creditor on the note or check. That is the rule in the negotiable instruments act, c. 73, § 46, which governs the case. The negotiable instruments act in regard to this is a codification of the common law." A similar statement was made in the case of *Seager v. Drake*, 105 Mass. 571, 105 N. E. 461.

<sup>73</sup> *Russell Electric Co. v. Russell*, 79 Conn. 709, 66 Atl. 531; *Mohn*, 181 Iowa, 119, 164 N. W. 1070; *Bank of Montreal v. Bee*, 81, 157 N. W. 1070; *Bank v. Oaks*, 184 Mo. App. S. W. 679; *Milius v. Kauff*, 93 N. Y. App. D. 442, 93 N. Y. S. 749; *Holmes v. Webb*, 166 Wis. 280, s. c. *sub nom.* *Holmes v. Wisconsin Grain & Co.*, 164 N. W. 1007.

<sup>74</sup> See *supra*, § 135.

the claim in question has matured, it is often possible to find facts warranting an implication of a promise of extension or forbearance.<sup>75</sup>

Merely crediting a customer with the proceeds of a discounted note for his future drawing will not constitute a bank a holder for value.<sup>76</sup> This is inconsistent with the language of section 25, though undoubtedly in accord with principle apart from the statute. The bank by its discount and credit in effect has made a promise to pay the amount with which it credits the customer. This promise would be "sufficient to support a simple contract."<sup>77</sup> Where, however, the bank permits the customer to check out the proceeds of discounted paper, there is no doubt that it is a holder for value.<sup>78</sup> And so where an obligation is incurred by the bank in reliance on the proceeds of the discount.<sup>79</sup>

If the proceeds by agreement are used to pay a debt due from the customer to the bank, the latter has indisputably given value,<sup>80</sup> but if the application was not made by agreement but by the mere exercise of the banker's lien or right of set-off the contrary conclusion has been reached in New

<sup>75</sup> See *Many v. Krueger*, 153 Ill. App. 327; *Zimbelman v. Finnegan*, 141 Ia. 358, 118 N. W. 312.

<sup>76</sup> *Tatum v. Commercial Bank*, 185 Ala. 249, 254, 64 So. 561; *City Deposit Bank v. Green*, 130 Ia. 384, 106 N. W. 942; *McNight v. Parsons*, 136 Ia. 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Merchants Nat. Bank v. Santa Maria Sugar Co.*, 162 N. Y. App. Div. 248, 147 N. Y. S. 498; *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068; *Miller v. Norton*, 114 Va. 609, 610, 77 S. E. 452. But see *contra*, *Royal Bank v. Tottenham*, [1894] 2 Q. B. 715, 717, 718; *Capital & Counties Bank v. Gordon*, [1903] A. C. 240, 245. Cf. *Gaden v. Newfoundland Sav. Bank*, [1899] A. C. 281.

<sup>77</sup> See *Marling v. Fitzgerald*, 138 Wis. 93, 120 N. W. 388, 131 Am. St. Rep. 1003.

<sup>78</sup> *National Bank v. Silke*, [1891] 1

Q. B. 435, 439; *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82; *Bland v. Fidelity Trust Co.*, 71 Fla. 499, 71 So. 630, L. R. A. 1916 F. 209; *Merchants Bank v. Santa Maria Sugar Co.*, 162 N. Y. App. Div. 248, 147 N. Y. S. 498; *Northfield Nat. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451, 12 L. R. A. (N. S.) 82.

<sup>79</sup> *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509; *Montrose Savings Bank v. Claussen*, 137 Ia. 73, 114 N. W. 547; *National Bank of Commerce v. Armbruster*, 42 Okla. 65, 140 Pac. 1190. See also *Hermann's Ex. v. Gregory*, 131 Ky. 819, 115 S. W. 809.

<sup>80</sup> *Mechanics' Bank v. Chardavoyne*, 69 N. J. L. 256, 55 Atl. 1080, 101 Am. St. Rep. 701; *Wallabout Bank v. Peyton*, 123 N. Y. App. D. 727, 108 N. Y. S. 42; *Ogle v. Armstrong* (Okla.), 155 Pac. 1139.

York.<sup>81</sup> It is not requisite that value be adequate, <sup>1</sup> one who takes paper at a large discount,<sup>82</sup> or simply for a short time to enforce a claim against a third may be a holder in due course. But a large discount evidence of bad faith when taken in connection with circumstances.<sup>84</sup>

**Section 26.—[WHAT CONSTITUTES HOLDER VALUE.]** Where value has at any time been given instrument, the holder is deemed a holder for value in to all parties who became such prior to that time.

**Section 27.—[WHEN LIEN ON INSTRUMENT STITUTES HOLDER FOR VALUE.]** Where the holder a lien on the instrument, arising either from contract implication of law, he is deemed a holder for value extent of his lien.<sup>85</sup>

**Section 28.—[EFFECT OF WANT OF CONSIDERATION.]** Absence or failure of consideration is no defense as against any person not a holder in due course and partial failure of consideration is a defence provided whether the failure is an ascertained and liquidated debt or otherwise.<sup>86</sup>

<sup>81</sup> Consolidation Nat. Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. S. 353. But see Sec. 27. The words "by implication of law" in that section would seem to require an opposite decision.

<sup>82</sup> Ham v. Merritt, 150 Ky. 11, 149 S. W. 1131; Wells v. Duffy, 69 Wash. 310, 124 Pac. 907.

<sup>83</sup> Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070.

<sup>84</sup> Harris v. Johnson, 89 Conn. 128, 93 Atl. 126.

<sup>85</sup> See Crewdson v. Shultz, 165 C. C. A. 434, 254 Fed. 24; Continental Credit Co. v. Ely, 91 Conn. 553, 100 Atl. 434; Elk Valley Coal Co. v. Third Nat. Bank, 157 Ky. 617, 163 S. W. 766; Citizens Bank v. Limpricht, 93 Wash. 361, 160 Pac. 1046. The transferee from such a lienholder may recover the full amount if he pays

value in good faith. Burnes v. Mineral Fertilizer Co., 218 Mo. 105 N. E. 1074.

<sup>86</sup> It seems clear under this taken in connection with Sec. whatever may have been the result to the enactment of the statute *supra*, § 108), the burden, not introducing some evidence of consideration but of ultimately such lack, is thrown upon the defendant; but a number of decisions to notice the effect of the statute followed their previous rule that ultimate burden is upon the party to establish sufficient consideration. The matter is discussed with reference to cases in Shaffer v. Bond, 1648, 99 Atl. 973, where the conclusion is reached. See also bins Hotel Co. v. Beissbarth (N

§ 1147. Accommodation parties.

**Section 29.—[LIABILITY OF ACCOMMODATION PARTY.]** An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time; of taking the instrument knew him to be only an accommodation party.<sup>87</sup>

This section does not affect the capacity, or lack of capacity to make an accommodation indorsement. By statute in some States, a married woman is incapable of contracting as surety for her husband.<sup>88</sup> Corporations cannot generally bind themselves in this way.<sup>89</sup> Nor has a partner authority to sign the partnership name for accommodation.<sup>90</sup> If a valid accommodation signature is made, knowledge by one who discounts the instrument that it was given for accommodation will not limit his rights. This was true before the enactment of the statute, and is expressly provided therein.<sup>91</sup>

Whether the authority to transfer accommodation paper is revoked on the maturity of the paper so that the accommodated party no longer can give a right even to a holder for value, is disputed. If an express agreement were made by which the accommodated party undertook to pay the obligation at maturity this agreement would, it seems, clearly

174 N. W. 217, and Brannan, Neg. Inst. Law (3d ed.) p. 95.

<sup>87</sup> In the Illinois Act the words "without receiving value therefor" are omitted and at the end of the section is added, "and in case a transfer after maturity was intended by the accommodating party, notwithstanding such holder acquired title after maturity."

<sup>88</sup> See *People's National Bank v. Schepflin*, 73 N. J. L. 29, 62 Atl. 333, and *supra*, § 269.

<sup>89</sup> See *Monument National Bank v. Globe Works*, 101 Mass. 57; *J. G. Brill Co. v. Norton & Taunton Street*

*Ry. Co.*, 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210; *Cox & Sons Co. v. Northampton Brewing Co.*, 245 Pa. St. 418, 91 Atl. 859, Ann. Cas. 1916 A. 86.

<sup>90</sup> *Tanner v. Hall*, 1 Pa. St. 417.

<sup>91</sup> See *Neal v. Wilson*, 213 Mass. 336, 100 N. E. 544; *Packard v. Windholz*, 88 N. Y. App. Div. 365, 84 N. Y. S. 666; *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996. Cf. *Lackawanna Trust Co. v. Carlucci* (Pa.), 107 Atl. 693.

create an equity and one who took the note after would take subject to the equity. It seems a fair inference from the mere fact of accommodation that the accommodator does make such agreement. For this reason the holder after maturity has generally been denied the right to recover.<sup>92</sup> Under the Negotiable Instruments Law, the Wisconsin court has held that transfer after maturity affords no defence to the accommodating party.<sup>93</sup>

§ 1148. How instruments are negotiated.

ARTICLE III

NEGOTIATION

Section 30.—[WHAT CONSTITUTES NEGOTIATION]

An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.<sup>1</sup>

This section does not lay down an exclusive method of transferring the property in a negotiable instrument. It is true that if it had written upon it a special indorsement to a particular person may be sued on by another person to whom it had been assigned without indorsement.<sup>95</sup> The section does, however, prescribe an exclusive method of negotiating the instrument, that is, transferring a title free from encumbrances.

§ 1149. What amounts to an indorsement.

Section 31.—[INDORSEMENT; HOW MADE.] 1

<sup>92</sup> See 26 Harv. L. Rev. 493, 495, 59 U. of Pa. L. Rev. 471, 486.

Professor Brannan, 26 Harv. L. Rev. 493, 497.

<sup>93</sup> *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996. It will be observed that section 29 of the statute uses the phrase "holder for value" which is defined in section 26 of the Act. *Marling v. Jones* was decided largely on the strength of these words. See the criticism of

<sup>94</sup> "An instrument may be negotiated within the meaning of this section by delivery to the payee *infra*, § 1157.

<sup>95</sup> *Carter v. Butler*, 264 Mo. 174 S. W. 399, Ann. Cas. 1917 See *infra*, Sec. 49, § 1155.

dorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.<sup>86</sup>

The indorsement may, like any other signature, be made in any form or any medium.<sup>87</sup>

This section does not completely define an indorsement, and some questions litigated before the passage of the statute are still open to argument. Thus the statute does not state whether an assignment or a guaranty operates as an indorsement. An indorsement normally involves both a transfer of the indorser's rights, and an obligation on his part. An assignment written on the note clearly indicates an intent to transfer the instrument.<sup>88</sup> But no clear intent is manifested to create an obligation on the part of the assignor. Nevertheless by the weight of authority, apart from statute, an assignment is in legal effect an indorsement,<sup>89</sup> and it is also so held under the Act.<sup>1</sup> A guaranty, however, written by the transferor of an instrument upon it, is not equivalent to an indorsement, but imposes only the obligations of a guarantor both at Common Law,<sup>2</sup> and under the Act.<sup>3</sup> The guaranty

<sup>86</sup> In the Illinois Act the following words are added "and the addition of words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated."

<sup>87</sup> *E. g.*, an indorsement by means of a rubber stamp made on behalf of a holder with his authority is sufficient. *American Union Trust Co. v. Never Break Range Co.*, 196 Mo. App. 206, 190 S. W. 1045; *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879; *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847; *Flanders v. Snare*, 37 Pa. Sup. Ct. 28. So an indorsement if made as such by the legal holder need not be in the name by which the holder is designated as payee or indorsee on the instrument. *Ames Cas. B. & N.*, I. 346, 347, II, 564, 565. See further, *supra*, § 585.

<sup>88</sup> *Hall v. Toby*, 110 Pa. 318, 1 Atl. 369.

<sup>89</sup> *Sears v. Lantz*, 47 Ia. 658; *Farnsworth v. Burdick*, 94 Kans. 749, 147 Pac. 863; *Adams v. Blethen*, 66 Me. 19, 22 Am. Rep. 547; *Maine Trust and Banking Co. v. Butler*, 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370; *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698; *Davidson v. Powell*, 114 N. C. 575, 19 S. E. 601; *Copeland v. Burke*, (Okla. 1916), 158 Pac. 1162, L. R. A. 1917 A. 1165. A contrary decision is *Lyons v. Divelbiss*, 22 Pa. 185.

<sup>1</sup> *Farnsworth v. Burdick*, 94 Kan. 749, 147 Pac. 863; *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. 1003. But see *Gale v. Mayhew*, 161 Mich. 96, 125 N. W. 781, 29 L. R. A. (N. S.) 648.

<sup>2</sup> *Belcher v. Smith*, 7 Cush. 482; *Miller v. Gaston*, 2 Hill, 188; *Snevely v. Johnston*, 1 Watts & S. 307.

<sup>3</sup> *Ireland v. Floyd*, 42 Okla. 609, 142 Pac. 401, 1915 C. L. R. A. 661.



§ 1150 **BILLS OF EXCHANGE AND PROMISSORY NOTE**

is itself not negotiable, but merely assignable like a chose in action,<sup>4</sup> and one who purchases from a holder gets merely a guaranty on the back of the instrument of an indorsement, takes subject to equities.<sup>5</sup>

§ 1150. **Partial indorsements invalid.**

**Section 32.—[INDORSEMENT MUST BE OF INSTRUMENT.]** The indorsement must be an indorsement of the entire instrument. An indorsement purports to transfer to the indorsee a part only of the instrument payable, or which purports to transfer the instrument to two or more indorsee severally, does not operate as an indorsement of the instrument. But where the instrument is paid in part, it may be indorsed as to the residue.<sup>6</sup>

§ 1151. **Various kinds of indorsement.**

**Section 33.—[KINDS OF INDORSEMENT.]** An indorsement may be either special or in blank; and it may be either restrictive or qualified, or conditional.

**Section 34.—[SPECIAL INDORSEMENT; INDORSEMENT IN BLANK.]** A special indorsement specifies a person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

**Section 35.—[BLANK INDORSEMENT CHANGED TO SPECIAL INDORSEMENT.]** The instrument may convert a blank indorsement into a special indorsement.

See also *Stephens v. Bowles* (Mo. App.), 206 S. W. 589, where the signature was "as surety."

<sup>4</sup> *Edgerly v. Lawson*, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432.

<sup>5</sup> *Central Trust Co. v. First Nat. Bank*, 101 U. S. 68, 25 L. Ed. 876; *Ireland v. Floyd*, 42 Okl. 609, 142 Pac. 401, 1915 C. L. R. A. 661. But see *Partridge v. Davis*, 20 Vt. 499, the

court held such a guaranty and purposes an indorsement. *First Nat. Bank v. Baldwin*, 25, 158 N. W. 371.

<sup>6</sup> See *Offenstein v. W. Kan.* 739, 132 Pac. 991; *Muller*, 164 N. Y. App. I N. Y. S. 620; *Smith* 182 Pa. 24, 37 Atl. 844, 823.

by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.<sup>7</sup>

§ 1152. Restrictive and qualified indorsements.

Section 36.—[WHEN INDORSEMENT RESTRICTIVE.]  
An indorsement is restrictive, which either,—

- (1) Prohibits the further negotiation of the instrument;  
or
- (2) Constitutes the indorsee the agent of the indorser; or
- (3) Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

An indorsement for collection is restrictive and makes the indorsee merely a trustee to collect for the beneficial owner.<sup>8</sup> It is common to speak of an indorsee for collection as an agent rather than as a trustee, but as such an indorsee can maintain an action in its own name on the instrument, and could do so prior to the Statute, it seems clear that he is properly a trustee rather than an agent.<sup>9</sup> Whether an indorsement "to any bank or banker" though not in terms an indorsement for collection is by virtue of banking custom to be so interpreted is not clear.<sup>10</sup>

<sup>7</sup> It seems improbable that any contract is consistent with a blank indorsement except one which merely affects the question of the person to whom the obligation of the indorsement shall run. There is no implied authority to write a guaranty over such an indorsement, *Belden v. Hann*, 61 Ia. 42, 15 N. W. 591, and its effect cannot be varied by parol evidence. *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145.

<sup>8</sup> *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 37 L. Ed. 363, 13 Sup. Ct. 533; *Lippitt v. Thames L. & T. Co.*, 88 Conn. 185, 90 Atl. 369; *Armstrong v. National Bank*, 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553;

*Freeman's Bank v. Tube Works*, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, 21 Am. St. Rep. 461; *Bank of America v. Waydell*, 187 N. Y. 115, 79 N. E. 857; *Murchison Nat. Bank v. Dunn Oil Mills*, 150 N. C. 718, 64 S. E. 885. See also *Werner Piano Co. v. Henderson*, 121 Ark. 165, 180 S. W. 495.

<sup>9</sup> *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11, 30 N. E. 176; *Ward v. Tyler*, 52 Pa. 393; *Metzger v. Sigall*, 83 Wash. 80, 145 Pac. 72.

<sup>10</sup> See *First Nat. Bank v. Weitsel*, 239 Fed. 497, 152 C. C. A. 375; *Citizens' Trust Co. v. Ward*, 195 Mo. App. 223, 190 S. W. 364; *National Bank of Commerce v. Bossemeyer*, 101 Neb. 96, 162 N. W. 503, L. R. A. 1917 E. 374.

**Section 37.—[EFFECT OF RESTRICTING INDORSEMENT; RIGHTS OF INDORSEE.]** A restrictive indorsement confers upon the indorsee the right,—

- (1) To receive payment of the instrument;
- (2) To bring any action thereon that the indorser may bring;
- (3) To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the rights of the first indorsee under the restrictive indorsement.<sup>11</sup>

**Section 38.—[QUALIFIED INDORSEMENT.]** A qualified indorsement constitutes the indorser a mere assignor of title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or words of similar import. Such an indorsement does not impair the negotiable character of the instrument.<sup>12</sup>

**Section 39.—[CONDITIONAL INDORSEMENT.]**

<sup>11</sup> In the Illinois Act the following words are added to subsection 2: "or except in the case of a restrictive indorsement specified in section 36—subsection 2—any action against the indorser or any prior party that a special indorsee would be entitled to bring." Subsection 3 reads as follows: "(3) To transfer the instrument, where the form of the indorsement authorizes him to do so" and at the end of the section is added: "specified in section 36—subsection 1—and as against the principal or cestui que trust only the title of the first indorsee under the restrictive indorsement specified in section 36—subsections 2 and 3 respectively." See *National Bank v. Bossemeyer*, 101 Neb. 96, 162 N. W. 503, L. R. A. 1917 E. 374; *Smith v. Bayer*, 46 Or. 143, 79 Pac. 497, 114 Am. St. 858; *Metzger v. Sigall*, 83 Wash. 80, 145 Pac. 72; *American Sav. & C. Bank v. Dennis*, 90 Wash. 547, 156 Pac. 559.

<sup>12</sup> See cases cited under Sec. 31, *supra*, § 1149. Though the statute speaks of "adding" the words "without

recourse," it may be shown where the statute has been phrased in the words "without recourse" that below one indorsement another were written by the indorser. *Leahmer v. McCull*, Kan. 451, 162 Pac. 297; *G. Wallace*, 154 Ky. 596, 157 S. W. 49 L. R. A. (N. S.), 789. The enactment of the statute evidence was admissible, *Fetzer*, 47 Neb. 269, 66 N. W. 100, even though the holder who came such did not know of it. *Fitchburg Bank v. Greenwood*, 151 N. C. 359, 66 S. E. 134 Am. St. Rep. 989; *Pag*, 65 Or. 450, 131 Pac. 1013, 41 N. S. 247, Ann. Cas. 1911; *Elgin City Banking Co. v. Tenn.*, 548, 108 S. W. 1068; *Thurston*, 38 Utah, 351, 111 S. W. 2d 100; *Dollar Sav. & Trust Co. v. Va.*, 69 W. Va. 109, 70 S. E. 1089; *A. (N. S.)* 587.

an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

§ 1153. Other kinds of indorsement.

Section 40.—[INDORSEMENT OF INSTRUMENT PAYABLE TO BEARER.] Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.<sup>13</sup>

Section 41.—[INDORSEMENT WHERE PAYABLE TO TWO OR MORE PERSONS.] Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

This section follows the previously existing rule.<sup>14</sup> It would seem, however, that either payee or indorsee could discharge the instrument, though unable to negotiate it.<sup>15</sup> The section does not cover the case of an instrument payable to "A or B," but only the case of joint payees.<sup>16</sup>

Section 42.—[EFFECT OF INSTRUMENT DRAWN OR INDORSED TO A PERSON AS CASHIER.] Where an in-

<sup>13</sup> In the Illinois Act instead of the words "payable to bearer," are the words "originally payable to or indorsed specially to bearer." See the criticism of the section in 26 Harv. L. Rev. 493, 500. It is probably applicable only to instruments which on their face are expressed to be payable to bearer, though section 9 (5) classifies instruments indorsed in blank as also payable to bearer. See Crawford, N. I. L. (4th ed.) 83.

<sup>14</sup> *Foster v. Hill*, 36 N. H. 526. See *Allen v. Corn Exchange Bank*, 87 N. Y. App. Div. 335, 84 N. Y. S. 1001. Under the statute see *First Nat. Bank v. Gridley*, 112 N. Y. App. D. 398, 98 N. Y. S. 445; *Martz v. State Nat. Bank*, 147 N. Y. App. Div. 250, 131 N. Y. S. 1045.

<sup>15</sup> See *supra*, § 343.

<sup>16</sup> *Union Bank v. Spies*, 151 Iowa, 178, 130 N. W. 928. See Sec. 8 (5) of the Act, *supra*, § 1139, also § 325.

maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.<sup>22</sup>

**Section 46.—[PLACE OF INDORSEMENT; PRESUMPTION.]** Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

Though a note is presumed to have been made where it is dated, evidence of a different actual place of making is admissible,<sup>23</sup> unless this would invalidate the instrument; in which case the signer is estopped to deny the truth of the representation contained in the instrument.<sup>24</sup>

**Section 47.—[CONTINUATION OF NEGOTIABLE CHARACTER.]** An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Under this section a bill or note is negotiable after maturity,<sup>25</sup> but the right of one who then purchases will be limited by the fact that he is not a holder in due course. He will succeed to the legal title of his transferor, but will be subject to all defences which were good against the latter.<sup>26</sup>

**Section 48.—[STRIKING OUT INDORSEMENT.]** The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.<sup>27</sup>

<sup>22</sup> See *German-American Bank v. Cunningham*, 97 N. Y. App. D. 244, 89 N. Y. S. 836; *Cedar Rapids Nat. Bank v. Bashara*, 39 Okla. 482, 135 Pac. 1051.

<sup>23</sup> *Finch v. Calkins*, 183 Mich. 298, 149 N. W. 1037.

<sup>24</sup> *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. 717.

<sup>25</sup> *Barnes v. Carr*, 65 Fla. 87, 61 So.

184; *Oakdale Mfg. Co. v. Clarke*, 29 R. I. 192, 69 Atl. 681.

<sup>26</sup> *Ohio Valley &c. Co. v. Great Southern F. Ins. Co.*, (Ky. 1917), 197 S. W. 399.

<sup>27</sup> See *New Haven Mfg. Co. v. New Haven Pulp Co.*, 76 Conn. 126, 55 Atl. 604; *Jerman v. Edwards*, 29 Dist. Col. App. 535; *Howell v. Commercial Nat. Bank*, 40 App. D. C. 370; *Ensign v. Fogg*, 177 Mich. 317, 143 N. W. 82;

**§ 1155. Transfer of negotiable instrument distinguish negotiation.**

**Section 49.—[TRANSFER WITHOUT INDORSE EFFECT OF.]** Where the holder of an instrument to his order transfers it for value without indorsing transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition to the right to have the indorsement of the transferor, the right to determine whether the transferor was a holder in due course, the negotiation takes effect at the time when the indorsement is actually made.<sup>28</sup>

The effect of this section is to give the transferee the position of an assignee of a tangible non-negotiable chose in possession who has power to sue in his own name.<sup>29</sup> But he is not a holder in due course.<sup>30</sup>

**§ 1156. Reissue.**

**Section 50.—[WHEN PRIOR PARTY MAY NEGOTIATE INSTRUMENT.]** Where an instrument is negotiated to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But

*Mackintosh v. Gibbs*, 79 N. J. L. 40, 74 Atl. 708.

<sup>28</sup> In the Illinois and Missouri Acts, after the word "right," the first sentence continues as follows: "to enforce the instrument against one who signed for the accommodation of his transferor, and the right to have the indorsement of the transferor, if omitted by accident or mistake. But for the purpose," etc. In the Colorado Act, at the end of the first sentence, there is added, "if omitted by mistake, accident or fraud." In the Wisconsin Act, at the end of the section, there is added: "When the indorsement was omitted by mistake, or there was an agreement to indorse made at the time of the transfer, the indorsement, when made, relates back to the time of the transfer."

<sup>29</sup> *Smith v. Nelson Land & C* 212 Fed. 53, 128 C. C. A. 51; *field Bank v. McKinley*, 53 125 Pac. 493; *Goodsell v. Bros. Co.*, 86 Conn. 402, 85 *Foster's Admr. v. Metcalfe*, 385, 138 S. W. 314; *Kiefer v. 128 Minn. 519, 151 N. W. 52 v. Butler*, 264 Mo. 306, 174 S. *Martz v. State Nat. Bank*, 1 App. Div. 250, 131 N. Y. S. 10; see *Myers v. Petty*, 153 N. C. S. E. 417; *Elgin City Bank v. McEachern*, 163 N. C. 333, 680.

<sup>30</sup> *Foster's Adm. v. Metcalfe*, Ky. 385, 138 S. W. 314; *1 turers' &c. Co. v. Blitz*, 131 N. D. 17, 115 N. Y. S. 402; *1 White*, 127 Tenn. 504, 15 1031.

not entitled to enforce payment thereof against any intervening party to whom he was personally liable.<sup>31</sup>

§ 1157. Who is a holder in due course.

## ARTICLE IV

### RIGHTS OF THE HOLDER

**Section 51.—[RIGHT OF HOLDER TO SUE; PAYMENT.]** The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument.<sup>32</sup>

**Section 52.—[WHAT CONSTITUTES A HOLDER IN DUE COURSE.]** A holder in due course is a holder who has taken the instrument under the following conditions:—

- (1) That it is complete and regular upon its face; <sup>33</sup>
- (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; <sup>34</sup>
- (3) That he took it in good faith and for value;
- (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.<sup>35</sup>

<sup>31</sup> See *Quimby v. Varnum*, 190 Mass. 211, 76 N. E. 671. The words "subject to the provisions of this Act" probably refer to Section 121. That section relates exclusively to payment at or after maturity. Though by the terms of the last sentence there can be no recovery against a party whose obligation intervenes between the two acquisitions of the instrument of the prior party, it may happen by negotiation of the instrument to a subsequent holder in due course that the intervening party may become liable.

<sup>32</sup> "Holder" includes one who holds as security, and such a holder may enforce the instrument, *Melton v. Pensacola Bank*, 190 Fed. 126, 111 C. C. A. 166, as may a holder for

collection with no personal interest. *Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 393; *Harrison v. Percy*, 174 Ky. 485, 192 S. W. 513. But see *Third Nat. Bank v. Exum*, 163 N. C. 199, 79 S. E. 498.

<sup>33</sup> As to incomplete instruments, see *supra*, §§ 1140, 1141.

<sup>34</sup> The last clause of this subsection refers to two cases: first, that of demand paper which has previously been presented and dishonored, though the purchaser had no reason to suppose so; and, second, to a time bill of exchange which has previously been presented for acceptance and acceptance refused. As to when an instrument is overdue, see *infra*, §§ 1170-1176.

<sup>35</sup> In the Wisconsin Act there is the

Prior to the enactment of the Statute there was that a payee who took in good faith for value was against personal defences as fully as a subsequent holder. There is no reason to suppose that there was any to change this rule, nor is there any necessity for the section in a way to change it. Such is the authority.<sup>37</sup> But because in subsection 4, reference to the time the instrument was "negotiated" to the courts of Iowa and Missouri, by what seems necessarily technical construction, have held the payee to be a holder in due course.<sup>38</sup>

**Section 53.—[WHEN PERSON NOT DEEMED HOLDER IN DUE COURSE.]** Where an instrument payable to order is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

**Section 54.—[NOTICE BEFORE FULL AMOUNT PAID.]** Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating it before he has paid the full amount agreed to therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.<sup>40</sup>

further subsection: (5) "That he took it in the usual course of business."

<sup>37</sup> *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646; 97 Am. St. Rep. 426, and cases cited, *Johnston v. Knipe*, 260 Pa. 504, 103 Atl. 957, L. R. A. 1918 E. 1042, and cases cited.

<sup>38</sup> *Ex parte Goldberg*, 191 Ala. 356, 67 So. 839, 843, L. R. A. 1915 F. 1157; *Boston S. & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426; *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N. E. 605, L. R. A. 1915 B. 144; *National Investment Co. v. Corey*, 222 Mass. 453, 111 N. E. 357; *Brown v. Brown*, 91 N. Y. Misc. 220, 154 N. Y. S. 1098; *Johnston v. Knipe*, 260 Pa. 504, 103 Atl. 957, 105 Atl. 705, L. R. A. 1918 E. 1042. See also *Wilbour v. Hawkins* (R. I.), 94 Atl. 856.

<sup>39</sup> *Vander Ploeg v. Van* Iowa, 350, 112 N. W. 807, (N. S.) 490, 124 Am. St. Long v. Shafer, 185 Mo. A. 171 S. W. 690; *St. Charles Bank v. Edwards*, 243 M. S. W. 978. See also *Wheeler*, [1902] 1 K.B. 361, however, *cf. Lloyds Bank v. Manhattan Co.*, 97 N. Y. 162 N. Y. S. 629, *aff'd* 180 D. 891, 166 N. Y. S. 1093.

<sup>40</sup> See *infra*, §§ 1171 *et seq.*

<sup>41</sup> See *Simmons v. Hodgson*, 424, 162 C. C. A. 494; *Bank v. Stotter* (Mich.), 142; *Rosenbaum v. Roth*, App. D. 617, 150 N. Y. S. v. Buckley, 167 N. Y. App. N. Y. S. 853.



**Section 55.—[WHEN TITLE DEFECTIVE.]** The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.<sup>41</sup>

**Section 56.—[WHAT CONSTITUTES NOTICE OF DEFECT.]** To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

This section states the rule supported by the great weight of authority prior to the passage of the statute.<sup>42</sup> To one who is disposed to put no narrower restriction on the law governing actionable negligence than is involved in the definition, "the careless doing of an act likely to cause damage and which does cause damage to another," there may seem an inconsistency in permitting recovery by one whose carelessness in purchasing the instrument has deprived the obligor of a defence which he would have had against the previous holder. Unquestionably negligence, especially if gross, when taken in

<sup>41</sup> In the Wisconsin Act there is added at the end of the section: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care." See chapters dealing with fraud, duress, mistake, illegality &c. As to the case where the signature of one of several joint makers is obtained by unlawful means, see *Schmidt v. Bank of Commerce*, 234 U. S. 64, 34 S. Ct. 730, 58 L. Ed. 1214.

<sup>42</sup> *Daniel*, Neg. Inst., § 775. See for decisions under the Statute, *Elmore*

*County Bank v. Avant*, 189 Ala. 418, 66 So. 509; *Arnd v. Aylesworth*, 145 Ia. 185, 123 N. W. 1000, 29 L. R. A. (N. S.), 638; *Ford v. Ott* (Ia.), 173 N. W. 121; *Farmers' Bank v. First Nat. Bank*, 164 Ky. 548, 175 S. W. 1019; *Citizens' State Bank v. Johnson County* (Ky.), 207 S. W. 8; *Van Slyke v. Rooks*, 181 Mich. 88, 147 N. W. 579; *Davis v. Clark*, 85 N. J. L. 696, 90 Atl. 303; *Interboro Brewing Co. v. Doyle*, 165 N. Y., App. D. 646, 151 N. Y. S. 325; *Everding v. Toft*, 82 Ore. 1, 160 Pac. 1160; *Ochsenreiter v. Block* (S. Dak.), 173 N. W. 734; *Scandinavian Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102.

connection with other matters, may be evidence of actual bad faith;<sup>43</sup> and only the desirability of imposing as little restriction as possible on the free transfer of negotiable instruments can justify the rule codified by the statute of allowing a holder to recover if his failure to learn of the rights or defences of others has been due to his own negligence.

It is not necessary, however, in order to subject a holder to a defence that he should have known the particular nature of the defence; it is enough that he had notice that there was something wrong.<sup>44</sup> But one who has notice that the consideration for a negotiable instrument was an executory promise is not thereby deprived of the status of a holder in due course unless he also has notice that the promise has been broken.<sup>44a</sup>

Since under section 52 (1), the instrument must have been "regular on its face" in order to constitute a purchaser a holder in due course, statements on the instrument itself showing that a negotiation is necessarily improper charge a holder with notice without reference to whether he did or did not draw correct inferences from the statements, as, for example, where an instrument is payable to trustees,<sup>45</sup> or an instrument made or indorsed by a trustee, executor, member of a firm, officer of a corporation or other fiduciary as

<sup>43</sup> *McNight v. Parsons*, 136 Ia. 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Link v. Jackson*, 158 Mo. App. 63, 139 S. W. 588; *Kipp v. Smith*, 137 Wis. 234, 238, 118 N. W. 848.

<sup>44</sup> *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830; *Ozark Motor Co. v. Horton* (Mo. App.), 196 S. W. 395.

<sup>44a</sup> *Piedmont Carolina Ry. Co. v. Shaw*, 223 Fed. 973, 138 C. C. A. 227; *Phoenix Safety Inv. Co. v. Michaels* (Ariz.), 176 Pac. 587; *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265; *Marx v. Frey*, 137 La. 948, 69 So. 757; *Black v. Bank of Westminster*, 96 Md. 399, 54 Atl. 88; *Hakes v. Thayer*, 165 Mich. 478, 131 N. W. 474; *Security Trust & Co. v.*

*Gleichman* (Okl.), 150 Pac. 908; *German-American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769. But see *contra*, *Heard v. Shedden*, 113 Ga. 162, 38 S. E. 387; *Sumter County State Bank v. Hays*, 68 Fla. 473, 67 So. 109. The question is identical in substance with that involved in the discussion whether a note which recites an executory promise as consideration is negotiable (see *supra*, § 1137, n. 14), namely: Does a recital or knowledge of such consideration compel inquiry whether the promise has been broken?

<sup>45</sup> *Ford v. Brown*, 114 Tenn. 467, 88 S. W. 1036, 1 L. R. A. (N. S.) 188; *Dollar Savings & Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587.

such is taken in payment of an individual debt of the signer.<sup>46</sup>

### § 1158. Absolute and personal defences.

The statute does not mark out, as clearly as it might, the sharp distinction between absolute and personal defences; though unquestionably, under the statute as before its enactment, the law distinguishes between a situation where there is only apparently but not really a negotiable obligation, and a case where there is an actual negotiable obligation but for some equitable or personal reason it should not be enforced.

<sup>46</sup> *National Bank v. Law*, 127 Mass. 72; *J. G. Brill Co. v. Norton, etc., St. Ry. Co.*, 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; *Newburyport v. Fidelity Ins. Co.*, 197 Mass. 596, 84 N. E. 111; *Newburyport v. Spear*, 204 Mass. 146, 90 N. E. 522; *Johnson-Kettell Co. v. Longley Luncheon Co.*, 207 Mass. 52, 92 N. E. 1035; *Coleman v. Stocke*, 159 Mo. App. 43, 139 N. W. 216; *Reynolds v. Title Guaranty Trust Co.*, 196 Mo. App. 21, 189 S. W. 33; *Wilson v. Metropolitan Ry. Co.*, 120 N. Y. 145, 150, 24 N. E. 384, 17 Am. St. Rep. 625; *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Squire v. Ordemann*, 194 N. Y. 394, 87 N. E. 435; *Lanning v. Trust Co. of America*, 137 N. Y. App. D. 722, 122 N. Y. S. 485; *Empire State Surety Co. v. Nelson*, 141 N. Y. App. D. 850, 126 N. Y. S. 453; *Newman v. Newman*, 160 N. Y. App. D. 331, 145 N. Y. S. 325; *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 484; *Brovan v. Kyle*, 166 Wis. 347, 165 N. W. 383. See also *Taylor v. Harris's Adm.*, 164 Ky. 654, 176 S. W. 168; *Franklin Sav. Bank v. International Trust Co.*, 215 Mass. 231, 102 N. E. 363; *Quincy Mutual Fire Ins. Co. v. International Trust Co.*, 217 Mass. 370, 104 N. E. 845, L. R. A. 1915 B. 725; *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585; *Niagara Woolen Co. v. Pacific Bank*, 141 N. Y. App. D.

265, 126 N. Y. S. 890; *United States Fidelity, etc., Co. v. United States Nat. Bank*, 80 Oreg. 361, 157 Pac. 155, L. R. A. 1916 E. 610; *Sheer v. Hall & Lyon Co.*, 36 R. I. 47, 88 Atl. 801; *Pelton v. Spider Lake Co.*, 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963. Cf. *In re Troy & Cohoes Shirt Co.*, 136 Fed. 420; *Havana Central R. Co. v. Central Trust Co.*, 204 Fed. 546, 123 C. C. A. 72, L. R. A. 1915 B. 715; *Miami County Bank v. State*, 61 Ind. App. 360, 112 N. E. 40; *Batchelder v. Central Nat. Bank*, 188 Mass. 25, 73 N. E. 1024; *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916, L. R. A. 1915, C. 518; *Allen v. Fourth Nat. Bank*, 224 Mass. 239, 112 N. E. 650; *Kindall v. Fidelity Trust Co.*, 230 Mass. 238, 119 N. E. 861; *Wilson v. Metropolitan Ry. Co.*, 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625; *Orr v. South Amboy Terra Cotta Co.*, 113 N. Y. App. D. 103, 98 N. Y. S. 1026; *Havana Central R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 92 N. E. 12, L. R. A. 1915 B. 720; *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916 F. 1059; *National City Bank v. Shelton Electric Co.*, 96 Wash. 74, 164 Pac. 933; *United States Fidelity & Co. v. Home Bank*, 77 W. Va. 665, 88 S. E. 109; *Mitchell Street State Bank v. Froedtert (Wis.)*, 170 N. W. 822.

If the signature of a maker to a negotiable instrument is forged, though he has apparently entered into an obligation, in fact he has not. If, however, he has been induced by fraudulent misstatements to sign such an instrument, if he has actually entered into a negotiable obligation, it is unjust to enforce it in favor of the fraudulent party. In the case of the forged note nobody can recover against the maker. On the fraudulent note the payee, if a party to the fraud, could not recover, but a holder in due course can. It may then be said that forgery is an absolute or real defence, while such fraud as that given in the illustration is an equitable defence, or, briefly, an equity. No equitable defence is available against a holder in due course. The distinction between absolute or real defences on the one hand, and personal defences or equities on the other, is fundamental in the law of negotiable instruments. All the questions in question, whether absolute or personal, would be the same in case of non-negotiable contracts, and, therefore, in dealing with such contracts, there is not the same importance in distinguishing the two classes of defences. Though most defences are dealt with in other parts of this book with reference to their application to contracts generally, yet they are conveniently summarized here. Prior to the effect of the Negotiable Instruments Law, the following questions as to an obligation were absolute or real, and still remain so unless section 57 of the Act requires a different result:

First—The lack of genuineness of the signature. This may be due to forgery or it may be due to lack of authority on the part of an agent who made the signature on behalf of the maker.

Second—Fraud or duress of some kinds;

Third—Lack of title, as where a holder claims title by a forged indorsement;

Fourth—Bankruptcy of the holder;

Fifth—Legal incapacity as of a minor, an insane person, and in some jurisdictions as to some matters—a married woman;

Sixth—Illegality of certain kinds;

Seventh—The legal discharge of the instrument by payment of the obligation in question.

The following are personal defences, or equities only, and are not available against a holder in due course:

First—Illegality of certain kinds;

Second—Fraud or duress generally;

Third—Lack of delivery of the instrument;

Fourth—Lack of consideration;

Fifth—Failure of consideration;

Sixth—Alteration;

Seventh—Discharge of the instrument before maturity;

Eighth—A surety is discharged by certain dealings with his principal which are prejudicial to him;

Ninth—Set-off.

There may be a defence to one obligation on a negotiable instrument and no defence to another on the same instrument. Sometimes all the obligations on an instrument are subject to the same defence, as where the instrument is materially altered after all the signatures have been put upon it. Sometimes there may be a defence of one kind to one obligation on the instrument, and a defence of another kind to another obligation. The obligation of each person whose name appears on the instrument frequently must be considered separately.

§ 1159. To what defences a holder in due course is subject.

Section 57.—[RIGHTS OF HOLDER IN DUE COURSE.]

A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.<sup>a</sup>

The words "Defect of title" in this section even when aided by section 55 and by the definition of holder do not indicate with perfect clearness that it is only personal or equitable defences from which the holder is freed, but there was probably no intention to change the law in regard to the matter, and there is no reason to suppose that a change has

<sup>a</sup> In the Illinois Act defences of fraud, circumvention and gaming within the meaning of certain local statutes are excepted and remain as

before the passage of the Act, absolute defences. In the Wisconsin statute also some exceptions are made to the enactment of freedom from defences.

been effected. Therefore, though in some cases a purchaser of an instrument payable to bearer can enforce it even though by common law or statute the instrument was originally void,<sup>48</sup> yet where the instrument was originally void, and there are either no circumstances justifying an estoppel, or, though there are, the policy of the law forbids enforcement of the instrument even by a holder in due course,<sup>49</sup> such a holder, according to the better view, cannot recover under the statute any more than under the previously prevailing law.<sup>50</sup> There are, however, decisions which lay stress on the words of the statute as showing that such illegality as formerly subjected a note to an absolute defence now affords merely a personal one.<sup>51</sup>

Section 57 changes the law of some States by allowing (as it properly should) a holder in due course to recover the full amount of a note subject to an equitable defence, though the holder bought it at a discount.<sup>52</sup>

<sup>48</sup> *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959; *Schaeffer v. Marsh*, 90 N. Y. Misc. 307, 153 N. Y. S. 96; *Jefferson Bank v. Chapman*, 122 Tenn. 415, 123 S. W. 641. The possibility of such cases is clearly recognized in the statute, which seems to allow the enforcement of, *e. g.*, an undelivered note stolen (see section 16); a forged instrument where the apparent maker has precluded himself from setting up the forgery against a holder in due course (section 23).

<sup>49</sup> See *infra*, § 1676.

<sup>50</sup> *Perry Savings Bank v. Fitzgerald*, 167 Ia. 446, 149 N. W. 497 (usurious note); *National Bank of Shenandoah v. Hall*, 169 Ia. 218, 151 N. W. 120 (such fraud as rendered note void); *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353; *Lawson v. Fulton First Nat. Bank*, 31 Ky. L. Rep. 318, 102 S. W. 324 ("peddler's note"); *Bothell v. Miller*, 87 Neb. 835, 128 N. W. 628 (such fraud as rendered note void); *Sabine v. Paine*, 166 N. Y. App. D. 9, 151 N. Y. S. 735, 223 N. Y. 401, 119 N. E. 849 (usurious note); *Twentieth*

*Street Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320, Ann. Cas. 1917 D. 695 (note for gaming); *Green v. Gunsten*, 154 Wis. 69, 142 N. W. 261, 46 L. R. A. (N. S.) 212 (note of drunken man). See also *Lewis v. Clay*, 14 T. L. R. 149 (such fraud as rendered instrument void).

<sup>51</sup> *Wirt v. Stubblefield*, 17 Dist. Col. App. 283; *Farmers' Savings Bank v. Reed*, 192 Mo. App. 344, 180 S. W. 1002 (note for illegal assignment of liquor license); *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619, 12 Am. Cas. 1138 (usurious note); *Schlesinger v. Lehmaier*, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591 (usurious note, but see later New York decision in previous note); *National Bank of Commerce v. Pick*, 13 N. Dak. 74, 99 N. W. 63 (note of foreign corporation illegally doing business); *Arnd v. Sjoblom*, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842 (note for lightning rods not stating consideration); *Samson v. Ward*, 147 Wis. 48, 132 N. W. 629 (note for stallion not stating consideration).

<sup>52</sup> *Lassas v. McCarty*, 47 Oreg. 474,

**Section 58.—[WHEN SUBJECT TO ORIGINAL DEFENSES.]** In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.<sup>53</sup>

**Section 59.—[WHO DEEMED HOLDER IN DUE COURSE.]** Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

§ 1160. Liability of maker, drawer or acceptor.

## ARTICLE V

### LIABILITIES OF PARTIES

**Section 60.—[LIABILITY OF MAKER.]** The maker of a negotiable instrument by making it engages that he will

84 Pac. 76; *Jefferson Bank v. Chapman White-Lyons Co.*, 122 Tenn. 415, 123 S. W. 641.

<sup>53</sup> A purchaser from a holder in due course may recover though he took with notice of a personal defence. *McMurray v. McMurray*, 258 Mo. 405, 167 S. W. 513; *Ratcliffe v. Costello*, 117 Va. 563, 85 S. E. 489. As to the second sentence of the section see *First Nat. Bank v. Stroup* (Kan.), 177 Pac. 836. This sentence does not seem to cover fully a case where a holder takes an instrument, not previously negotiated to a holder in due course, with notice of fraud or illegality, and after disposing of it to a holder in

due course again becomes the holder. Such a person is not "a party to any fraud" in a strict sense, and it was therefore said in *Horan v. Mason*, 141 N. Y. App. Div. 89, 125 N. Y. S. 668, that only the payee of an instrument subject to the defence of fraud or illegality is debarred from improving his title by a subsequent acquisition of the instrument from a holder in due course. See a criticism of the section for this reason in 26 *Harv. L. Rev.* 493, 502. It seems, however, by liberal construction of the section a court need not reach the conclusion of the New York court. See *Berenson v. Conant*, 214 Mass. 127, 101 N. E. 60.

pay it according to its tenor, and admits the existence of the payee and his then capacity to endorse.<sup>54</sup>

**Section 61.—[LIABILITY OF DRAWER.]** The drawer by drawing the instrument admits the existence of the payee and his then capacity to endorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

**Section 62.—[LIABILITY OF ACCEPTOR.]** The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; <sup>54a</sup> and admits,—

(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

(2) The existence of the payee and his then capacity to endorse.

It has been settled since the time of Lord Mansfield <sup>55</sup> that a drawee who pays (or accepts) a bill on which the signature of the drawer is forged does so at his peril, and cannot recover the payment or rescind the acceptance as against an innocent holder.<sup>56</sup>

<sup>54</sup> This section is applicable though the maker signed for accommodation. *First State Bank v. Williams*, 164 Ky. 143, 175 S. W. 10; *Vanderford v. Farmers' Nat. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; *Richards v. Market Exch. Bank*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99.

<sup>54a</sup> *Smith v. W. M. Hurlbut Co.* (Conn.), 106 Atl. 319.

<sup>55</sup> By the case of *Price v. Neal*, 3 Burr. 1354, s. c. 1 Wm. Black. 390, and cases in the following note.

<sup>56</sup> *Smith v. Mercer*, 6 Taunt. 76; *Hoffman v. Milwaukee Bank*, 12 Wall.

181, 20 L. Ed. 366; *United States v. New York Bank*, 219 Fed. 648, 134 C. C. A. 579, L. R. A. 1915 D. 797; *United States v. Chase Nat. Bank*, 241 Fed. 535, 250 Fed. 105, 162 C. C. A. 277; *Young v. Lehman*, 63 Ala. 519; *First Bank v. Ricker*, 71 Ill. 439, 441, 22 Am. Rep. 104; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10, 13 S. W. 339, 7 L. R. A. 849; *Neal v. Coburn*, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; *Manufacturers' Bank v. Swift*, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381; *First Nat. Bank of Danvers v. First Nat. Bank of Salem*, 151 Mass. 280, 282, 24 N. E.



This has been generally rested on an obligation on the part of the drawee to know the signature of the drawer; and probably no other good reason can be found. It is clear that the holder does not warrant the genuineness of the instrument. One who presents a bill to a drawee for acceptance or payment makes no representation of the validity of the document. It is not a sale of the bill, but a presentation of what purports to be an order on the drawee calling upon him to act. The holder presents this and asks what action the drawee proposes to take. But both parties doubtless assume that the instrument is genuine. And the holder who receives the payment had no genuine claim against the person purporting to be the drawer.<sup>57</sup> Therefore, except for a duty cast upon the drawee to determine the truth, it is hard to see why rescission for mutual mistake is not appropriate.<sup>57a</sup> The statute adopts the rule of the common law.<sup>58</sup>

44, 21 Am. St. Rep. 450; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286; Germania Bank v. Boutell, 60 Minn. 189, 195, 62 N. W. 327, 51 Am. St. Rep. 519; State Bank v. First Nat. Bank, 87 Neb. 351, 127 N. W. 244, 29 L. R. A. (N. S.) 100; State Nat. Bank v. Bank of Magdalena, 21 N. Mex. 653, 157 Pac. 498, Ann. Cas. 1916 E. 1296; Havana Central R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12, 1915 B. L. R. A. 720; Bergstrom v. Ritz-Carlton Co., 171 N. Y. App. D. 776, 157 N. Y. S. 959; State Bank v. Cumberland Sav. Co., 168 N. C. 605, 85 S. E. 5, L. R. A. 1915 D. 1138; First Nat. Bank of Belmont v. First Nat. Bank of Barnesville, 58 Oh. St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748; Cherokee Nat. Bank v. Union Trust Co., 33 Okla. 342, 125 Pac. 464; First Nat. Bank v. Bank of Cottage Grove, 59 Oreg. 388, 117 Pac. 293; People's Bank v. Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; Farmers' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. St.

Rep. 817; Figuers v. Fly, 137 Tenn. 358, 193 S. W. 117. But see First Nat. Bank of Wyndmere, 15 N. Dak. 299, 108 N. W. 540, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588; Union Nat. Bank v. Franklin Nat. Bank, 249 Pa. 375, 94 Atl. 1085; Colonial Trust Co. v. National Bank, 50 Pa. Super. 510; First Nat. Bank v. Brule, 38 S. Dak. 396, 161 N. W. 616.

<sup>57</sup> See *infra*, § 1574.

<sup>57a</sup> See a discussion of the principle by Ames in 4 Harv. L. Rev. 297; Keener, Quasi Contracts, 154; Wigmore, 25 Am. L. Rev. 695, 706; Woodward, Quasi Contracts, § 80. Even if such a duty is admitted, the existing law is somewhat hard to explain, since the negligence of the plaintiff does not ordinarily preclude recovery of money paid under a mistake. See *infra*, § 1596.

<sup>58</sup> Farmers' Nat. Bank v. Farmers', etc., Bank, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915 A. 77; National Bank of Commerce v. Mechanics' Nat. Bank, 148 Mo. App. 1, 127 S. W. 429; Title Guarantee, etc., Co. v. Haven, 196 N. Y. 487, 492, 89 N. E. 1062,

Presumably the qualification usually made to the rule prior to the enactment of the Negotiable Instruments Law—namely that if the holder was guilty of no recovery is allowed the drawee,—<sup>59</sup> is not abolished by the statute.<sup>60</sup>

Apparently also by the first paragraph of section 1161 who accepts a raised bill or check is bound to pay to the holder the raised amount. This result is contrary to the previously existing law,<sup>61</sup> but in accordance with the law of the continent of Europe;<sup>62</sup> and if a change in the common law has been made by the Statute, it seems a desirable one.

### § 1161. Irregular indorsers.

**Section 63.**—[WHEN PERSON DEEMED INDORSER.] A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed an indorser, unless he clearly indicates by appropriate language his intention to be bound in some other capacity.<sup>64</sup>

1085, 25 L. R. A. (N. S.) 1308; *State Bank v. Cumberland, etc., Trust Co.*, 168 N. C. 605, 85 S. E. 5, L. R. A. 1915 D. 1138; *Cherokee Nat. Bank v. Union Trust Co.*, 33 Okla. 342, 125 Pac. 464; *First Nat. Bank v. Bank of Cottage Grove*, 59 Or. 388, 117 Pac. 293. A statutory rule to the contrary in Pennsylvania has not been changed by the passage of the Negotiable Instruments Law. *Union Nat. Bank v. Franklin Nat. Bank*, 249 Pa. 375, 94 Atl. 1085.

<sup>59</sup> See *infra*, § 1572.

<sup>60</sup> *Farmers' Nat. Bank v. Farmers' & Traders' Bank*, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915 A. 77; *Rolla v. First Nat. Bank*, 141 Mo. App. 719, 125 S. W. 513; *State Nat. Bank v. Bank of Magdalena*, 21 N. Mex. 653, 157 Pac. 498, L. R. A. 1916 E. 1296; *Williamsburgh Trust Co. v. Tum Suden*, 120 N. Y. App. D. 518, 105 N. Y. S. 335; *First Nat. Bank v. Bank of Cottage Grove*, 59 Ore. 388, 117 Pac. 293; *Canadian Bank v. Bingham*, 30 Wash. 484, 71 Pac. 43, 60 L. R. A.

955. But see *National Bank of Commerce v. Mechanics' &c. Co.*, 1 Mo. App. 1, 127 S. W. 429; *First Nat. Bank v. Cumberland Sav. &c. Co.*, 605, 85 S. E. 5, L. R. A. 1915 D. 1138. As to the effect of the negligence of a depositor of a bank in failing to cover forgeries, see *supra*, § 1161, and 32 Harv. L. Rev. 28.

<sup>61</sup> A drawee who has paid on an altered bill has been allowed to recover the payment back in: *Imperial Bank v. Hamilton Bank*, [1903] A. C. 18; *Bank v. Hamilton Bank*, 18 Wall. 604, 21 L. R. A. 1; *Young v. Lehman*, 63 Ala. 51; *Imperial Bank v. Woods*, 45 Cal. 406, 13 P. 190; *Parke v. Roser*, 67 Ind. 1; *Rep. 102*; *National Bank v. Bank*, 114 N. Y. 28, 20 L. R. A. 1; *City Bank v. National Bank*, 203. *A fortiori* these courts have held an acceptor of such a bill liable.

<sup>62</sup> See 4 Harv. L. Rev. at p. 102.

<sup>63</sup> See for further analogies, *infra*, § 1572.

<sup>64</sup> Where a payee in trans-

**Section 64.—[LIABILITY OF IRREGULAR INDORSER.]**

Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules:—

(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

(2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

(3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.<sup>66</sup>

The subject of this section before the passage of the Act was a matter of great conflict in judicial decisions.<sup>66</sup> It has been said of this section that it "is an otherwise excellent piece of codification, but defective because under subsection 2 a party signing as indorser for the accommodation of an acceptor would not be liable to a drawer-payee, but only to subsequent parties."<sup>67</sup> The words in the first line of the section "not otherwise a party" do not change the rule that a partner and the partnership to which he belongs

note writes his name on its face under the maker's signature it will be inferred that he signed as indorser not as maker. *E. D. Fisher Lumber & Co. v. Robins* (Kan.), 180 Pac. 264. As to the admission of parol evidence, see *supra*, § 644, also *infra*, §§ 1259-1262.

<sup>66</sup> See *Peck v. Eastern*, 74 Conn. 456, 51 Atl. 134; *Tucker v. Mueller*, 287 Ill. 551, 122 N. E. 847; *Young v. Exchange Bank*, 152 Ky. 293, 153 S. W. 444, Ann. Cas. 1915 B. 148; *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. 455; *Overland Auto Co. v. Winters* (Mo. App.), 180 S. W. 561; *Wilson v. Hendee*, 74 N. J. L. 640, 67 Atl. 81; *Roessle v. Lancaster*, 130 N. Y. App. D. 1, 114 N. Y. S. 387, *affd*, without opinion, 205 N. Y. 626, 98 N. E. 1114; *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. 875; *Farquhar Co. v. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *McLean*

*v. Bryer*, 24 R. I. 599, 54 Atl. 373. As to the admissibility of parol evidence to show an intent to assume a different liability than that stated in the statute, see *supra*, § 644. In the Illinois Act subsections (1) and (2) are as follows: (1) If the instrument is a note or bill payable to the order of a third person, or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties. (2) If the instrument is a note or unaccepted bill payable to bearer, he is liable to all parties subsequent to the maker or drawer. See *Tucker v. Mueller*, 287 Ill. 551, 122 N. E. 847.

<sup>67</sup> The effect of the various decisions, now happily made unimportant by the Statute, may be found in 1 Ames' Cas. Bills and Notes, 269.

<sup>68</sup> Professor Ames in 14 Harv. L. Rev. 241.

are different persons for the purpose of making and i  
a negotiable instrument.<sup>68</sup> Though the section fixes t  
of a holder against irregular indorsers, the rights of  
ligors on the instrument as against one another may  
be shown by parol.<sup>69</sup>

§ 1162. Warranties implied on negotiation.

Section 65.—[WARRANTY WHERE NEGOTIAT  
DELIVERY, ETC.] Every person negotiating an ins  
by delivery or by a qualified indorsement, warrants:-

- (1) That the instrument is genuine and in all  
what it purports to be;
- (2) That he has a good title to it;
- (3) That all prior parties had capacity to contract;
- (4) That he has no knowledge of any fact which  
impair the validity of the instrument or render it va

But when the negotiation is by delivery only, the w  
extends in favor of no holder other than the immediat  
feree.

The provisions of subdivision three of this section  
apply to persons negotiating public or corporation se  
other than bills and notes.<sup>70</sup>

Section 66.—[LIABILITY OF GENERAL INDO  
Every indorser who indorses without qualificatio  
rants to all subsequent holders in due course:

<sup>68</sup> Fourth Nat. Bank v. Mead, 216  
Mass. 521, 104 N. E. 377, 52 L. R. A.  
(N. S.) 225.

<sup>69</sup> See *supra*, § 644, *infra*, §§ 1259-  
1262.

<sup>70</sup> The earlier paragraphs of this  
section state the warranties applicable  
to sales of chattels with such variations  
as the nature of the property here in  
question requires. Many authorities  
are collected in Meyer v. Richards, 163  
U. S. 385, 41 L. Ed. 199, 16 Sup. Ct.  
Rep. 1148. See also *supra*, § 977. An  
indorser without recourse is thus liable.  
Miller v. Stewart (Tex. Civ. App.), 214  
S. W. 565. The final paragraph  
codifies the rule of certain decisions

which hold that there is n  
warranty protecting the pu  
securities of the kind name  
prove void or defective beca  
invalidity in the proceedings  
izations of public or corpora  
Otis v. Cullum, 92 U. S. 447,  
46; Meyer v. Richards, 163  
41 L. Ed. 199, 16 S. C. 1148  
Rhodes, 92 Cal. 124, 28 Pac.  
v. Robinson, 50 Mich. 75,  
704; Bank of Commerce v. F  
Mo. App. 124, 175 S. W. 30  
v. Walsh, 12 Neb. 28, 10 N  
Walsh v. Rogers, 15 Neb. 3  
W. 135.

(1) The matters and things mentioned in subdivisions one, two and three of the next preceding section; and

(2) That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

§ 1163. Liabilities of various indorsers.

Section 67.—[LIABILITY OF INDORSER WHERE PAPER NEGOTIABLE BY DELIVERY.] Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Section 68.—[ORDER IN WHICH INDORSERS ARE LIABLE.] As respects one another indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.<sup>71</sup>

Section 69.—[LIABILITY OF AN AGENT OR BROKER.] Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.<sup>72</sup>

§ 1164. When presentment is necessary.

ARTICLE VI

PRESENTMENT FOR PAYMENT

Section 70.—[EFFECT OF WANT OF DEMAND ON PRINCIPAL DEBTOR.] Presentment for payment is not necessary in order to charge the person primarily liable on

<sup>71</sup> See *supra*, § 644, *infra*, § 1282.

Gallaudet, 120 N. Y. 298, 24 N. E. 994,

<sup>72</sup> See *Meriden National Bank v.* and *supra*, §§ 284, 285.

the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.<sup>73</sup>

Logically where the promise is to pay at a particular place, presentment at maturity at that place should be a condition precedent to the liability of even a primary party and such is the English rule as to promissory notes<sup>74</sup> and, until changed by statute, likewise in regard to acceptances.<sup>75</sup> But in the United States the previously existing law is accurately stated in this section of the Negotiable Instruments Law.<sup>76</sup>

A demand note literally is conditional upon demand, but the peculiar rule of the common law in regard to conditions of demand<sup>77</sup> has led to the result that a note payable on demand is, so far as the maker's liability is concerned, payable without a demand.<sup>78</sup> Certificates of Deposit, however, have generally been held prior to the Act conditional on presentment.<sup>79</sup>

The effect of failure to make due presentment in discharging drawers and indorsers is familiar and universal law. Less generally had in mind is the effect of such laches in discharging a debt for which the instrument was given.<sup>80</sup>

<sup>73</sup> In the Illinois Act after the word "instrument" are inserted the words: "except in the case of bank notes." In the Kansas, New York and Ohio Acts after the word "maturity" are inserted the words: "and has funds there available for that purpose." In the Wisconsin Act all of the first sentence after the words "on the instrument" is omitted.

<sup>74</sup> 2 Ames Bills and Notes, 792, 793; Bills of Exchange Act, §§ 52 (1) (2); 87 (1).

<sup>75</sup> *Ibid.*

<sup>76</sup> *Cox v. National Bank*, 100 U. S.

704, 713, 25 L. Ed. 739; *Parker v. Stroud*, 98 N. Y. 379, 384, 50 Am. Rep. 685; *Binghampton Pharmacy v. First Nat. Bk.*, 131 Tenn. 711, 176 S. W. 1038. As to the effect of tender given to the maker's ability and willingness to pay, see *Moore v. Alton*, 196 Ala. 158, 70 So. 681.

<sup>77</sup> See *infra*, § 1289.

<sup>78</sup> See *infra*, § 1175.

<sup>79</sup> See the comment on this section of the statute in Brannan, *Neg. Inst. Law* (3d ed.), 430, 524, and *infra*, § 2039.

<sup>80</sup> See *infra*, § 1922a.

## § 1165. Day for presentment.

Section 71.—[PRESENTMENT WHERE INSTRUMENT IS NOT PAYABLE ON DEMAND AND WHERE PAYABLE ON DEMAND.] Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.<sup>81</sup>

A distinction formerly made in some cases between interest-bearing instruments and those not bearing interest, is under the statute no longer valid as matter of law, though the character of the instrument may affect the question of what is a reasonable time.<sup>82</sup> A check need not be forwarded by the most expeditious route, necessarily. It may be sent through various banks in accordance with mercantile custom.<sup>83</sup>

The last sentence of this section seems to change the law for the worse; the change was doubtless unintentional and due to an effort to condense the language of the English Bills of Exchange Act.<sup>84</sup> Under the words as they stand, it is plainly stated that an indorser of a bill payable on demand will not be discharged however long presentment to the drawer may be delayed, if the bill is indorsed for the last time within a reasonable time prior to presentment.<sup>85</sup> However unreason-

<sup>81</sup> In the Nebraska Act all of the section after the words "reasonable time after its issue" is omitted. In the Vermont Act instead of the last five words of the section are substituted: "after its issue in order to charge the drawer."

<sup>82</sup> See *Anderson v. First Nat. Bank*, 144 Iowa, 251, 122 N. W. 918; *Schlesinger v. Schultz*, 110 N. Y. App. D. 356, 96 N. Y. S. 383.

<sup>83</sup> *Sublette Exchange Bank v. Fitzgerald*, 168 Ill. App. 240; *Plover Sav. Bank v. Moodie*, 135 Iowa, 685, 110 N. W. 29, 113 N. W. 476.

<sup>84</sup> The English Act provides "Where

it is payable on demand, presentment must be made within a reasonable time after its indorsement in order to charge the indorser, and in case of a bill of exchange presentment for payment must be made within a reasonable time after its issue in order to charge the drawer."

<sup>85</sup> This construction was laid down in *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451. See also *Plover Sav. Bank v. Moodie*, 135 Ia. 685, 110 N. W. 29, 113 N. W. 476; *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522.

able the delay may have been, therefore, a further negotiation of the bill and prompt presentment thereafter, it seems, will cure the delay. It should be observed, however, that section 53 states that where an instrument payable on demand is negotiated an unreasonable time after its issue, the purchaser is not a holder in due course. Section 186 lays down a rule as to charging drawers of checks which differs from that of the present section,<sup>86</sup> but section 71 governs the charging of indorsers of checks.

**§ 1166. General requisites of presentment.**

**Section 72.—[WHAT CONSTITUTES A SUFFICIENT PRESENTMENT.]** Presentment for payment, to be sufficient, must be made:—

- (1) By the holder, or by some person authorized to receive payment on his behalf;
- (2) At a reasonable hour on a business day;
- (3) At a proper place as herein defined;
- (4) To the person primarily liable on the instrument or if he is absent or inaccessible, to any person found at the place where the presentment is made.<sup>87</sup>

**Section 73.—[PLACE OF PRESENTMENT.]** Presentment for payment is made at the proper place:—

- (1) Where a place of payment is specified in the instrument and it is there presented;
- (2) Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
- (3) Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
- (4) In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.<sup>88</sup>

<sup>86</sup> See *infra*, § 1209.

<sup>87</sup> See *Fowler Paper Co. v. Best-Jones & Co.*, 183 Ill. App. 310; *Columbia-Knickerbocker Trust Co. v. Miller*, 156 N. Y. App. D. 810, 142 N. Y. S. 440, 215 N. Y. 191, 109 N. F.

179, Ann. Cas. 1917 A. 348; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

<sup>88</sup> See *Ryan v. State*, 60 Fla. 25, 53 S. E. 448; *Finch v. Calkins*, 183 Mich. 298, 149 N. W. 1037; *Schlesinger v. Schultz*,



**Section 74.—[INSTRUMENT MUST BE EXHIBITED.]** The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.<sup>80</sup>

It is insufficient to call the maker over the telephone,<sup>80</sup> and, though if a holder with the instrument in his possession is personally present before the maker and demands payment which is refused, the actual exhibition of the instrument if not demanded is waived.<sup>81</sup> This is not true where the holder is talking from a distance over the telephone, even though he has the instrument in his possession.<sup>82</sup>

**§ 1167. Presentment in special cases.**

**Section 75.—[PRESENTMENT WHERE INSTRUMENT PAYABLE AT BANK.]** Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet at it any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.<sup>83</sup>

**Section 76.—[PRESENTMENT WHERE PRINCIPAL DEBTOR IS DEAD.]** Where a person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his per-

110 N. Y. App. D. 356, 96 N. Y. S. 383; *Baer v. Hoffman*, 150 N. Y. App. D. 473, 135 N. Y. S. 28; *Meyers Co. v. Battle*, 170 N. C. 168, 86 S. E. 1034; *Nelson v. Grondahl*, 13 N. Dak. 363, 100 N. W. 1093; *Norwood Nat. Bank v. Piedmont &c. Co.*, 106 S. Car. 472, 91 S. E. 866.

<sup>80</sup> *Congress Brewing Co. v. Habenicht*, 83 N. Y. App. D. 141, 82 N. Y. S. 481; *State of New York v. Kennedy*, 145 N. Y. App. D. 669, 130 N. Y. S. 412.

<sup>81</sup> *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912 A. 861.

<sup>82</sup> *Lockwood v. Crawford*, 18 Conn. 361; *King v. Crowell*, 61 Me. 244, 14

Am. Rep. 560; *Waring v. Betta*, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890. See also *Hodges v. Blaylock*, 82 Oreg. 179, 161 Pac. 396.

<sup>83</sup> *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912 A. 861.

<sup>84</sup> The Nebraska Act ends with the words "banking hours." See *Archerleta v. Johnston*, 53 Colo. 393, 127 Pac. 134; *Columbia-Knickerbocker Trust Co. v. Miller*, 156 N. Y. App. D. 810, 142 N. Y. S. 440, 215 N. Y. 191, 109 N. E. 179, Ann. Cas. 1917 A. 348; *Neckell v. Bradshaw* (Oreg.), 183 Pac. 12; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

sonal representative if such there be, and if, with the exercise of reasonable diligence, he can be found.<sup>94</sup>

Section 77.—[PRESENTMENT TO PERSONS AS PARTNERS.] Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Section 78.—[PRESENTMENT TO JOINT DEBITORS.] Where there are several persons, not partners, jointly liable on the instrument, and no place of payment is specified, presentment must be made to them all.<sup>95</sup>

§ 1168. When presentment is excused or delay justifiable

Section 79.—[WHEN PRESENTMENT NOT REQUIRED TO CHARGE THE DRAWER.] Presentment for payment is not required in order to charge the drawer where the holder has a right to expect or require that the drawee or acceptor will pay the instrument.<sup>96</sup>

Section 80.—[WHEN PRESENTMENT NOT REQUIRED TO CHARGE THE INDORSER.] Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be presented.<sup>97</sup>

Section 81.—[WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.] Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not in whole or in part to his default, misconduct or negligence. When the

<sup>94</sup> See *Reed v. Spear*, 107 N. Y. App. D. 144, 95 N. Y. S. 1007.

<sup>95</sup> *State of New York Bank v. Kennedy*, 145 N. Y. App. D. 669, 130 N. Y. S. 412.

<sup>96</sup> See *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 708, 28 L. Ed. 866, 5 Sup. Ct. 314; *Simonoff v. Granite City Nat. Bank*, 279 Ill. 246, 116 N. E. 636; *Beauregard v. Knowlton*,

156 Mass. 395, 31 N. E. 389; *A. I. Tucker Co.*, 217 Mass. N. E. 360, L. R. A. 1916 F. 81.

<sup>97</sup> See *McDonald v. Lutz*, 170 Fed. Rep. 434, 95 C. C. 170; *Dillon v. Bron*, 96 Kan. 189, 553; *Bergen v. Trimble*, 130 101 Atl. 137; *Marquardt's*, 73 Pa. 73, 95 Atl. 917; *Union v. Sullivan*, 214 N. Y. 332, 108

delay ceases to operate, presentment must be made with reasonable diligence.<sup>88</sup>

**Section 82.—[WHEN PRESENTMENT MAY BE DISPENSED WITH.]** Presentment for payment is dispensed with:—

- (1) Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
- (2) Where the drawee is a fictitious person;
- (3) By waiver of presentment, express or implied.

Insolvency of the maker does not operate as an implied waiver.<sup>89</sup> Lack of presentment may be excused by a new promise;<sup>1</sup> and prior to maturity any words or conduct of a party to be charged inducing the holder to believe presentment would not be required, will operate as a waiver.<sup>2</sup>

#### § 1169. Dishonor and its effect.

**Section 83.—[WHEN INSTRUMENT DISHONORED BY NON-PAYMENT.]** The instrument is dishonored by non-payment when,—

- (1) It is duly presented for payment and payment is refused or cannot be obtained; or
- (2) Presentment is excused and the instrument is overdue and unpaid.

An excuse under this section for not making presentment will not excuse failure to give notice of dishonor at maturity to a party secondarily liable;<sup>3</sup> and a waiver of notice does not excuse failure to make presentment.<sup>4</sup>

**Section 84.—[LIABILITY OF PERSON SECONDARILY LIABLE, WHEN INSTRUMENT DISHONORED.]** Sub-

<sup>88</sup> *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 326, 68 L. R. A. 964, 109 Am. St. 925.

<sup>89</sup> *Bassenhorst v. Wilby*, 45 Ohio St. 333, 13 N. E. 75; *Reinke v. Wright*, 93 Wis. 368, 67 N. W. 737.

<sup>1</sup> See *supra*, § 157.

<sup>2</sup> See *Worley v. Johnson*, 60 Fla. 294, 53 So. 543, 33 L. R. A. (N. S.) 639; *Simonoff v. Granite City Nat. Bank*, 279 Ill. 248, 116 N. E. 636;

*Sweetser v. Jordan*, 216 Mass. 350, 103 N. E. 905; *Bessenger v. Wenzel*, 161 Mich. 61, 125 N. W. 750, 27 L. R. A. (N. S.) 516; *Moll v. Roth*, 7 Oreg. 593, 152 Pac. 235.

<sup>3</sup> *Read v. Spear*, 107 N. Y. App. Div. 144, 94 N. Y. S. 1007.

<sup>4</sup> *Hayward v. Empire State Sugar Co.*, 105 N. Y. App. D. 21, 93 N. Y. S. 449.

ject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

§ 1170. When an instrument matures.

Section 85.—[TIME OF MATURITY.] Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due [or becoming payable] on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.<sup>5</sup>

Section 86.—[TIME; HOW COMPUTED.] Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.<sup>6</sup>

§ 1171. Date of maturity important for three questions.

At this point it is desirable to state more fully when an instrument is overdue. That is necessary for several purposes, and unfortunately under the Common Law an instru-

<sup>5</sup> The words in brackets [or becoming payable] have been inserted for the sake of clearness. They are found in the Florida, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington Acts. This section having twice used the word "payable" then uses the words "falling due." This has raised doubts in the minds of some as to the rule if Friday is a legal holiday and an instrument matures on that day. These words were inserted to

remove any possible doubt, though they seem unnecessary. Sight drafts are excepted from abolition of days of grace in Massachusetts, North Carolina and New Hampshire. The provision of the section in regard to Saturday is omitted in Arizona, Kentucky, Vermont and Wisconsin. The section is further amended in Iowa and Massachusetts. See for a discussion of this section, 23 Harv. L. Rev. 603; 26 *id.*, 592.

<sup>6</sup> A note dated Nov. 8, 1908, payable in twelve months must be presented on Nov. 8, 1909. *Lewy v. Wilkinson*, 135 La. 105, 64 So. 1003.

ment may not be overdue for all these purposes at the same moment. The first question is—When can the holder sue the party primarily liable? The second question is—When can the holder give effective notice of dishonor to parties secondarily liable that the instrument has been dishonored at maturity? The third question is—After what moment does the instrument become subject to personal defences when purchased even by a *bona fide* purchaser for value.

**§ 1172. In Europe an instrument is overdue for all purposes at the same time.**

Under the practice which prevails on the continent of Europe, of presentment by a notary who marks on the face of a bill the fact of its dishonor or of its payment on presentment, the difficulties that beset our law in regard to this matter do not occur. The answers to each of these three questions there will always be the same. As soon as there is a right of action against the maker then will always be the time to give notice, and thereafter the instrument will always pass subject to equities; and this time will be the moment on the day of maturity when the notary has thus indicated that the instrument is dishonored.

**§ 1173. When right of action accrues in the United States.**

It is the rule in simple contracts that when a man contracts to do something on a given day he has until the last minute of that day to satisfy his obligation. That is true both of contracts to pay money and of contracts to do other things.<sup>7</sup> If, therefore, by a simple contract one agrees to pay \$1,000 on the 2d of January, he cannot be sued on that obligation until after the last minute of the 2d of January has expired, for until that last minute it is possible he may fulfill his contract. The result is that a right of action will not accrue until the 3d of January. That principle, unfortunately, has been applied rather generally to negotiable instruments. If a note is by its terms payable on the 2d of January the gen-

<sup>7</sup> *Webb v. Fairmaner*, 3 M. & W. 473, *supra*, § 857.

eral rule is that no action can be begun against th  
to it until the 3d of January.<sup>8</sup>

This is probably contrary to the theory and cu  
bankers and merchants. Their theory is that the i  
the instrument agrees that he will pay it on present  
the 2d of January, that the maker is not entitled to  
minute of the day, that he must be ready at the b  
of the business day, and that at whatever hour on t  
the holder presents that instrument he is entitled to  
payment. The law in some States has to some ext  
ognized this custom. If there is an actual presentm  
dishonor on the 2d of January a right of action aga  
maker it is held arises immediately in favor of the l

But it is law generally, in these States as well as els  
that if presentment is not made on the 2d of Janua  
under the Negotiable Instruments Law there is no n  
of presentment except to charge the indorsers, and th  
a note without indorsers need not be presented) the  
is not liable to suit until the 3d of January;<sup>10</sup> unless the  
ment is payable at a bank. In that event it has be  
logically enough by some courts that as the maker cou  
comply with his promise during banking hours, a suit b  
on the day of maturity after banking hours, was n  
mature.<sup>11</sup> Even in such a case the general rule allow  
maker the full day of maturity is supported by other c

<sup>8</sup> Kennedy v. Thomas, [1894] 2 Q. B. 759. And see cases in the following notes, and *supra*, § 857.

<sup>9</sup> Leftley v. Mills, 4 T. R. 170; Heise v. Bumpass, 40 Ark. 545; Veazie Bank v. Winn, 40 Me. 62; Staples v. Franklin Bank, 1 Met. 43, 35 Am. Dec. 345; McKenzie v. Durant, 9 Rich. 61; Coleman v. Ewing, 4 Humph. 241. But even in such a case some courts hold that no right of action arises until January 3. Sutcliffe v. Humphreys, 58 N. J. L. 42, 32 Atl. 706; Oothout v. Ballard, 41 Barb. 33. Under Sec., 66 of the Act, the indorser, it is said, engages that the maker shall pay on presentment. It seems possible, therefore, that a right of action should

accrue against the indorser or of maturity if he is notified p  
It would be odd if there sho  
right of action against the  
before there is against the m

<sup>10</sup> Benson v. Adams, 69 Ind. Am. Rep. 220; Sturz v. Fisher, App. Div. 457, 459, 56 N. Y. Hardon v. Dixon, 77 N. Y. 241, 78 N. Y. S. 1061.

<sup>11</sup> Sabin v. Burke, 4 Ida. 28 352; Exchange Bank v. Bank America, 132 Mass. 147, 148; reys v. Sutcliffe, 192 Pa. 336 954, 73 Am. St. Rep. 819; Bank v. Lay, 80 Va. 436, 440.

<sup>12</sup> Benson v. Adams, 69 Ind. Am. Rep. 220; Sutcliffe v. Hu

The day of maturity is also affected by Sundays and holidays. If the day of maturity falls on Sunday or a holiday, the instrument is not payable until the next business day, and time instruments payable on Saturday must also be presented on the next business day in order to charge secondary parties.<sup>13</sup>

**§ 1174. When an instrument is overdue for other purposes.**

The second inquiry is this: When is an instrument overdue for the purpose of charging indorsers? For that purpose it is everywhere overdue as soon as it is presented and dishonored on the day of maturity (Sections 71, 83, 102), and the third inquiry is, when is it overdue for the purpose of letting in equities against a purchaser for value of the instrument? Everywhere but in Massachusetts, so far as it has been decided, the instrument is overdue for this purpose only on the day after that on which it falls due, that is, on the 3d of January, in the case above supposed.<sup>14</sup>

A purchaser on the 2d of January, unless he had notice that the instrument had been presented and dishonored, would be a holder in due course. In Massachusetts, however, one who purchases on the 2d of January is not a holder in due course,<sup>15</sup> unless Section 52 of the Negotiable Instruments Law has changed the law previously existing in that State.

**§ 1175. When right of action accrues on demand paper.**

A more troublesome question than that concerning the day of maturity of time paper is the day of maturity of demand paper, and here again the distinction must be made clear between these several questions of when a right of action arises, when the instrument is subject to equities, and when notice may be given to indorsers. On demand paper a right of action against the maker arises immediately as soon as it is delivered. By the terms of the paper it might be supposed

58 N. J. L. 42, 32 Atl. 706; *Smith v. Aylesworth*, 40 Barb. 104; *Taylor v. Jacoby*, 2 Pa. St. 495, 45 Am. Dec. 615.

<sup>13</sup> See *supra*, § 1170.

<sup>14</sup> *Savings Bank v. Bates*, 8 Conn.

505; *Walter v. Kirk*, 14 Ill. 55; *Goodpaster v. Voris*, 8 Ia. 334, 74 Am. Dec. 313; *Fox v. Bank of Kansas City*, 30 Kan. 441, 1 Pac. 789; *Crosby v. Grant*, 36 N. H. 273.

<sup>15</sup> *Pine v. Smith*, 11 Gray, 38.

that demand was a prerequisite to such a right of action, and on theory it ought to be, but, as has been said,<sup>16</sup> in the United States and in England it is not.<sup>17</sup>

**§ 1176. Maturity of demand paper to charge indorsers.**

The holder may make a demand on the maker within a reasonable time after the issue of the instrument for the purpose of charging indorsers, the instrument maturing at any time within that limit at which the holder wishes to present it. (Section 71 of the Act). That is, he may demand payment at once of the party primarily liable, and on his refusal to pay and notice to the indorser, he will acquire a right of action against the latter (Section 66), or he may defer demand until a reasonable time has nearly elapsed. The limit of time within which a purchaser of the instrument can acquire a title free of equitable defences is the same at common law,<sup>18</sup> and remains the same under the statute unless Section 53 and the last clause of Section 71 when taken together produce a different result.<sup>19</sup>

A check negotiated the day after its issue is certainly negotiated within a reasonable time,<sup>20</sup> and if a holiday intervenes, this will not make the following day unreasonable.<sup>21</sup> A cashier's check not negotiated until five days after its issue was held negotiated within a reasonable time.<sup>22</sup> The rule

<sup>16</sup> *Supra*, § 1164.

<sup>17</sup> *Norton v. Ellam*, 2 M. & W. 461; *Hunter v. Wood*, 54 Ala. 71; *Bell v. Sackett*, 38 Cal. 407; *Fankboner v. Fankboner*, 20 Ind. 62; *Burnham v. Allen*, 1 Gray, 496; *Farmers' Nat. Bank v. Venner*, 192 Mass. 531, 78 N. E. 540; *Wheeler v. Warner*, 47 N. Y. 519, 7 Am. Rep. 478; *Hyman v. Doyle*, 53 N. Y. Misc. 597, 103 N. Y. S. 778; *Shuman v. Citizens' Bank*, 27 N. Dak. 599, 147 N. W. 388, L. R. A. 1915 A. 728; *Union Central Life Ins. Co. v. Curtis*, 35 Ohio St. 357; *Dominion Trust Co. v. Hildner*, 243 Pa. 253, 90 Atl. 69; *Dawley v. Wheeler*, 52 Vt. 574.

In *Hebblethwaite v. Flint*, 185 N. Y. App. D. 249, 173 N. Y. S. 81, the court stated that if a demand note was non-

negotiable it must be presented to charge the maker; but the common-law rule that promises to pay on demand are payable without a demand does not depend upon negotiability. See *infra*, § 1289.

<sup>18</sup> In Massachusetts prior to the passage of the Negotiable Instruments Law, a statutory rule subjected all demand notes to personal defences whenever transferred.

<sup>19</sup> See *supra*, § 1165.

<sup>20</sup> *Matlock v. Scheuerman*, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747.

<sup>21</sup> *Asbury v. Taube*, 151 Ky. 142, 151 S. W. 372.

<sup>22</sup> *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522.



in regard to demand notes is more liberal than in regard to demand bills. The facts of each case must be considered, but perhaps two to three months seems the ordinary time permissible for notes.<sup>23</sup>

In several States, prior to the passage of the Negotiable Instruments Law, statutes fixed the length of a reasonable time;<sup>24</sup> but the Negotiable Instruments Law has repealed such statutes.<sup>25</sup> In Massachusetts, however, it has been held that a usage had grown up making sixty days (the period previously fixed by the local statute) a reasonable time within which demand must be made on the maker, in order to charge an indorser on such a note.<sup>26</sup> There is great advantage of certainty in having the limits of a reasonable time exactly defined.

There can be no question that Section 71 has reversed an exceptional doctrine prevailing in New York to the effect that if a note payable on demand contained an express provision for the payment of interest it was intended as a "continuing security" and an indorser would not be discharged by failure to make demand so long as the note remained an enforceable obligation.<sup>27</sup>

### § 1177. Domiciled notes.

**Section 87.—[RULE WHERE INSTRUMENT PAYABLE AT BANK.]** Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.<sup>28</sup>

<sup>23</sup> See *Hampton v. Miller*, 78 Conn. 267, 61 Atl. 952; *Ranger v. Cary*, 1 Metc. 369; *Stevens v. Bruce*, 21 Pick. 193; *McAdam v. Grand Forks Mercantile Co.*, 24 N. Dak. 645, 140 N. W. 725, 47 L. R. A. (N. S.) 246; *Sice v. Cunningham*, 1 Cow. 397, 404.

<sup>24</sup> *E. g.*, in Connecticut, Massachusetts, Minnesota, Vermont.

<sup>25</sup> *Hampton v. Miller*, 78 Conn. 267, 271, 61 Atl. 952; *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987.

<sup>26</sup> *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987; *Plymouth County Trust*

*Co. v. Scanlan*, 227 Mass. 71, 116 N. E. 468.

<sup>27</sup> The prior law is indicated by *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243; *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231. As to the effect of the statute, see *supra*, § 1165.

<sup>28</sup> This section is omitted in Illinois, Nebraska and South Dakota, and has been repealed in Kansas. In Minnesota the section is retained but instead of the words "it is equivalent" are substituted "it shall not be equiva-

A note payable at "any bank in Boston" is the scope of this section.<sup>29</sup>

The effect of making a note payable at a bank, instrument sometimes called a "domiciled note," thus stated.<sup>30</sup> "In England, presentment of a note at the designated place is necessary as a condition to suit against the maker, but failure to present at maturity seems only to affect the question of interest costs."<sup>31</sup> In America, before the Negotiable Instrument Law, no presentment was necessary as a condition to bring an action against the maker, though, as in England, the maker was set up as a valid tender the fact that he had funds in the bank at the day of maturity.<sup>32</sup> If the holder did not present the note, the majority view was that the bank might be liable out of funds of the maker on deposit,<sup>33</sup> though this view was controversially disputed.<sup>34</sup> And there seem to have been isolated and much criticised decisions which denied the maker a recovery where his neglect to present resulted in the loss of the note due to failure of the bank.<sup>35</sup> However, the

order is limited to the day of maturity." In Missouri and New Jersey

<sup>29</sup> *Carpenter v. National Shawmut Bank*, 187 Fed. 1, 109 C. C. A. 55.

<sup>30</sup> 29 Harv. L. Rev. 205.

<sup>31</sup> Citing *Dickinson v. Bowes*, 16 East, 110; *Sands v. Clarke*, 8 C. B. 751. *Contra*, *Nichols v. Bowes*, 2 Campb. 498. *Cf.* *Rowe v. Young*, 2 Brod. & B. 165.

<sup>32</sup> Citing *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95.

<sup>33</sup> Citing *Bedford Bank v. Acoam*, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258; *Kymer v. Laurie*, 18 L. J. Q. B. 218. See also *Home Nat. Bank v. Newton*, 8 Bradw. 563; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Commercial Nat. Bank v. Henninger*, 105 Pa. 496. And perhaps the bank was bound to the maker to make the payment. *German Nat. Bank v. Foreman*, 138 Pa. 474, 21 Atl. 20, 21

Am. St. Rep. 908. But the bank is under no obligation to make payment from the account of the maker. *Mechanics', etc. Seitz*, 150 Pa. 632, 24 Am. St. Rep. 853.

<sup>34</sup> Citing *Wood & Co. v. Savings, etc., Co.*, 41 Ill. 222; *Commercial National Bank v. Commercial National Bank*, 10 S. W. 774, 31 Am. St. Rep. 669.

<sup>35</sup> Citing *Lazier v. Hoag*, 75, 7 N. W. 457, 39 Am. St. Rep. 669. (this case was thought to be overruled in *Bank of England v. Commercial National Bank of Charlestown, etc.*, 105 Ia. 349, 75 Am. St. Rep. 444, 37 Am. Rep. 444; *Story, Promissory Notes*, a careful criticism of the case. *Adams v. Hackensack*, 44 N. J. 43 Am. Rep. 406 (15 V. 43) also *Williamsport Gas Co. v. Williamsport Gas Co.*, 95 Pa. St. 62.

has been materially changed by the Negotiable Instruments Law. At common law the bank had at most but a bare authority to pay a note domiciled there. Now, by express provision, such an instrument is equivalent to an order on the bank to pay the same.<sup>36</sup> This is in effect the creation of negotiable paper similar to a check, differing only in that it is payable at a future date. And there is not even this distinction when the note is payable on demand. In both cases the business understanding is that the debtor will have sufficient funds at the bank, and it is the duty of the bank to apply such funds to payment of the instrument. It might well be urged, therefore, that the statute has, in substantial effect, put the maker of a domiciled note in a position of secondary liability similar to that of the drawer of a check."<sup>37</sup>

#### § 1178. Payment.

**Section 88.—[WHAT CONSTITUTES PAYMENT IN DUE COURSE.]** Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Payment before maturity is only a personal defence even though made to the holder,<sup>38</sup> and if made to one who is neither the holder nor authorized by him to receive payment is totally inoperative,<sup>39</sup> unless the party paying acquires the instrument properly indorsed, and in effect becomes a purchaser of it. Payment at or after maturity is in effect an absolute defence

<sup>36</sup> Citing Brannan, *Negotiable Instruments Law*, (3d ed.) § 87.

<sup>37</sup> This view is supported by the cases of *New England Nat. Bank v. Dick*, 84 Kans. 252, 114 Pac. 378; *Baldwin's Bank v. Smith*, 215 N. Y. 76, 109 N. E. 138, Ann. Cas. 1917 A. 500. But these decisions seem inconsistent with Sec. 70 of the statute, unless it can be said that the maker of a note is not the "person primarily liable" if the instrument is payable at a bank—a somewhat extreme contention. The

New York decision is criticised in Crawford's *Negotiable Instruments Law* (4th ed.), 162. See also *Binghamton Pharmacy v. First Nat. Bank*, 131 Tenn. 711, 176 S. W. 1038.

<sup>38</sup> *Burbridge v. Manners*, 3 Camp. 193; *Watson v. Wyman*, 161 Mass. 96, 99, 36 N. E. 692.

<sup>39</sup> *Wheeler v. Guild*, 20 Pick. 545, 32 Am. Dec. 231; *Hayden v. Speakman*, 20 N. Mex. 513, 150 Pac. 292. But see *Bainbridge v. Louisville*, 83 Ky. 285, 4 Am. St. Rep. 153.

## § 1179 BILLS OF EXCHANGE AND PROMISSORY NOTE

if made to the party entitled to receive it, since there is no new holder in due course after maturity. But the conclusive proof that a person is entitled to receive is the contemporaneous surrender of the instrument indorsed,<sup>40</sup> and a payment made to one who is not the holder is inoperative.<sup>41</sup> On the other hand, payment before or after maturity to a holder is a discharge by the words, of section 88; but the party paying will not be charged if he has notice that the holder is not truly and equitably entitled to payment.<sup>42</sup>

### § 1179. Requirement of notice, and its effect.

## ARTICLE VII

### NOTICE OF DISHONOR

**Section 89.—[TO WHOM NOTICE OF DISHONOR MUST BE GIVEN.]** Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

By this section, following the rule of the law, proper notice is made a condition precedent of any action on the instrument on the part of a drawer or an indorser. Failure to give notice may also deprive the holder of his right to resort to a debt for which the instrument was given. A guarantor is not entitled to notice of dishonor.<sup>43</sup> The same rule applies to an accommodation maker.<sup>45</sup>

<sup>40</sup> *Loizeaux v. Fremder*, 123 Wis. 193, 101 N. W. 423.

<sup>41</sup> *Adair v. Lenox*, 15 Oreg. 489, 16 Pac. 182.

<sup>42</sup> *Hinckley v. Union Pac. R.*, 129 Mass. 52, 37 Am. Rep. 297.

<sup>43</sup> By the French Commercial Code (Arts. 168-170), though lack of notice discharges indorsers, it does not discharge the drawer unless he shows that the drawee had sufficient effects of the

drawer to meet the bill when presented. Under the German Exchange Law (Art. 45), failure to give notice discharges the holder only of interest, unless the omission causes loss.

<sup>44</sup> See *infra*, § 1922a.

<sup>45</sup> *Roberts v. Hawkins*, 566, 38 N. W. 575; *H. O'Brien*, 37 Minn. 306, 34 Am. Rep. 34; *Brown v. Curtiss*, 2 N. Y. 100.

<sup>46</sup> *First State Bank v. V*

**Section 90.—[BY WHOM GIVEN.]** The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given.

**Section 91.—[NOTICE GIVEN BY AGENT.]** Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.<sup>45</sup>

**Section 92.—[EFFECT OF NOTICE GIVEN ON BEHALF OF HOLDER.]** Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.<sup>47</sup>

**Section 93.—[EFFECT WHERE NOTICE IS GIVEN BY PARTY ENTITLED THERETO.]** Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

**Section 94.—[WHEN AGENT MAY GIVE NOTICE.]** Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice himself the same time for giving notice as if the agent had been an independent holder.<sup>48</sup>

## § 1180. Form of notice.

**Section 95.—[WHEN NOTICE SUFFICIENT.]** A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communica-

Ky. 143, 175 S. W. 10; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875.

<sup>45</sup> See Hooper v. Herring, 14 Ala. App. 455, 70 So. 308; Traders' Nat. Bank v. Jones, 104 N. Y. App. D. 433, 93 N. Y. S. 768.

<sup>46</sup> Piedmont Carolina Ry. Co. v. Shaw, 223 Fed. 973, 138 C. C. A. 227.

<sup>47</sup> Gleason v. Thayer, 87 Conn. 248, 87 Atl. 790, Ann. Cas. 1915 B. 1069. See also Fielding v. Corry, [1898] 1 Q. B. 268; Blue Ribbon Garage v. Baldwin, 91 Conn. 674, 101 Atl. 83.

tion. A misdescription of the instrument does not void notice unless the party to whom the notice is given is misled thereby.<sup>49</sup>

Section 96.—[FORM OF NOTICE.] The notice in writing or merely oral and may be given in a form which sufficiently identifies the instrument, and that it has been dishonored by non-acceptance or payment. It may in all cases be given by delivery personally or through the mails.<sup>50</sup>

Though the form of notice is legally immaterial, it is obviously desirable for purposes of easy proof to have a proper form of notice. Mere knowledge of dishonor is not enough to make a party secondarily liable. Notification is a conditional obligation.<sup>51</sup>

§ 1181. To whom notice must be given.

Section 97.—[TO WHOM NOTICE MAY BE GIVEN.] Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Section 98.—[NOTICE WHERE PARTY IS DEAD.] If any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if with reasonable diligence he cannot be found. If there be no personal representative, notice must be sent to the last residence or last place of business of the deceased.<sup>52</sup>

Section 99.—[NOTICE TO PARTNERS.] Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

Section 100.—[NOTICE TO PERSONS JOINTLY LIABLE.] Notice to joint parties who are not partners is notice to all.

<sup>49</sup> Under the Kentucky Act, the notice must be written and signed.

<sup>50</sup> Notice by telephone is sufficient. *Blue Ribbon Garage Co. v. Baldwin*, 91 Conn. 674, 101 Atl. 83; *American Nat. Bank v. National Fertilizer Co.*, 125 Tenn. 328, 143 S. W. 597.

<sup>51</sup> *Marshall v. Sonneman*, 216 Pa. 65, 64 Atl. 874; *McVeigh v. Bank of*

*Old Dominion*, 26 Gratt. 18; *Old Dominion v. McVeigh*, 546.

<sup>52</sup> See *Second Nat. Bank v. Jones*, 99 N. J. L. 531, 103 Atl. 862.

<sup>53</sup> *Feigenspan v. McDonough*, 341 Mass. 341, 87 N. E. 624; *Nat. Bank v. Jones*, 104 N. Y. 433, 93 N. Y. S. 768.

be given to each of them, unless one of them has authority to receive such notice for the others.<sup>54</sup>

Section 101.—[NOTICE TO BANKRUPT.] Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§ 1182. Time allowed for notice.

Section 102.—[TIME WITHIN WHICH NOTICE MUST BE GIVEN.] Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

Section 103.—[WHERE PARTIES RESIDE IN SAME PLACE.] Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

(1) If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

(2) If given at his residence, it must be given before the usual hours of rest on the day following.

(3) If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Section 104.—[WHERE PARTIES RESIDE IN DIFFERENT PLACES.] Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:—

(1) If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.<sup>55</sup>

(2) If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

<sup>54</sup> See *supra*, § 333.

113, 115 N. E. 292; Second Nat. Bank

<sup>55</sup> See *Harris v. Baker*, 226 Mass. v. *Smith*, 91 N. J. L. 531, 103 Atl. 862.

§ 1183. Notice properly sent is effective, though not

Section 105.—[WHEN SENDER DEEMED TO HAVE GIVEN DUE NOTICE.] Where notice of dishonor is addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding miscarriage in the mails.<sup>56</sup>

The notice must be duly stamped as well as "addressed and deposited;"<sup>57</sup> and evidence that the notice was received is relevant to the issue whether it was sent.<sup>58</sup>

Section 106.—[DEPOSIT IN POST-OFFICE; WHEN NOTICE IS DEEMED TO HAVE BEEN GIVEN.] Notice is deemed to have been given in the post-office when deposited in any branch post-office or in any letter box under the control of the post-department.

§ 1184. Time for charging successive parties.

Section 107.—[NOTICE TO ANTECEDENT PARTIES.] Where a party receives notice of dishonor, after the receipt of such notice, the same time is allowed for notice to antecedent parties that the holder has after dishonor.

The rule that when notice is properly given to a party secondarily liable, he has the same time to give notice to antecedent parties raises rather a curious situation. Suppose the holder gave prompt notice to the last of five indorsers, and also gave notice, but not promptly, to the first indorser; the latter notice is ineffective. But if notice had been given by the last indorser to the other four, and so in turn each indorser seasonably notifies the one before him until finally the first indorser is notified by the last, that is a good notice to the first indorser, although it may be a week or a fortnight later than the other one which was bad notice; and under section 93, that second notice

<sup>56</sup> See *Second Nat. Bank v. Smith*, 126, 120 N. W. 820, 131 A. 91 N. J. L. 531, 103 Atl. 862.

<sup>57</sup> *First Nat. Bank v. Miller*, 139 Wis.

<sup>58</sup> *First Nat. Bank v. Case Co.*, 187 Mich. 224,



not only inure to the benefit of the indorser who sent it, but it would inure to the benefit of the holder. There is one method of sending notice to earlier indorsers which was upheld in a case decided in Massachusetts some years ago, and perhaps the same method is in use now; that is, by mailing notices to all the indorsers under one cover to the last indorser, leaving it to him to forward the notices to the earlier indorsers. Of course, if he does so promptly there is no doubt that such notices are timely (Section 107) and inure to the benefit of the holder, but it was further held in the case in question to be a proper method of notification, charging all the indorsers, even though the last indorser did not forward the notices to the earlier indorsers.<sup>59</sup>

It may be doubted if the Massachusetts decision would generally be accepted.<sup>60</sup> It is obvious that if the risk of the notices being forwarded is on the original sender, the method in question is a very unsafe one to adopt in charging parties secondarily liable.

#### § 1185. Address to which notice must be sent.

**Section 108.—[WHERE NOTICE MUST BE SENT.]** Where a party has added an address to his signature, notice of dishonor must be sent to that address;<sup>61</sup> but if he has not given such address, then the notice must be sent as follows:—

(1) Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or <sup>62</sup>

722; *Union Bank v. Deshel*, 139 N. Y. App. D. 217, 123 N. Y. S. 585. Cf. *First Nat. Bank v. Delone*, 254 Pa. 409, 98 Atl. 1042.

<sup>59</sup> *Wamesit Bank v. Buttrick*, 11 Gray, 387.

<sup>60</sup> See *Vaughan v. Potter*, 131 Ill. App. 334; *Van Brunt v. Vaughn*, 47 Ia. 145, 29 Am. Rep. 468; *Wood v. Callaghan*, 61 Mich. 402, 28 N. W. 162, 1 Am.-St. Rep. 597; *Stix v. Matthews*, 63 Mo. 371, 375; *Fuller Buggy Co. v. Waldron*, 112 N. Y. App. D. 814, 99 N. Y. S. 561; *Lawson v. Farmers' Bank*, 1 Ohio St. 206.

<sup>61</sup> See *Lankofsky v. Raymond*, 217 Mass. 98, 104 N. E. 489. Notice sent to a place which the indorser said, at the time when the note was made, was his address, is sufficient to charge him. *Archuleta v. Johnston*, 53 Col. 393, 127 Pac. 134.

<sup>62</sup> Notice sent addressed to an indorser at "New York City" without more was held sufficient though his exact address could have been found in the telephone directory. *McGrath v. Fancolini*, 92 N. Y. Misc. 359, 156 N. Y. S. 981.

(2) If he live in one place, and have his place of in another, notice may be sent to either place; or

(3) If he is sojourning in another place, notice sent to the place where he is sojourning.

But where the notice is actually received by t within the time specified in this act, it will be s though not sent in accordance with the requirer this section..

# § 1186. Effect of waiver.

Section 109.—[WAIVER OF NOTICE.] Notice honor may be waived, either before the time of giving has arrived, or after the omission to give due notice, waiver may be express or implied.<sup>63</sup>

Section 110.—[WHOM AFFECTED BY W. Where the waiver is embodied in the instrument it is binding upon all parties; but where it is written the signature of an indorser, it binds him only.<sup>64</sup>

Section 111.—[WAIVER OF PROTEST.] A waiver protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a not only of a formal protest, but also of presentment notice of dishonor.

“The liability of an indorser is conditional, the condition being first, that at the maturity of the note there shall be demand upon the maker for payment, and second, that if the note be not then paid due notice thereof shall be given to the indorser. And these two conditions are distinct.”

<sup>63</sup> See *supra*, §§ 157, 689. Recent illustrations of waiver implied from previous dealings are found in *Simonoff v. Granite City Nat. Bank*, 279 Ill. 248, 116 N. E. 636; *Linthicum v. Bagby*, 131 Md. 644, 102 Atl. 997. Whether waiver of presentment involves waiver of notice is disputed. See this section *ad fin.*

<sup>64</sup> *Owensboro Sav. Bank v. Haynes*, 143 Ky. 534, 136 S. W. 1004; *Atkins v. Dixie Fair Co.*, 135 La. 622, 65 So.

762. Where there was a waiver on the back of the note, several indorsers who signed the back of the instrument before delivery were each held bound by the waiver. *Central Nat. Bank v. Bankville &c. Co.*, 79 W. Va. 782, 808. And in *Hurlbut v. Quigg*, 180 Pac. 613, the words “waive presentment &c.” written by the names of several indorsers was held to waive a joint and several promise

independent of each other. Either can be waived and the other insisted upon.”<sup>65</sup> Protest is an added requisite in case of a foreign bill. Logically, therefore, a waiver of protest should waive neither presentment nor notice; but protest is so often inexactly used by business men to express presentment and notice as well as a technical protest that the statute has accepted this use of language and given effect to it.<sup>66</sup>

**§ 1187. Excuses for failure or delay in giving notice.**

**Section 112.—[WHEN NOTICE IS DISPENSED WITH.]** Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

**Section 113.—[DELAY IN GIVING NOTICE: HOW EXCUSED.]** Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to this default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

**Section 114.—[WHEN NOTICE NEED NOT BE GIVEN TO DRAWER.]** Notice of dishonor is not required to be given to the drawer in either of the following cases:—

- (1) Where the drawer and drawee are the same person;
- (2) When the drawee is a fictitious person or a person not having capacity to contract;
- (3) When the drawer is the person to whom the instrument is presented for payment;
- (4) Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
- (5) Where the drawer has countermanded payment.

**Section 115.—[WHEN NOTICE NEED NOT BE GIVEN TO INDORSER.]** Notice of dishonor is not required to be given to an indorser in either of the following cases:—

- (1) Where the drawee is a fictitious person or a person

<sup>65</sup> *Hall v. Crane*, 213 Mass. 326, 327, 100 N. E. 554. See also *Baer v. Hoffman*, 150 N. Y. App. D. 473, 135 N. Y. S. 28. But see *contra*, *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886.

<sup>66</sup> *Atkinson v. Skidmore*, 152 Ky. 413, 153 S. W. 456; *Frank-Taylor-Kendrick Co. v. Voissemment*, 142 La. 973, 77 So. 895.

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not having capacity to contract, and the indorser was of the fact at the time he indorsed the instrument;

(2) Where the indorser is the person to whom the instrument is presented for payment;

(3) Where the instrument was made or accepted for accommodation.

§ 1188. **Effect of notice of non-acceptance; protest.**

Section 116.—[NOTICE OF NON-PAYMENT ACCEPTANCE REFUSED.] Where due notice of non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary, unless meantime the instrument has been accepted.

Section 117.—[EFFECT OF OMISSION TO GIVE NOTICE OF NON-ACCEPTANCE.] An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Section 118.—[WHEN PROTEST NEED NOT BE MADE; WHEN MUST BE MADE.] Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.<sup>68</sup>

§ 1189. **Discharge of instrument.**

**ARTICLE VIII**

**DISCHARGE OF NEGOTIABLE INSTRUMENTS**

Section 119.—[INSTRUMENT; HOW DISCHARGED.] A negotiable instrument is discharged:—

(1) By payment in due course by or on behalf of the principal debtor;

(2) By payment in due course by the party accountable.

<sup>68</sup> In the Wisconsin Act these words are added "but this shall not be construed to revive any liability discharged by such omission."

<sup>69</sup> Protest is not conclusive of dishonor. *Man v. Brazier*, 198 Mass. 478, 856.

dated, where the instrument is made or accepted for accommodation;

(3) By the intentional cancellation thereof by the holder;

(4) By any other act which will discharge a simple contract for the payment of money;

(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right;<sup>66</sup>

It has been frequently pointed out<sup>70</sup> that paragraph four is a blunder. An accord and satisfaction, or payment before maturity, will discharge a simple contract for the payment of money, but unless the Statute has changed the law, will not discharge a negotiable instrument against a subsequent holder in due course.<sup>71</sup>

Subsections 1 and 5 introduce a question of suretyship by the use of the term "principal debtor." The words "person primarily liable" should have been inserted here.

Subsection 2 covers the case of a principal debtor who is not the party primarily liable, and subsections 1 and 5 should have been confined to dealing with the person primarily liable on the instrument whether he has assumed that position for accommodation or not. When an accommodation maker pays a note at maturity the note is legally discharged. He will have a right to recover from the accommodated indorser, not, however, on the note but on a collateral obligation; and if equity should regard the note as still alive for the purpose of subrogating the surety to the creditor's claim against the principal debtor,<sup>72</sup> this should be regarded as effective only between these parties on equitable principles.

#### § 1190. Discharge of individual parties.

Section 120.—[WHEN PERSONS SECONDARILY LIABLE ON, DISCHARGED.] A person secondarily liable on the instrument is discharged:—

(1) By any act which discharges the instrument;

<sup>66</sup> In the Illinois Act subsection (4) is omitted.

<sup>70</sup> *E. g.*, 26 Harv. L. Rev. 588, 593.

<sup>71</sup> Daniel, Neg. Inst., § 1233; *supra*, § 1178.

<sup>72</sup> In *Walker v. Chicago, etc., R. Co.*, 277 Ill. 451, 115 N. E. 659, however, it was held that a joint maker of a note who was in fact a surety might buy the note without thereby discharging it.

(2) By the intentional cancellation of his signature by the holder;

(3) By the discharge of a prior party;

(4) By a valid tender of payment made by a party;

(5) By a release of the principal debtor, unless the right of recourse against the party secondarily liable is expressly reserved;

(6) By any agreement binding upon the holder at the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.<sup>73</sup>

The difficulties introduced in the preceding section by the words "principal debtor" are continued in this section. A proposed amendment of the section which was adopted restored the rules commonly in force before the present act was to strike out subsections (3) (5) and (6) and section (4) then becoming (3)] and to add a new subsection (4).

"(4) A party who as between himself and another is also discharged by any act which under the law of the State discharges a surety; but such a discharge shall not affect the rights of a subsequent holder in due course."

This amendment was not, however, adopted and

<sup>73</sup> In the Illinois Act subsection (3) reads: "(3) By a valid tender of payment made by a prior party." To subsection 5 there is added "or unless the principal debtor be an accommodating party." Subsection (6) is amended to read as follows: By an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent, prior or subsequent, of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party." In the Missouri Act there is added to subsection (3) "except when

such discharge is had in legal proceedings." In the Wisconsin Act there is inserted a new subsection (4a) By giving up or applying for purposes collateral security to the debt, or, there being in the holder's hands or within his means of complete or partial satisfaction, the same are applied to the purposes." The words "prior or subsequent" are inserted after the word "agreement" in subsection (6) and the words "unless he is fully indemnified" are added to the subsection. In the Illinois and New York Acts the words "unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved" are omitted.

probable that the Negotiable Instruments Law will be construed as effecting a change in the law where indulgence is given to a secondary party who, as between himself and an antecedent party is a principal debtor.<sup>74-75</sup>

**§ 1191. Effect of payment by a party secondarily liable.**

**Section 121.—[RIGHT OF PARTY WHO DISCHARGES INSTRUMENT.]** Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:—

(1) Where it is payable to the order of a third person, and has been paid by the drawer; and

(2) Where it was made or accepted for accommodation, and has been paid by the party accommodated.<sup>76</sup>

The provision of this section is literally inapplicable where the party secondarily liable who pays is an anomalous indorser who was liable to the payee under section 64 (1), since previous to the payment the indorser has never had a title to which he can be remitted.<sup>77</sup> The last clause of the section should properly have been "where it was made, accepted or indorsed for accommodation," etc., but in spite of the failure to cover expressly the case of an accommodated indorser, payment by such a person would extinguish the instrument.<sup>78</sup>

**§ 1192. Renunciation without consideration.**

**Section 122.—[RENUNCIATION BY HOLDER.]** The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the

<sup>74-75</sup> See *infra*, § 1260.

<sup>76</sup> See *Assets Realization Co. v. Mercantile Nat. Bank*, 167 N. Y. App. Div. 757, 153 N. Y. S. 156.

<sup>77</sup> *Quimby v. Varnum*, 190 Mass. 211, 76 N. E. 671; but see *Graves v. Neeves*,

183 Ill. App. 235; *Lill v. Gleason*, 92 Kan. 754, 142 Pac. 287; *Pease v. Tyler*, 78 Wash. 24, 138 Pac. 310.

<sup>78</sup> *Josephsohn v. Gens*, 85 N. Y. Misc. 372, 147 N. Y. S. 451. See Secs. 119, 196.

principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course with notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

The doctrine of this section so far as it permits discharge without consideration, is peculiar to the law of bills of exchange. An agreement for consideration to discharge a note has no legal effect, but no express statutory provision is needed to bring this about. A release of one joint debtor coupled with a reservation of rights against others is not "absolute and unconditional" within the meaning of the section;<sup>81</sup> nor is an undelivered writing in the possession of a deceased holder of a note.<sup>82</sup>

### § 1193. Unintentional cancellation and alteration.

**Section 123.—[CANCELLATION; UNINTENTIONAL CANCELLATION; BURDEN OF PROOF.]** A cancellation made unintentionally, or under a mistake or without authority, is inoperative; but where an instrument or any part thereof appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was unintentional, or under a mistake or without authority.

**Section 124.—[ALTERATION OF INSTRUMENT.]** Where a negotiable instrument is altered without the assent of all parties liable thereon, the alteration is avoided, except as against a party who has himself authorized or assented to the alteration, and subsequent holders.

But when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration,

<sup>79</sup> See *infra*, §§ 1829 *et seq.*

<sup>80</sup> *Whitcomb v. National Exch. Bank*, 123 Md. 612, 91 Atl. 689.

<sup>81</sup> *Davis v. Gutheil*, 87 Wash. 596, 152 Pac. 14.

<sup>82</sup> *Leask v. Dew*, 102 N. Y. App. D. 529, 92 N. Y. S. 891. See also *In re George*, 44 Ch. D. 627. Cf. *Pyle v. East*, 173 Iowa, 165, 155 N. W. 283.

<sup>83</sup> See *Morris v. Reyr*, App. 112, 103 N. E. 422; *Pott's Est.*, (Iowa 1917) 167; *First Nat. Bank v. N. Y. App. D.* 398, 98 N. Y. App. D. 398, 98 N. Y. S. 910, and *in* 1598.



alteration, he may enforce payment thereof according to its original tenor.<sup>84</sup>

**Section 125.—[WHAT CONSTITUTES A MATERIAL ALTERATION.]** Any alteration which changes,—

- (1) The date;
- (2) The sum payable, either for principal or interest;
- (3) The time or place of payment;
- (4) The number or the relations of the parties;
- (5) The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.<sup>85</sup>

§ 1194. Special rules governing bills of exchange.

## TITLE II

### BILLS OF EXCHANGE

#### ARTICLE I

##### FORM AND INTERPRETATION

**Section 126.—[BILL OF EXCHANGE DEFINED.]** A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

**Section 127.—[BILL NOT AN ASSIGNMENT OF FUNDS IN HANDS OF DRAWEE.]** A bill of itself does not operate as an assignment of the funds in the hands of the drawee

<sup>84</sup>Smith, Kline & French Co. v. Freeman (N. J. L.), 106 Atl. 22. In the Illinois Act the words "fraudulently or" (probably "and" was intended), are inserted before "materially" in line one and the words "by the holder" after "altered" in the

same sentence. In the Wisconsin Act the words "orally or in writing" are inserted after "assented" in the fifth line. See comment on this section, *infra*, § 1892.

<sup>85</sup>See *infra*, §§ 1902-1908.

available for the payment thereof, and the drawee is liable on the bill unless and until he accepts the same.

Section 128.—[BILL ADDRESSED TO MORE THAN ONE DRAWEE.] A bill may be addressed to two or more drawees jointly, whether they are partners or not, or to two or more drawees in the alternative or in succession.

Section 129.—[INLAND AND FOREIGN BILLS OF EXCHANGE.] An inland bill of exchange is a bill which on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

Section 130.—[WHEN BILL MAY BE TREATED AS A PROMISSORY NOTE.] Where in a bill the drawer and drawee are the same person, or where the drawee is a partner of the drawer, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Section 131.—[REFEREE IN CASE OF NEED.] The drawer of a bill and any indorser may insert the name of a person to whom the holder may resort in case of need, that is to say in case the bill is dishonored by non-acceptance or non-payment. Such person is called a referee in case of need. It is in the option of the holder whether he resort to the referee in case of need or not as he may think proper.

§ 1195. What amounts to an acceptance.

## ARTICLE II

### ACCEPTANCE

Section 132.—[ACCEPTANCE; HOW MADE, ETC.] The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

<sup>22</sup> See *supra*, §§ 425, 426.

Prior to the enactment of the statute oral acceptances were often held good,<sup>87</sup> but this was doubtless opposed to the best mercantile understanding, and, except as provided by Section 137, has been wisely changed by the statute.<sup>88</sup> A written admission that the drawee is indebted in an amount equal to the face of a bill drawn on him, is not an acceptance.<sup>89</sup>

**Section 133.—[HOLDER ENTITLED TO ACCEPTANCE ON FACE OF BILL.]** The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and, if such request is refused, may treat the bill as dishonored.

**Section 134.—[ACCEPTANCE BY SEPARATE INSTRUMENT.]** Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.<sup>90</sup>

**Section 135.—[PROMISE TO ACCEPT; WHEN EQUIVALENT TO ACCEPTANCE.]** An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who upon the faith thereof, receives the bill for value.<sup>91</sup>

<sup>87</sup> See *Scudder v. Union Bank*, 91 U. S. 406, 23 L. Ed. 245; *Hall v. Cordell*, 142 U. S. 116, 35 L. Ed. 956, 12 Sup. Ct. 154; *Jarvis v. Wilson*, 46 Conn. 90, 33 Am. Rep. 18; *Cook v. Baldwin*, 120 Mass. 317, 21 Am. Rep. 517.

<sup>88</sup> *Fairecloth-Byrd, etc., Co. v. Adkinson*, 167 Ala. 344, 52 So. 419; *Rambo v. First State Bank*, 88 Kan. 257, 128 Pac. 182; *Clayton Town Site Co. v. Clayton Drug Co.*, 20 N. Mex. 185, 147 Pac. 460; *Izzo v. Ludington*, 79 N. Y. App. Div. 272, 79 N. Y. S. 744; *Fredrick v. Spokane Grain Co.*, 47 Wash. 85, 91 Pac. 570. Cf. *Gruenther v. Bank of Monroe*, 90 Neb. 280, 133 N. W. 402.

<sup>89</sup> *Plaza Farmers' Union W. & E. Co. v. Ryan*, 78 Wash. 124, 138 Pac. 651. See also *Carmichael v. Tishomingo Banking Co.*, (Mo. App. 1917), 191 S. W. 1043.

<sup>90</sup> See *Jones v. Clumpler*, 119 Va. 143, 89 S. E. 232.

<sup>91</sup> A promise by telegraph is in writing within the meaning of the statute. *Oil Well Supply Co. v. MacMurphey*, 119 Minn. 500, 138 N. W. 784. Even though the sender telephoned the message to the operator. *Selma Sav. Bank v. Webster County Bank (Ky.)*, 206 S. W. 870. See also the following cases where the writing was held to amount to an acceptance. *North Atchison Bank v. Garretson*, 51 Fed. 168; *First Nat. Bank v. First Nat. Bank*, 210 Fed. 542; *Lehnhard v. Sidway*, 160 Mo. App. 83, 141 S. W. 430; *State Bank v. Bradstreet*, 89 Neb. 188, 130 N. W. 1038, 38 L. R. A. (N. S.) 747; *Johnson v. Clark*, 39 N. Y. 216; *First Nat. Bank v. Muskogee Pipe Line Co.*, 40 Okla. 603, 139 Pac. 1136, L. R. A. 1916 B. 1021. Cf. *Soppe v. Mecha-*

**Section 136.—[TIME ALLOWED DRAWEE CEPT.]** The drawee is allowed twenty-four hours for presentation, in which to decide whether or not to accept the bill; but the acceptance if given, dates from the day of presentation.

**Section 137.—[LIABILITY OF DRAWEE RE-CEIVING OR DESTROYING BILL.]** Where a drawee to whom a bill is delivered for acceptance destroys the same before it is due, or within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, whether accepted or non-accepted to the holder, he will be deemed to have accepted the same.<sup>92</sup>

The language of this section if taken literally seems to be open to objection. Aside from the inartistic terminology in calling what is really conversion an acceptance, to follow that if such conversion is deemed an acceptance, a notice of dishonor need not be given to the drawer or to the holder, with an unfortunate result. Furthermore it is doubtful if the words "within such other period" are intended to mean "within such longer period." Presumably they are so intended, but they do not say so. Accidental destruction is not within the scope of the section.<sup>93</sup> Retention without more is not to amount to an acceptance within the meaning of the statutes from which this was taken;<sup>94</sup> but under the Negotiable Instruments Law it has been held that such retention does amount to an acceptance.<sup>95</sup>

*ley* (Neb.), 172 N. W. 35; *Bank of Morgan v. Hay*, 143 N. C. 326, 55 S. E. 811; *Colcord v. Banco de Tamapulipas*, 181 N. Y. App. D. 295, 168 N. Y. S. 710, where the writing did not amount to an acceptance. This section is held applicable to checks. *Selma Sav. Bank v. Webster County Sav. Bank* (Ky.), 206 S. W. 870.

<sup>92</sup> This section is omitted in Illinois and South Dakota. In Pennsylvania and Wisconsin it is provided that mere retention is not an acceptance.

<sup>93</sup> *Bailey v. Southwestern Co.*, 126 Ark. 257, 190 S. W. 430, 207 S. W. 34.

<sup>94</sup> See *St. Louis & C. Ry. Co. v. Marsh*, 57 Mo. App. 566; *v. Moulton*, 79 N. Y. 627.

<sup>95</sup> *State Bank v. Weiss*, 46 N. Y. S. 276; *Wisner v. Bank*, 220 Pa. 21, 68 Atl. 94; *A. (N. S.)* 1266 (changed in Pennsylvania; see *Union v. Franklin Nat. Bank*, 249 Atl. 1085); *People's Nat. Bank v. Swift*, 134 Tenn. 175, 183 S. E. 1074. See also *Standard Trust Co. v. Commercial Nat. Bank*, 166 N. S. E. 1074.

**Section 138.—[ACCEPTANCE OF INCOMPLETE BILL.]** A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

**§ 1196. General and qualified acceptances.**

**Section 139.—[KINDS OF ACCEPTANCES.]** An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

**Section 140.—[WHAT CONSTITUTES A GENERAL ACCEPTANCE.]** An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

**Section 141.—[QUALIFIED ACCEPTANCE.]** An acceptance is qualified, which is:—

(1) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;

(2) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

(3) Local, that is to say, an acceptance to pay only at a particular place;

(4) Qualified as to time;

(5) The acceptance of some one or more of the drawees, but not of all.

**Section 142.—[RIGHTS OF PARTIES AS TO QUALIFIED ACCEPTANCE.]** The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the

**§ 1197 BILLS OF EXCHANGE AND PROMISSORY NOTE**

holder to take a qualified acceptance, or subsequent thereto. When the drawer or an indorser receives of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed assented thereto.\*

**§ 1197. When presentment for acceptance is necessary.**

**ARTICLE III**

**PRESENTMENT FOR ACCEPTANCE**

**Section 143.—[WHEN PRESENTMENT FOR ACCEPTANCE MUST BE MADE.]** Presentment for acceptance must be made:—

(1) Where the bill is payable after sight, or in case, where presentment for acceptance is necessary to fix the maturity of the instrument; or

(2) Where the bill expressly stipulates that it is to be presented for acceptance; or

(3) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

**Section 144.—[WHEN FAILURE TO PRESENT A BILL RELEASES DRAWER AND INDORSER.]** Except as otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and indorsers are discharged.

**§ 1198. How and when presentment for acceptance must be made.**

**Section 145.—[PRESENTMENT; HOW MADE.]** Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and

\* See *Lewis, Hubbard & Co. v. Morton*, 80 W. Va. 137, 92 S. E.

the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

(1) Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

(2) Where the drawee is dead, presentment may be made to his personal representative;

(3) Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Section 146.—[ON WHAT DAYS PRESENTMENT MAY BE MADE.] A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.<sup>77</sup>

Section 147.—[PRESENTMENT WHERE TIME IS INSUFFICIENT.] Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 1199. Dishonor by non-acceptance and its effect.

Section 148.—[WHERE PRESENTMENT IS EXCUSED.] Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:—

(1) Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

<sup>77</sup> The last sentence is omitted in Kentucky and Wisconsin.

(2) Where, after the exercise of reasonable presentment cannot be made.

(3) Where, although presentment has been acceptance has been refused on some other ground

Section 149.—[WHEN DISHONORED BY ACCEPTANCE.] A bill is dishonored by non-acceptance

(1) When it is duly presented for acceptance an acceptance as is prescribed by this act is refused cannot be obtained; or

(2) When presentment for acceptance is exacted the bill is not accepted.

Section 150.—[DUTY OF HOLDER WHERE BILL IS NOT ACCEPTED.] Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the holder presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Section 151.—[RIGHTS OF HOLDER WHERE BILL IS NOT ACCEPTED.] When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder and no further presentment for payment is necessary.

§ 1200. Requirement of protest and its contents.

## ARTICLE IV

### PROTEST

Section 152.—[IN WHAT CASES PROTEST IS NECESSARY.] Where a foreign bill appearing on its face is dishonored by non-acceptance, it must be protested for non-acceptance, and where such a bill has not previously been dishonored by non-acceptance, it must be protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of non-acceptance is unnecessary.



**Section 153.—[PROTEST; HOW MADE.]** The protest must be annexed to the bill, or must contain a copy thereof and must be under the hand and seal of the notary making it, and must specify:—

- (1) The time and place of presentment;
- (2) The fact that presentment was made and the manner thereof;
- (3) The cause or reason for protesting the bill;
- (4) The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§ 1201. By whom, when and where protest should be made.

**Section 154.—[PROTEST; BY WHOM MADE.]** Protest may be made by,—

- (1) A notary public; or
- (2) By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

**Section 155.—[PROTEST; WHEN TO BE MADE.]** When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

**Section 156.—[PROTEST; WHERE MADE.]** A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

**Section 157.—[PROTEST BOTH FOR NON-ACCEPTANCE AND NON-PAYMENT.]** A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

**Section 158.—[PROTEST BEFORE MATURITY WHERE ACCEPTOR INSOLVENT.]** Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures,

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the holder may cause the bill to be protested security against the drawer and indorsers.

**§ 1202. When protest excused; lost bill.**

**Section 159.—[WHEN PROTEST DISPENSED]** Protest is dispensed with by any circumstances which dispense with notice of dishonor. Delay in noting a bill is excused when delay is caused by circumstances in the control of the holder and not imputable to his misconduct or negligence. When the cause of delay operates, the bill must be noted or protested with diligence.

**Section 160.—[PROTEST WHERE BILL IS LOST]** When a bill is lost or destroyed or is wrongly detained by the person entitled to hold it, protest may be made in copy or written particulars thereof.

**§ 1203. Nature of acceptance for honor.**

**ARTICLE V**

**ACCEPTANCE FOR HONOR**

**Section 161.—[WHEN BILL MAY BE ACCEPTED FOR HONOR.]** Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better and is not overdue, any person not being a party already thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for only a part of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

**Section 162.—[ACCEPTANCE FOR HONOR MADE.]** An acceptance for honor supra protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

**Section 163.—[WHEN DEEMED TO BE AN ACCEPTANCE FOR HONOR OF THE DRAWER.]** Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

**§ 1204. Obligation incurred by acceptor for honor.**

**Section 164.—[LIABILITY OF THE ACCEPTOR FOR HONOR.]** The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

**Section 165.—[AGREEMENT OF ACCEPTOR FOR HONOR.]** The acceptor for honor, by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given him.

**Section 166.—[MATURITY OF BILL PAYABLE AFTER SIGHT; ACCEPTED FOR HONOR.]** Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

**§ 1205. Presentment and protest of acceptance for honor.**

**Section 167.—[PROTEST OF BILL ACCEPTED FOR HONOR, ETC.]** Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

**Section 168.—[PRESENTMENT FOR PAYMENT TO ACCEPTOR FOR HONOR; HOW MADE.]** Presentment for payment to the acceptor for honor must be made as follows:—

(1) If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

(2) If it is to be presented in some other place than the

place where it was protested, then it must be within the time specified in section one hundred and

Section 169.—[WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.] The provisions of section 169 apply where there is delay in making presentment for honor or referee in case of need.

Section 170.—[DISHONOR OF BILL BY ACCEPTOR FOR HONOR.] When the bill is dishonored by the acceptor for honor it must be protested for non-payment by

§ 1206. Payment for honor.

## ARTICLE VI

### PAYMENT FOR HONOR

Section 171.—[WHO MAY MAKE PAYMENT FOR HONOR.] Where a bill has been protested for non-payment any person may intervene and pay it supra protest for honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Section 172.—[PAYMENT FOR HONOR; HOW MADE.] The payment for honor supra protest in order to be valid must be by a notarial act of honor which may be appended to the protest or form an extension to it.

Section 173.—[DECLARATION BEFORE PAYMENT FOR HONOR.] The notarial act of honor must be preceded by a declaration made by the payer for honor or by some other person in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Section 174.—[PREFERENCE OF PARTIES OF PAYERS.] Where two or more persons pay a bill for the honor of different parties, the payment will discharge most parties to the bill given the preference.

Section 175.—[EFFECT ON SUBSEQUENT PAYMENTS.] Where a bill has been paid for honor, all parties subsequent to the

for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

**Section 176.—[WHERE HOLDER REFUSES TO RECEIVE PAYMENT SUPRA PROTEST.]** Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

**Section 177.—[RIGHTS OF PAYER FOR HONOR.]** The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

§ 1207. Bills in parts or sets.

## ARTICLE VII

### BILLS IN A SET

**Section 178.—[BILLS IN SETS CONSTITUTE ONE BILL.]** Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

Nevertheless as the following section shows the holder of a single part may be the owner of the whole bill.\*

**Section 179.—[RIGHT OF HOLDERS WHERE DIFFERENT PARTS ARE NEGOTIATED.]** Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

**Section 180.—[LIABILITY OF HOLDER WHO INDORSES TWO OR MORE PARTS OF A SET TO DIFFER-**

\* *Caras v. Thalmann*, 138 N. Y. App. D. 297, 123 N. Y. S. 97. See also *Casper v. Kuhne*, 159 N. Y. App. D. 389, 144 N. Y. S. 502.

ENT PERSONS.] Where the holder of a set indorses more parts to different persons he is liable on every; and every indorser subsequent to him is liable on he has himself indorsed, as if such parts were bills.

Section 181.—[ACCEPTANCE OF BILLS DRAWN IN SETS.] The acceptance may be written on any it must be written on one part only. If the drawer indorses more than one part, and such accepted parts are not to different holders in due course, he is liable on every part as if it were a separate bill.<sup>99</sup>

Section 182.—[PAYMENT BY ACCEPTOR OF BILLS DRAWN IN SETS.] When the acceptor of a bill drawn in set pays it without requiring the part bearing his indorsement to be delivered up to him, and that part at the time is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Section 183.—[EFFECT OF DISCHARGING ONE PART OF A SET.] Except as herein otherwise provided when one part of a bill drawn in a set is discharged by payment, the whole bill is discharged.<sup>1</sup>

§ 1208. Definition of a promissory note.

### TITLE III

## PROMISSORY NOTES AND CHECKS

### ARTICLE I

Section 184.—[PROMISSORY NOTE DEFINED.] A promissory note is a written promise to pay to a certain person or to the order of a certain person, or to bearer, at a fixed or determinable future time, a sum certain in money. Where a note is drawn to the order of a certain person, it is not complete until indorsed by him.

<sup>99</sup> See *Holdsworth v. Hunter*, 10 B. & C. 449.

<sup>1</sup> See *Casper v. Kuhne*, 144 N. Y. App. D. 389, 393.

### § 1209. Checks.

**Section 185.—[CHECK DEFINED.]** A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

There are important differences between the legal effect of a check and of an ordinary bill of exchange: (1) A check is a representation that the drawee has in his hands funds to meet the check.<sup>2</sup> (2) Laches in presentment discharges the drawer of a check only to the extent of his loss.<sup>3</sup> (3) The effect of certification of a check in discharging drawer and indorser under Section 188 has no analogy in the acceptance of ordinary bills of exchange. (4) The reasonable time for presenting a demand bill may be extended by negotiating the bill,<sup>4</sup> and though the same rule is applicable to checks so far as indorsers are concerned, the drawer's liability cannot be preserved<sup>5</sup> by negotiating the check, which must be presented in order to charge the drawer (if the drawee bank is in the same place where the check is drawn) on the day following delivery,<sup>6</sup> or (if the drawee bank is not in the place where the check is drawn) it must be sent forward for collection on the following day.<sup>7</sup>

**Section 186.—[WITHIN WHAT TIME A CHECK MUST BE PRESENTED.]** A check must be presented for payment within a reasonable time after its issue or the drawer will

<sup>2</sup> *In re Robinson*, 256 Fed. 55; *Barton v. People*, 135 Ill. 405, 25 N. E. 776; *Mulroney Mfg. Co. v. Weeks* (Iowa), 171 N. W. 36; *Footo v. People*, 17 Hun, 218.

<sup>3</sup> See Sec. 186 of the Act.

<sup>4</sup> See Sec. 71.

<sup>5</sup> *Plover Sav. Bank v. Moodie*, 135 Ia. 685, 110 N. W. 29, 113 N. W. 476; *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

<sup>6</sup> *Dehoust v. Lewis*, 128 N. Y. App. Div. 131, 112 N. Y. S. 559, and see cases in the following note.

<sup>7</sup> *Watt v. Gans*, 114 Ala. 264, 21 So. 1011, 62 Am. St. Rep. 99; *Cox v. Citizens' State Bank*, 73 Kans. 789, 85 Pac. 762; *First Nat. Bank v. Buckhannon*, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332; *Gordon v. Levine*, 194 Mass. 418, 421, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565; *Haggerty v. Baldwin*, 131 Mich. 187, 91 N. W. 150; *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130, L. R. A. 785; *Gregg v. Beane*, 69 Vt. 22, 26, 37 Atl. 248.

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**Section 188.—[EFFECT WHERE THE HOLDER OF CHECK PROCURES IT TO BE CERTIFIED.]** Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.<sup>13</sup>

If the drawer of a check procures it to be certified he is not discharged;<sup>14</sup> even though he does so at the payee's request.<sup>15</sup>

**Section 189.—[WHEN CHECK OPERATES AS AN ASSIGNMENT.]** A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.<sup>16</sup>

#### § 1210. Miscellaneous provisions.

### TITLE IV

## GENERAL PROVISIONS

### ARTICLE I

**Section 190.—[SHORT TITLE.]** This act may be cited as the Uniform Negotiable Instruments Act.<sup>17</sup>

First Nat. Bank, 213 N. Y. 301, 107 N. E. 693, L. R. A. 1916 C. 186; Meuer v. Phenix Nat. Bank, 94 N. Y. App. D. 331, 88 N. Y. S. 83; Blake v. Hamilton &c. Bank, 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684.

<sup>13</sup> See Times Square Auto. Co. v. Rutherford Nat. Bank, 77 N. J. L. 649, 73 Atl. 479; St. Regis Paper Co. v. Tonawanda Co., 107 N. Y. App. D. 90, 94 N. Y. S. 946; Lyons v. Union Exch. Nat. Bank, 150 N. Y. App. D. 493, 135 N. Y. S. 121.

<sup>14</sup> Brunswick v. People's Sav. Bank, 194 Mo. App. 360, 190 S. W. 60; Cullinan v. Union Surety &c. Co., 79 N. Y. App. D. 409, 80 N. Y. S. 58;

Davenport v. Palmer, 152 N. Y. App. D. 761, 137 N. Y. S. 796.

<sup>15</sup> Randolph Nat. Bank v. Hornblower, 160 Mass. 401, 35 N. E. 830.

<sup>16</sup> See *supra*, § 425.

<sup>17</sup> The Uniform Sales Act (Section 74), the Uniform Warehouse Receipts Act (Section 57), the Uniform Transfer of Stock Act (Section 19), and the Uniform Bills of Lading Act (Section 52), provide that: "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it." While the Uniform Negotiable Instruments Act does not contain this section, yet the courts have interpreted it in harmony with the

**Section 191.—[DEFINITIONS AND MEANINGS.]** In this act, unless the context otherwise requires,

“Acceptance” means an acceptance complete in form and accompanied by delivery or notification.

“Action” includes counterclaim and set-off.

“Bank” includes any person or association carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a negotiable instrument which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, constructive, from one person to another.

“Holder” means the payee or indorsee of a negotiable instrument who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement complete in form and accompanied by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” means in writing or print.

**Section 192.—[PERSON PRIMARILY LIABLE ON INSTRUMENT.]** The person “primarily” liable on a negotiable instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other persons “secondarily” liable.

**Section 193.—[REASONABLE TIME, WHAT IT MEANS.]**

principle thus expressed. *Rockfield v. First Nat. Bank*, 77 Oh. St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Downey v. O’Keefe*, 26 R. I. 571, 59 Atl. 929; *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592; *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455; *Gibbs v. Guaraglia*, 75 N. J. L. 168, 67 Atl. 81; *Buntz*, 53 Fla. 340, 42 So. 275; *quahar Co. v. Higham*, 16 112 N. W. 557; *Vander P Zuuk*, 135 Ia. 350, 112 N. L. R. A. (N. S.) 490, 124 A. 275.

TUTES.] In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

Section 194.—[TIME, HOW COMPUTED; WHEN LAST DAY FALLS ON HOLIDAY.] Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Section 195.—[APPLICATION OF ACT.] The provisions of this act do not apply to negotiable instruments made and delivered prior to the [taking effect] hereof.

Section 196.—[CASES NOT PROVIDED FOR IN ACT.] In any case not provided for in this act the rules of [law and equity including] the law merchant shall govern.<sup>18</sup>

Section 197.—[REPEALS.] All acts and parts of acts inconsistent with this act are hereby repealed.

Section 198.—[TIME WHEN ACT TAKES EFFECT.] This [act] shall take effect on <sup>19</sup>

<sup>18</sup> Section 196 as drafted reads "In any case not provided for in this Act the rules of the law merchant shall govern." The words in brackets [law and equity including] were inserted in many States to harmonise the section with the Uniform Sales Act (Section 73), the Uniform Warehouse Receipts Act (Section 56), the Uniform Transfer of Stock Act (Section 18) and the Uniform Bills of Lading Act (Section 51). The object of sections such as these, is to clearly point out that no one of these acts pretends to be a complete

codification of the whole law upon each topic but that there are cases not provided for in each of the statutes. Another purpose is to leave room for the growth of new usages and customs so that none of these acts should put the law merchant in a straight jacket and thus prevent the further expansion of the law merchant.

<sup>19</sup> Section 198 as drafted uses the word "chapter." In many States this term is inappropriate; therefore the word in brackets [Act] has been inserted in lieu of the word "chapter."

## CHAPTER XXXIV

### CONTRACTS OF SURETYSHIP. THE SURETY'S LIABILITY AND DEFENCES

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### § 1211. Suretyship defined.

"Whoever is liable to pay the debt of another, whether for value, as in the case of the broker who receives a commission for incurring liability, or gratuitously as between himself and the person primarily liable, is a surety."<sup>1</sup> Whether one is a surety, therefore, depends not on his relation to the

<sup>1</sup> Per Jessel, M. R., in *Imperial Bank v. London, etc., Docks Co.*, 5 Ch. Div. 195, 200.

creditor but on his relation to the principal debtor. Consequently, an agreement for sufficient consideration between the principal and surety, by which the latter assumes to be a principal and the former a surety.<sup>3</sup> In some American cases a narrower meaning is given to the word surety. It is confined to one who makes a direct and unconditional promise to the creditor, distinguished from a guarantor who makes a collateral promise to pay the debt if the principal debtor fails to do so.<sup>4</sup> In American cases, also, a peculiar definition is given of the word which confines its meaning to an engagement that the principal debtor is solvent;<sup>5</sup> but there is no propriety in this usage or in ordinary legal usage in this restriction. It is to pay if the principal debtor does not in the ordinary

<sup>3</sup> In *Dearing v. Veal*, 25 Ky. L. Rep. 1809, 78 S. W. 886, 887; *McGraw v. Union Trust Co.*, 136 Mich. 521, 99 N. W. 758; *Wendlandt v. Sohre*, 37 Minn. 162, 33 N. W. 700, and *Reissaus v. Whites*, 128 Mo. App. 135, 106 S. W. 603, 605, the court defined a surety as any person "who, being liable to pay a debt, or perform an obligation is entitled if it is enforced against him, to be indemnified by some other person who ought himself to have made payment or performed before the surety was compelled to do so." See also the use of the word in *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686; *Thayer v. Braden*, 27 Cal. App. 435, 150 Pac. 653; *Townsend v. Sullivan*, 3 Cal. App. 115, 84 Pac. 435; *Singer Mfg. Co. v. Littler*, 56 Ia. 601, 9 N. W. 905; *Watriss v. Pierce*, 32 N. H. 560; *People v. Backus*, 117 N. Y. 196, 22 N. E. 759; *Gagan v. Stevens*, 4 Utah, 348, 9 Pac. 706.

<sup>4</sup> *Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358; *United States Bank v. Stewart*, 4 Dana, 27; *Williams v. Selly*, 37 N. Y. 375; *Rhea v. Preston*, 75 Va. 757; *Bailey v. Griffith*, 40 U. C. C. B. 418.

<sup>5</sup> *J. R. Watkins Medical Co. v. Lovelady*, 186 Ala. 414, 65 So. 52;

*W. T. Rawleigh Medical Supply*, 5 Ala. App. 412, *News-Times Pub. Co. v. Col.* 386, 118 Pac. 974; *York & Heaney Mfg. Co.*, 184 N. E. 669 [*cf.* *Hess v. J. Medical Co. (Ind. App.)*, 440]; *Courtis v. Dennis*, *In re Kelley's Est.*, 173 Minn. N. W. 250, Ann. Cas. 16; *Rouse v. Wooten*, 140 N. S. E. 430, 432, 111 Am. S. *Pittsburg Const. Co. v. Belt R. Co.*, 227 Pa. 90, 1029; *Homewood People's Bank v. Hastings*, 263 Pa. 260, 106; *Farmers' & Merchants' Nat. Bank v. Lillard Milling Co. (Tex.)*, 210 S. W. 265; *Ballard v. Vt.* 387, 24 Atl. 769, 16 L. *Ricketson v. Lizotte*, 90 Atl. 801; *Kearnes v. Mor* W. Va. 29.

<sup>6</sup> *McIntosh-Huntington* 89 Fed. 464; *J. R. Watkins Co. v. Lovelady*, 186 Ala. 414; *Manry v. Waxelbaum*, 17, 33 S. E. 701; *Northern v. Bellamy*, 19 N. Dak. 5; *N. W.* 888, 31 L. R. A. 1; *Reigart v. White*, 52 Pa. 41.

of a guaranty.<sup>6</sup> A promise to pay if the debtor is insolvent or cannot pay is a guarantee of collectibility.<sup>7</sup>

The question is simply one of terminology, but a confusion in terminology is likely to cause a confusion in the application of legal rules. The English terminology of calling any obligor a surety who is liable in any form for the debt of another not only is in inveterate common use in America also, but is intrinsically the better since it centres attention on the one vital point that the debt as between principal and surety is the debt of the principal. Most of the peculiar rules of suretyship in any form, whether of guaranty or otherwise, are based on this relation of the principal debtor to the surety and not on any difference between the form of contract which the surety makes with the creditor, and it is desirable to have a single word which includes all cases where the relation in question exists. The ordinary principles of contracts are generally sufficient to explain any differences in the creditor's right where the surety's undertaking is direct and where it is collateral. A surety may impose any condition in his promise to the creditor which the parties agree upon or the law implies, and there is no necessity for a single descriptive word for each of the various bargains that may be thus made. An indorser on commercial paper is a special kind of surety whose obligations are subject to conditions first implied in fact from the custom of merchants and now adopted into the law. Whether in a simple contract of guarantee the guarantor promises to pay (1), if the debtor fails to pay, or (2), if the creditor after due diligence is unable to collect, or (3) if the creditor is insolvent, or (4) on some other con-

<sup>6</sup> A guaranty is so defined, *e. g.*, in *Guaranty Trust Co. v. Koehler*, 187 Fed. 192, 200; *Pfaelser v. Kau*, 207 Ill. 116, 69 N. E. 914, 916; *Cowan v. Roberts*, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845; *J. L. Mott Iron Works v. Clark*, 87 S. C. 199, 69 S. E. 227, 228; *Clymer v. Terry*, 50 Tex. Civ. App. 300, 109 S. W. 1129, 1131.

<sup>7</sup> Such phrases as "the surety insures the debt, the guarantor the solvency of

the debtor," and "A surety undertakes to pay if the debtor does not; a guarantor undertakes to pay if the debtor cannot" (see cases in the preceding note) are intended to express the narrow definition of guarantor here criticised. Even if the narrow definition of guarantor were accepted, the latter phrase is inaccurate since unquestionably a surety's promise is frequently subject to no condition whatever.

dition, is a question of fact. "In every case w to the terms of the guaranties and the circumst which it was made to ascertain the character at the undertaking."<sup>8</sup>

### § 1212. Capacity to become surety.

Capacity to contract as a surety exists ordin there is general capacity to contract. In a few Sta have introduced an exception in regard to the married women to become sureties, especially for bands.<sup>9</sup> Capacity of an agent or partner to bin cipal or firm by a contract of suretyship must be by the general principles of agency and partnersh neither actual nor apparent power exists, the p firm cannot be bound.<sup>10</sup> If the actual or appare authority included such a contract and only a special or agreement restricted the power and made its e proper, the test must be whether the creditor wa the impropriety when he received the surety's ol A corporation has power to enter into contracts ship if the purpose of the contract is appropriate to ter powers of the corporation.<sup>12</sup> Whether the c

<sup>8</sup> *Welsh v. Ebersole*, 75 Va. 651. Difficulty is often caused by statutory enactments in regard to "sureties," which the courts deem inappropriate to all kinds of suretyship contracts and therefore seek to narrow the meaning of the word.

<sup>9</sup> See *supra*, § 269. On the construction of such statutes, see *National Bank v. Smith*, 142 Ga. 663, 83 S. E. 526, L. R. A. 1915 B. 1116; *Druck-amiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028; *Russell v. Rice*, 19 Ky. L. Rep. 1613, 44 S. W. 110.

<sup>10</sup> Cases of this sort concerning agents are *Dugan v. Champion*, etc., Co., 105 Ky. 821, 49 S. W. 958; *Lovett v. Sullivan*, 189 Mass. 535, 75 N. E. 738; *Stovall v. Commonwealth*, 84 Va. 246, 4 S. E. 379. Cases concerning partners are—*Davis v. Black-*

*well*, 5 Ill. App. 32; *Russe* 109 Mass. 72, 12 Am. F *borne v. Stone*, 30 Minn N. W. 922, 923.

<sup>11</sup> In *Seufert v. Gille*, 131 S. W. 102, 31 L. R. A a partner after dissolutio firm name to a renewal n originally due from the i held that if the payee wa the dissolution he could r

<sup>12</sup> *Heims Brewing Co.* 137 Ill. 309, 27 N. E. 28 *Nat. Bank v. Baker*, 170 57 N. E. 603; *Timm v. C Brewery Co.*, 160 Mich. 31 357, 27 L. R. A. (N. S.) *v. Hall*, 34 R. I. 273, 83 also *Re Romadka Bros.* ( 113, 132 C. C. A. 357. *Brewing Co. v. Klassen*,



suretyship of a corporation entered into under other circumstances is wholly ineffectual, depends upon the law governing *ultra vires* contracts of corporations.<sup>13</sup>

Still another distinction must be taken. There are statutes prohibiting certain persons from becoming sureties on bonds of various kinds. These statutes are designed to secure a bond of unquestionable security not to protect the prohibited persons. Therefore though such statutes justify a refusal to accept a bond with sureties of the prohibited class, the sureties will, nevertheless, be held liable if the contract is actually entered into.<sup>14</sup>

### § 1213. The principal's non-liability as a defence to the surety.

It is often said that the surety is not liable unless the principal is bound, but that this rule is subject to many exceptions. Such a statement omits an essential primary inquiry, namely, what are the terms of the contract? It is possible for a surety to promise to pay whatever debt the principal may owe. On the other hand, the surety's promise may be to pay a stated sum or render a fixed performance for which the principal also purports to bind himself. If the contract is of the former sort it is obvious that by the very terms of his contract the surety is liable for nothing if the principal is under no liability;<sup>15</sup> and statements not infrequently made that a surety cannot be liable unless a principal debtor is liable have reference to such a case and must be confined to it. On a fair interpretation where the surety's promise relates to a specific transaction, it will generally be found that his promise must be construed as one to pay an agreed

57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26; Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 3 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362.

<sup>13</sup> See *supra*, § 271.

<sup>14</sup> King v. Sheriff, 2 East, 181, 182; Kansas v. United States, etc., Guaranty Co., 81 Kans. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865; Holandsworth v. Commonwealth, 11 Bush, 617; Wal-

lace v. Scoles, 6 Ohio, 429; Kohn v. Washer, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28. See also *infra*, § 1632.

<sup>15</sup> Bristol, etc., Co. v. Eveline, 89 Conn. 382, 94 Atl. 290; Marietta Fertilizer Co. v. Gary (Ga. App.), 96 S. E. 711; Galleher v. O'Grady, 78 N. H. 343, 100 Atl. 549. A similar question arises where the debts of another are assumed. See *supra*, § 394.

debtor has the defence of infancy,<sup>18</sup> insanity,<sup>19</sup> *ultra vires*,<sup>20</sup> or where there is any apparently valid but in fact defective obligation of the principal,<sup>21</sup> or such an alteration of a

N. C. 374, 375; *Wiggins' App.*, 100 Pa. 155; *Smyley v. Head*, 2 Rich. L. 590, 45 Am. Dec. 750; *Hicks v. Randolph*, 3 Baxt. 352, 27 Am. Rep. 760; *St. Albans Bank v. Dillon*, 30 Vt. 122, 73 Am. Dec. 295; *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627; *Bolyard v. Bolyard*, 79 W. Va. 554 91 S. E. 529, L. R. A. 1917 D. 440.

<sup>18</sup> *Wauthier v. Wilson*, 27 T. L. R. 582, 28 T. L. R. 239; *Baker v. Kennett*, 54 Mo. 82; *Gates v. Tebbetts*, 83 Neb. 573, 119 N. W. 1120, 20 L. R. A. (N. S.) 1000; *Kuns's Exr. v. Young*, 34 Pa. 60; *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627; *Burner v. Nutter*, 77 W. Va. 256, 87 S. E. 359, 360. But where restoration of the consideration is made by law a condition of disaffirmance by the infant, and he has disaffirmed and put the other party in *statu quo*, the surety on a note given by the infant in the original transaction is discharged by failure of consideration. *Keokuk State Bank v. Hall*, 106 Ia. 540, 76 N. W. 832; *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752; *Evans v. Taylor*, 18 N. Mex. 371, 137 Pac. 583, 50 L. R. A. (N. S.) 1113.

<sup>19</sup> *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Caldwell v. Ruddy*, 2 Idaho, 5, 1 Pac. 339; *Lee v. Yandell*, 69 Tex. 34, 6 S. W. 665; *Burner v. Nutter*, 77 W. Va. 256, 87 S. E. 359; cf. *Grove v. Johnston*, L. R. 24 Ir. 352.

<sup>20</sup> *Yorkshire Railway Wagon Co. v. Maclure*, 19 Ch. D. 478; *Chambers v. Manchester, etc., Ry. Co.*, 5 B. & S. 588, 612; *Maledon v. Leflore*, 62 Ark. 387, 35 S. W. 1102; *Weare v. Sawyer*, 44 N. H. 198; *Davis v. Commissioners*, 72 N. C. 441, 74 N. C. 374; *Mason v. Nichols*, 22 Wis. 376.

<sup>21</sup> *Young v. Perry*, 187 Ala. 122, 65 So. 817, 52 L. R. A. (N. S.) 1146; *Helms v. Wayne Agricultural Co.*, 73

Ind. 325, 38 Am. Rep. 147 (forgery); *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555 (forgery); *Jones v. Thayer*, 12 Gray, 443, 74 Am. Dec. 602. In this case the principal debtor gave a note to his own order but failed to indorse it. Neither the creditor nor the surety knew this fact when the surety guaranteed payment of the note. Cf. however, *Dole Bros. Co. v. Cosmopolitan Co.*, 167 Mass. 481, 46 N. E. 105, 57 Am. St. Rep. 477; *Green v. Kindy*, 43 Mich. 279, 5 N. W. 297, where the forgery of the principal's signature was held to excuse the surety; and *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665, where a majority of the court held that a surety for a partnership contract was not bound because the contract had been executed on behalf of the partnership by one partner without authority.

*Wells, J.*, dissented and the dissent is supported by the following language of the court in *Stewart v. Behm*, 2 Watts, 356:—"Where the obligee has acted with good faith, what has he to do with the mistakes or misconceptions of the obligor? Here the principal obligor signed the name of his firm; and the point of defence is rested on an assumption of the fact that the surety supposed the signature would bind both the parties. But his mistake was in a matter of law which he was bound to know; and even had it been in a matter of fact, which was the basis of his motive for becoming bound, it would not avail him, unless it were induced by the misrepresentation of the obligee. Here it seems the obligee was not present at the act of execution; and as there is no pretence of misrepresentation or concealment by him at any time, there was no color for the defence." See also *Watterson v.*

written contract prior to its execution by the surety as discharges the principal.<sup>22</sup> Any of these defences of the principal might, however, be a defence to the surety if coupled with the further fact that the creditor at the time the surety's contract was entered into knew of the defence, and the surety did not know of it.<sup>23</sup>

### § 1215. Discharge in bankruptcy of the principal debtor.

In accordance with the principles stated in the previous section, the principal's discharge in bankruptcy does not excuse the surety from liability to the creditor.<sup>24</sup> This is expressly so provided in the Federal Bankruptcy Statute.<sup>25</sup> Even though the assent of a majority of his creditors is necessary in order to enable the principal to receive a discharge or to have a composition made effective and the creditor in question has joined in giving such assent, the surety has generally been held not to be released.<sup>26</sup> So far has this been

Owens River Canal Co., 25 Cal. App. 247, 143 Pac. 90; Luce v. Foster, 42 Neb. 818; Weare v. Sawyer, 44 N. H. 198, 205; Holland v. Clark, 67 N. Car. 104; Dickerman v. Bowman, 14 Wis. 388, and *infra*, §§ 1244 *et seq.*

<sup>22</sup> See *infra*, § 1898.

<sup>23</sup> See extract from *Stewart v. Behm*, 2 Watts, 356, *supra*, n. 21.

<sup>24</sup> *Ex parte* Williamson, 1 Atk. 82; Browne v. Carr, 7 Bing. 508; Moody v. King, 2 B. & C. 558; Inglis v. Macdougall, 1 Moore, 196; London Assurance Co. v. Buckle, 4 Moore, 153; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309; Knapp v. Anderson, 15 N. B. R. 316; Phillips v. Wade, 66 Ala. 53; Jones v. Hawkins, 60 Ga. 52; Lackey v. Steere, 121 Ill. 598, 13 N. E. 518, 2 Am. St. Rep. 135; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Burtis v. Wait, 33 Kans. 478, 6 Pac. 783; Serra v. Hoffman, 30 La. Ann. 67; Cochrane v. Cushing, 124 Mass. 219; Wolfboro Loan, etc., Co. v. Rollins, 195 Mass. 323, 81 N. E. 204; Robinson v. Soule, 56 Miss. 549; Claffin v. Cogan, 48 N. H. 411; Linn v. Hamilton, 34 N. J.

L. 305; Hall v. Fowler, 6 Hill, 630; Wilson v. Field, 27 Hun, 46; Bank v. Simpson, 90 N. C. 467; Noble v. Scofield, 44 Vt. 281. Similarly where the principal, a corporation, is dissolved and under the statute its liability and that of its contributories discharged, the surety remains liable. *In re Fitts George*, [1905] 1 K. B. 462.

<sup>25</sup> Sec. 16.

<sup>26</sup> Browne v. Carr, 7 Bing. 508; Megrath v. Gray, L. R. 9 C. P. 216; Ellis v. Wilmot, L. R. 10 Exch. 10; *Ex parte* Jacobs, L. R. 10 Ch. 211 (overruling Wilson v. Lloyd, L. R. 16 Eq. 60); Simpson v. Henning, L. R. 10 Q. B. 406; *Re* Burchell, 4 Fed. 406; Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; Neslor v. Grove (N. J. Eq.), 107 Atl. 281 (the court held the surety impliedly assented to the discharge); Mason & Hamlin Co. v. Bancroft, 1 Abb. N. C. 415; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926. But see *contra*, *Re* McDonald, 14 N. B. R. 477; Calloway v. Snapp, 78 Ky. 561; Unino Nat. Bank v. Grant, 48 La. Ann. 18, 18 So. 705. But where a creditor

carried that even where it was found as a fact that except for the plaintiff's assent the bankrupt would not have received a discharge, the surety has been held liable.<sup>27</sup> Except as this last result may be required by express language in a Bankruptcy Statute, it seems somewhat difficult to support and to reconcile with decisions holding that the voluntary participation by the creditor in a foreign bankruptcy, whereby the discharge of the principal becomes binding on the creditor, discharges the surety.<sup>28</sup>

**§ 1216. Discharge of the principal in bankruptcy may prevent performance of a condition of the surety's liability.**

Though the mere discharge in bankruptcy of the principal does not discharge the surety, it should be observed that the surety's obligation may be subject to an express condition which precludes enforcement of the debt against him after the discharge of the principal. Thus a bond given to discharge an attachment is generally conditioned on the payment of any judgment which may be recovered against the principal. If, therefore, no judgment can be recovered against the principal because he has been discharged, it necessarily follows that the surety escapes liability. To avoid this difficulty some courts have, without the aid of a procedural statute authorizing it, given judgment against the principal with a perpetual stay of execution,<sup>29</sup> thereby satis-

secretly bargained for a greater proportion of his claim than other creditors were to receive, this not only deprived him of all right against the debtor but also against a surety for the debtor, though the composition deed expressly reserved rights against sureties. *Mayhew v. Boyes*, 103 L. T. (N. S.) 1.

<sup>27</sup> *Cilley v. Colby*, 61 N. H. 63.

<sup>28</sup> *Third Nat. Bank v. Hastings*, 134 N. Y. 501, 505, 32 N. E. 71; *Phelps v. Borland*, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755.

<sup>29</sup> *Re Martin*, 105 Fed. 753; *Re Albrecht*, 17 N. B. R. 287; *Hill v. Harding*, 116 Ill. 92, 4 N. E. 361; *Kendrick v. Warren*, 110 Md. 47, 76, 72 Atl.

461, 465; *Fisse v. Einstein*, 5 Mo. App. 78; *Zollar v. Janvrin*, 49 N. H. 114, 6 Am. Rep. 469; *Batchelder v. Putnam*, 54 N. H. 84, 20 Am. Rep. 115; *Holyoke v. Adams*, 1 Hun, 223; *Farrell v. Finch*, 40 Ohio St. 337. Where, however, the attachment was made within four months the court refused to enter a judgment with stay of execution against the principal debtor in order to charge sureties on the attachment bond, in *House v. Schnadig*, 235 Ill. 301, 85 N. E. 395; *Crook-Horner Co. v. Gilpin*, 112 Md. 1, 75 Atl. 1049, 28 L. R. A. (N. S.) 233, 136 Am. St. Rep. 376, (see also *Klipstein v. Allen-Miles Co.*, 136 Fed. 385, 69 C. C. A.

fying the condition of the surety's obligation with more than technical violation to the principal discharge; and the Supreme Court of the United States held that rendering such a judgment is not inconsistent with the protection given by the Bankruptcy Law to a discharged bankrupt.<sup>30</sup> Other States, however, have refused to give such a qualified judgment against the principal in the absence of an express local statute authorizing it. Somewhat similar cases may arise in regard to directors and stockholders who are made by statute, under certain circumstances, sureties for the debts of the corporation. A State statute requires as a condition of the liability of a director that judgment shall first be obtained against the corporation and execution be returned unsatisfied. It is impossible to comply with this condition if the corporation obtains a discharge in bankruptcy.<sup>32</sup>

### § 1217. Illegality of the contract with the principal in the absence of a discharge to the surety.

The general reason for denying recovery in such cases is (see § 1219); since under the Bankruptcy Law, if a corporation is dissolved by the Statute such an attachment would have been dissolved by bankruptcy, and the court declined to give its aid to hold the surety on the bond bound to satisfy a judgment which could not have been satisfied from the attached property if no bond had been given to dissolve the attachment.

<sup>30</sup> *Hill v. Harding*, 130 U. S. 699, 32 L. Ed. 1084.

<sup>31</sup> *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Klipstein v. Allen-Miles Co.*, 136 Fed. 385, 69 C. C. A. 229; *Odell v. Wootten*, 38 Ga. 224; *Payne v. Able*, 7 Bush, 344, 3 Am. Rep. 316; *Carpenter v. Turrell*, 100 Mass. 450; *Barnstable Savings Bank v. Higgins*, 124 Mass. 115; *Goyer Co. v. Jones*, 79 Miss. 253, 30 So. 651; *Martin v. Kilbourn* (Tenn.), 1 Cent. L. J. 94. In Massachusetts the Statute of 1875, Chap. 68, enabled judgment to be given against the sureties though the principal had been discharged in bankruptcy. See *Fickett v. Durham*, 119 Barnstable Savings Bank 124 Mass. 115.

<sup>32</sup> In *Train v. Marshall*, 180 Mass. 513, 62 N. E. 91, the court held the discharge of the corporation barred relief against the directors. Cf. *Way v. Barney*, 116 Mich. 1, 75 N. W. 801, 38 L. R. A. 111, 11 Ann. Cas. 1913 A. 716. In *Vanderveer*, 55 N. Y. App. Div. 67, 77 N. Y. S. 371. By the amendment to Sec. 4 (b) of the Federal Bankruptcy Act after the decision in *Train v. Marshall*, *Paper Co.*, *supra*, it was provided that "The bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from their liability under the laws of the Territory of the United States." This is difficult, however, to see in the Federal Bankruptcy Statute. It changes the conditions which must be met by the law which may impose qualifying conditions on the liability of directors and stockholders.

tracts is not so much the illegality of the contract as the illegality of the plaintiff.<sup>33</sup> A creditor, therefore, tainted with illegality in his contract with the principal of a kind which would prevent recovery against the latter is subject to the same defence when endeavoring to enforce the surety's obligation.<sup>34</sup> What illegality is of this sort and when it is so directly connected with a contract as to make it unenforceable is elsewhere considered.<sup>35</sup> Even though the illegality would not totally destroy the principal's liability, if it impairs in any way the surety's position, and was not known to him he will be discharged.<sup>35a</sup> It is, however, to be observed that where the non-enforcement of an illegal contract would impose a penalty on those intended to be protected by the law, the obligation will be enforced;<sup>35b</sup> and this principle finds illustration in official bonds, required for the security of those to whom the principal on the bond is or may be liable in his official capacity. Though such a bond may be taken in a form forbidden by law, not only the principal but the sureties will be liable.<sup>35c</sup>

<sup>33</sup> See *infra*, § 1630.

<sup>34</sup> *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66; *State v. Brantley*, 27 Ala. 44; *United States Fidelity & Co. v. Charles*, 131 Ala. 658, 31 So. 558, 57 L. R. A. 212; *First Nat. Bank v. Clark's Est.*, 59 Colo. 455, 149 Pac. 612; *Ferry v. Burchard*, 21 Conn. 597; *William-Hester Marble Co. v. Walton* (Ga. App.), 96 S. E. 269; *Thompson v. Buckhannon*, 2 J. J. Marsh. 416, 419; *Leckie v. Scott*, 10 La. 412; *Gorham v. Keyes*, 137 Mass. 583; *Boylston Bottling Co. v. O'Neill*, 231 Mass. 498, 121 N. E. 411; *Crum v. Wilson*, 61 Miss. 233; *Harley v. Stapleton*, 24 Mo. 248; *Swift v. Beers*, 3 Denio, 70; *Morse v. Hovey*, 9 Paige, 197; *Basnight v. American Mfg. Co.*, 174 N. C. 206, 93 S. E. 734; *Russell v. Failor*, 1 Oh. St. 327, 59 Am. Dec. 631; *Hartford Township Board v. Thompson*, 33 Ohio St. 321; *Zurn v. Mitchell* (Tex. Civ. App.), 196 S. W. 544. In *Citizens' Trust Co. v. Tindle*, 272 Mo. 681, 199 S. W. 1025,

the obligation was held binding on the surety to the extent that the transaction was legal, though it was partially illegal.

<sup>35</sup> See *infra*, §§ 1628 *et seq.* In the following cases the illegal acts of the principal were held not so directly connected with the obligation in question as to give the surety a defence. *Tri-Bullion Smelting & Co. v. McLean*, 61 Colo. 80, 156 Pac. 133; *Eagle Roller Mill Co. v. Dillman*, 67 Minn. 232, 69 N. W. 910.

<sup>35a</sup> In *Lott v. Peterson* (Ga. App.), 98 S. E. 361, and *Duckett v. Martin* (Ga. App.), 99 S. E. 151, a surety on a note containing waiver of homestead exemption was held to be discharged by a secret usurious payment of interest which invalidated the waiver of exemption.

<sup>35b</sup> See *infra*, § 1632.

<sup>35c</sup> This was so held in regard to the bond of a bank cashier in *Citizens' Trust Co. v. Tindle*, 272 Mo. 681, 199

of the surety's promise. For the same reason some cases deny the surety a defence because of fraud practiced on the principal.<sup>39</sup> In some of these cases, however, the facts were known to the surety when he entered into his obligation, and under such circumstances it is not inequitable to enforce his contract against him, if his promise was in either form.<sup>40</sup> It is obvious, however, that unless the surety has thus deprived himself of his equity, a result which permits the creditor to recover without first determining whether or not the principal wishes to exercise his privilege of avoiding the contract is open to the same objection as where the duress or fraud made the principal debtor's obligation absolutely void. Either the surety may be deprived of his right against the principal or the principal is in effect denied the right to avoid the transaction.<sup>40a</sup> The only problem is how to make sure that the principal's desire is to avoid the transaction before relieving the surety. To this end the surety should by some procedure be allowed to bring the facts before the court with all parties present. The appropriate method where common-law procedure is still in

*Spicer v. State*, 9 Ga. 49; *Plummer v. People*, 16 Ill. 358; *Peacock v. People*, 83 Ill. 331; *Tucker v. State*, 72 Ind. 242; *Jones v. Turner*, 5 Litt. 147; *Oak v. Dustin*, 79 Me. 23, 7 Atl. 815, 1 Am. St. Rep. 281; *Robinson v. Gould*, 11 Cush. 55; *Bowman v. Hiller*, 130 Mass. 153, 39 Am. Rep. 442; *Harris v. Carmody*, 131 Mass. 51, 53, 41 Am. Rep. 188; *Thompson v. Lockwood*, 15 Johns. 256. See also *Walton v. American Surety Co. (Pa.)*, 107 Atl. 725.

<sup>39</sup> *Fluker v. Henry's Adm.*, 27 Ala. 403; *Brown v. Wright*, 7 T. B. Mon. 396, 18 Am. Dec. 190; *Walker v. Gilbert*, 15 Miss. 456; *Ettlinger v. National Surety Co.*, 221 N. Y. 467, 117 N. E. 945.

<sup>40</sup> *Haney v. People*, 12 Colo. 345, 21 Pac. 39; *Walton v. American Surety Co. (Pa.)*, 107 Atl. 725. In *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356, the court held that knowledge by the surety of the fact of

imprisonment without knowledge of its illegality did not deprive the surety of a defence. See also *Osborn v. Robbins*, 36 N. Y. 365.

<sup>40a</sup> In *Patterson v. Gibson*, 81 Ga. 802, 806, 10 S. E. 9, 12 Am. St. Rep. 356, the court said: "In *Hawes et al. v. Marchant et al.*, 1 Curtis C. C. 136, Justice Curtis, in reviewing this doctrine as laid down in the leading case of *Hoscomb v. Standing*, says: 'It has often been assumed to be good law; I am not prepared to say it is not so, though it must be admitted that it may lead to strange consequences, in a case where the surety pays the bond and comes back on the principal to indemnify him, and thus the principal is effectually held for a debt which, according to the case in *Cro. Jac.*, does not appear to have been justly due, and which he was forced by duress to render himself liable for to the surety who at his request enters into the obligation.' "

force seems to be by a bill in equity in which the principal debtor are joined as defendants. The action at law against the sureties should, at the such a bill, be temporarily enjoined until it can be whether the principal has an effective defence creditor which he has not surrendered, and does to surrender. If this is established the injunction creditor's proceeding should be made absolute.

The necessity of such procedure does not seem much considered in the decisions,<sup>41</sup> but several have allowed the surety a defence because of duress on the principal without considering the possibility of ratification,<sup>42</sup> and the same result has been reached where the creditor has been guilty of fraud against the principal where there has been failure of consideration as to the principal before judgment in the action against the surety the surety has manifested an election to avoid his agreement. The surety should at once acquire an absolute defence at law for the action has become the same as if the principal's agreement had been void *ab initio*.<sup>45</sup>

It has been assumed that the fraud or duress was exercised by the creditor. If exercised by a third person, the surety has such a character as to render the obligation total. The creditor who gives value for the obligation can enforce it only against the surety, but against the defrauded principal. The case must also be distinguished where on the

<sup>41</sup> See *Walker v. Gilbert*, 15 Miss. 456.

<sup>42</sup> *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356; *Schuster v. Arena*, 83 N. J. L. 79, 84 Atl. 723; *Griffith v. Sitgreaves*, 90 Pa. 161; *Bitner v. Diehl*, 61 Pa. Super. 483. See also *Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913 D. 1185; *Walton v. American Surety Co. (Pa.)*, 107 Atl. 725.

<sup>43</sup> *Whitcomb v. Shultz*, 223 Fed. 268, 278, 138 C. C. A. 510; *Hagar v. Mounts*, 3 Blackf. 57; *Bryant v. Crosby*, 36 Me. 562, 58 Am. Dec. 767; *Putnam v. Schuyler*, 4 Hun, 166. See also *Schmidt v. Bank of Commerce*, 234 U. S.

64, 34 Sup. Ct. 730, 58 *Burner v. Nutter*, 77 W. S. E. 359.

<sup>44</sup> *Troxler v. Wilson*, 202 S. W. 819; *Adams v. La. Ann.* 485; *Sawyer v. Barb.* 622; *Gunnis v. Pa.* 191, 6 Atl. 465; *cf. E. v. Robinson*, 1 Bailey (I

<sup>45</sup> *Hazard v. Irwin*, 1 Macey, etc., Co. v. Heger 45 Atl. 675.

<sup>46</sup> See *infra*, §§ 1488, 16

<sup>47</sup> *Fairbanks v. Snow*, 13 N. E. 596, 1 Am. St. E. also *infra*, §§ 1246, 1248.



of an obligation originally procured by the obligee by fraud or duress the surety guarantees its performance. If the obligation is non-negotiable the assignee cannot recover against the original obligor;<sup>48</sup> but the guarantor, whether himself innocent of the fraud or not, and whether or not he will have any remedy over against the principal is liable on his guaranty.<sup>49</sup>

### § 1219. Payment of the debt discharges the surety.

Whatever may be the form of a suretyship contract, the creditor is entitled to but a single full payment of his claim, and if he receives that, or a satisfaction accepted as equivalent the surety is discharged.<sup>50</sup> Even though the debt was paid by a third person, the result is the same.<sup>51</sup> If a third person wishes to keep the obligation of the surety alive, he should buy the claim from the creditor, not pay it. If once paid the debt cannot be revived by a subsequent assignment.<sup>52</sup> Where, however,

<sup>48</sup> See *supra*, § 432.

<sup>49</sup> *Mann v. Eckford's Exec.*, 15 Wend. 502; *Putnam v. Schuyler*, 4 Hun, 166.

<sup>50</sup> *Kinnaird v. Webster*, 10 Ch. D. 139; *Gartrell v. Johns*, 15 Ga. App. 671, 84 S. E. 175; *Lackey v. Steere*, 121 Ill. 598, 13 N. E. 518, 2 Am. St. Rep. 135; *Petefish v. Watkins*, 124 Ill. 384, 16 N. E. 248; *Knight v. Kerfoot*, (Ind. App. 1913), 102 N. E. 983; *Rubli v. Norman*, 7 Bush, 582; *Stewart v. Levis*, 42 La. Ann. 37, 6 So. 898; *Brink v. Bartlett*, 105 La. 336, 29 So. 958; *Burnet v. Courts*, 5 Har. & J. 78; *Baugh v. Duphorn*, 9 Gill, 314; *Merrimack Bank v. Parker*, 7 Pick. 88; *Chapman v. Collins*, 12 Cush. 163; *Coots v. Farnsworth*, 61 Mich. 497, 23 N. W. 534; *Walker v. Archer*, 128 Mich. 603, 87 N. W. 754; *Downs v. American Surety Co.*, 132 Minn. 201, 156 N. W. 5; *Foster v. Walker*, 34 Miss. 365; *Manufacturers' Union Co. v. Todd*, 4 Mo. App. 591; *Eastman v. Plumer*, 32 N. H. 238; *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 694;

*Woodman v. Mooring*, 3 Dev. 237; *Garrett v. Dodson* (Tex. Civ. App.), 199 S. W. 675; *Gibson v. Rix*, 32 Vt. 824; *Felch v. Lee*, 15 Wis. 265; *Greening v. Patten*, 51 Wis. 146, 8 N. W. 107; *cf. Bridgeton v. Fidelity & Co.*, 88 N. J. L. 645, 96 Atl. 918.

<sup>51</sup> *Blackburn v. Beall*, 21 Md. 208; *Eastman v. Plumer*, 32 N. H. 238. See *infra*, §§ 1857-1860.

<sup>52</sup> In *Gill v. Waterhouse*, 245 Fed. 75, 157 C. C. A. 371, discussing the question whether a guaranteed claim had been paid and the guarantor discharged the court said: "The most natural thing for men of business affairs to have done, if it were a purchase of the account, was to take an assignment of it at once, together with all the guaranties, and if it were not a purchase, simply to do as they did, pay the money, and let it be applied on the account, as was done. When, therefore, the money was paid, the account was satisfied to the extent of the payment, and a subsequent assignment by the bank could not re-

the payment is rightfully reclaimed, the rescissionment revives the liability of the surety.<sup>53</sup> Even reason for reclaiming the payment was because it is voidable by the debtor's assignee or trustee in bankruptcy, the creditor has been allowed to recover of the surety.<sup>54</sup>

§ 1220. Release of the principal discharges the surety

There are now to be considered certain equities of the surety arising from dealings of the creditor with the principal. For such a defence to arise, it is necessary that the creditor should know of the suretyship relation. If it is disclosed by the contract itself, but frequently is not, it is generally immaterial, however, if the creditor knew of it at the time he took the action in question of the suretyship relation. If he derived this knowledge from the contract or other sources.<sup>55</sup> A voluntary release of a known principal by the creditor or an accord and satisfaction of the principal discharges the surety, unless his liability is expressly reserved and if there are several principals a release of a

principal discharges the surety; and, of course, the account being satisfied, the guaranty was satisfied also, and Gill has his recourse only against McNab, at whose request he made the payment. The conclusion thus reached is borne out by the following analogous cases: *Lee v. Field*, 9 N. Mex. 435, 54 Pac. 873; *Penwell v. Flickinger*, 46 Mont. 526, 129 Pac. 323; *Moran v. Abbey*, 63 Cal. 56; *Day v. Humphrey*, 79 Ill. 452."

<sup>53</sup> *Petty v. Cooke*, L. R. 6 Q. B. 790.

<sup>54</sup> *Pritchard v. Hitchcock*, 6 M. & G. 151; *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 9, 54 C. C. A. 387; *Watson v. Poague*, 42 Ia. 582; *Perry v. Van Norden Trust Co.*, 103 N. Y. S. 543; *Wright v. Gansevoort Bank*, 103 N. Y. S. 548; *Harner v. Batdorf*, 35 Oh. St. 113; *Second Nat. Bank v. Prewett*, 117 Tenn. 1, 96 S. W. 334, 9 L. R. A. (N. S.) 581. But see *contra* *Northern*

*Bank v. Cooke*, 13 I. R. 1; *Northern Bank v. Farmer*, 111 Ky. 350, 63 S. W. 2d 111; *Bartholow v. Bean*, 18 L. Ed. 866; *In re George*, 130 Fed. 315, 64 C. C. A. 130.

<sup>55</sup> See *infra*, §§ 1258-1260.

<sup>56</sup> *Lewis v. Jones*, 4 B. & C. 101; *Coe v. Coe*, 77 Cal. 54, 18 Pa. St. Rep. 235; *State v. No. 1919*, 106 Atl. 504; *v. Mattoon*, 5 Mackey, Ayer, 24 Ga. 288; *Am. Co. v. Lion, etc., Surety*, 1304, 160 N. W. 939; *Penn.*, 22 La. Ann. 28; *Capel*, 53 Miss. 350; *Pr. Mo.* 241; *Kirby v. Ta. Ch.* 242; *Beaver Trust Co.* 259 Pa. 567, 103 Atl. 5; *Phillips*, 17 Tex. 128; *Thacher*, 48 Vt. 574; *Meighan*, 7 Ir. L. R. 511.

release the surety altogether.<sup>57</sup> But a release of part only of the claim will discharge the surety only to that extent.<sup>58</sup> If no fraud was practiced on the creditor, his ignorance when he accepted a compromise as full satisfaction from the principal of the existence of a surety will not prevent the latter's discharge.<sup>59</sup>

The original reason for the broad statement in the books that release of the principal discharged the surety is probably the assumption that the extinction of the debt of the principal necessarily extinguishes the surety's obligation; but here as always it is necessary to determine first what the surety promised. If he promised to be answerable for whatever the principal might owe, the fact that the principal now owes nothing is conclusive, but if the surety's promise was to pay a fixed sum of money or to perform a fixed act, the fact that a principal debtor was formerly bound for the same performance and has ceased to be so is not material. Another reason had to be found for the rule as applied to such a case and the statement has been made "that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor, and the Court will give effect to the intention of the parties by construing the release as a covenant not to sue the principal debtor."<sup>60</sup> The validity of the reasoning depends upon the assumption that the creditor who releases the principal debtor thereby undertakes that the release shall be effectual to free the debtor from all possibility of indirect liability on the debt as well as from direct suit by the creditor. It may be questioned whether, in every case at least, this is a fair construction of the transaction even though no express language indicating a reservation of rights against the surety is used. A covenant not to sue one co-debtor where no suretyship relation exists, involves no obligation so to act that the covenantee shall not be sued for contribution by the other

<sup>57</sup> *Shutte v. Colgate Grain Co. Surety Co.*, 178 Ia. 1304, 160 N. W. (Okl.), 172 Pac. 780. 939.

<sup>58</sup> *Beaver Trust Co. v. Morgan*, 259 Pa. 567, 103 Atl. 367.

<sup>59</sup> *Mellish, L. J.*, in *Nevill's Case*, L. R. 6 Ch. 43, 47.

<sup>60</sup> *American Blower Co. v. Lion, etc.*,

co-debtors,<sup>61</sup> and it is hard to see why the surety should affect the construction of a release or cove sue a co-debtor. If there is a valid reason then for rule that a release of the principal discharges th must be because injury would be caused to the contrary rule rather than to prevent bad faith to th This is made abundantly clear by the fact that if is fully indemnified against loss, he will not be dis a release of the principal,<sup>62</sup> and by the fact that discharge of the principal is due to the acts of t which produce that result without any agreemen on his part to the discharge, the surety is none lieved.<sup>63</sup> These cases also seem to indicate (though are inconsistent with this) that the surety's loss of t subrogation by the creditor's action will not be unless loss of the right involved a real injury. The of the reasons why time given to the principal dis surety is here applicable.

**§ 1221. Whether an executory accord with the principal discharges the surety.**

An unexecuted agreement of accord for the settl future day of the principal's debt, has been held charge the surety.<sup>64</sup> The reason given is that the s not suspend the right of action. If an accord is not contract, this is true, and the authorities in question less based on the old notion that an accord is invalid therefore merely illustrations of the principle that an to give time which is not binding does not affect tl

<sup>61</sup> See *supra*, § 338.

<sup>62</sup> *Chilton v. Robbins*, 4 Ala. 223, 37 Am. Dec. 741; *Home Bank v. Waterman*, 134 Ill. 461, 29 N. E. 503; *Crim v. Fleming*, 101 Ind. 154; *Keinhaus v. Generous*, 25 Oh. St. 667; *Smith v. Steele's Estate*, 25 Vt. 427, 60 Am. Dec. 276; *Jones v. Ward*, 71 Wis. 152, 36 N. W. 711.

<sup>63</sup> *Mayhew v. Boyes*, 103 L. T. 1. (The creditor discharging the principal by secretly stipulating for a private

advantage over other creditors.) *Beaver Morgan*, 259 Pa. 567, (The creditor discharged by misapplication of sec

<sup>64</sup> *Badnall v. Samuel*, *Vernon v. Turley*, 1 M. *Mueller v. Dobschuetz*, *Miller v. Hatch*, 72 Me. Rep. 346; *Harnsberger's* 1 Adm., 3 Gratt. 144.

<sup>65</sup> See *infra*, § 1839.

liability. But a bilateral accord supported by sufficient consideration is now recognized as a binding contract, and carries with it by implication an agreement on the part of the creditor to forbear until the time fixed in the accord for its performance; or if no time is fixed until a reasonable time for performance has elapsed.<sup>66</sup> Whether a remedy at law is allowed by local practice to a debtor whose creditor has agreed to forbear temporarily or whether the debtor's only remedy is a cross action for damages or an application to a court of equity for a temporary injunction, has not been thought material in the establishment of the general proposition that giving time to the principal discharges the surety,<sup>67</sup> and it should make no difference whether the creditor's sole undertaking is to forbear for a time or whether he agrees not only to forbear for a time but also then to accept some substituted performance in satisfaction of the obligation.

#### § 1222. Giving time to the principal discharges the surety.

Though it is a modern doctrine that a binding agreement between the principal and the creditor giving the former an extension of time for the payment or performance of his obligation discharges the surety,<sup>68</sup> and though the doctrine has been often criticized as going to an extreme in discharging the surety altogether even when the extension of time has injured him not at all, or very slightly,<sup>69</sup> no doctrine is better settled.<sup>70</sup>

<sup>66</sup> See *infra*, §§ 1844, 1845.

<sup>67</sup> See *Fraser v. Jordan*, 8 E. & B. 303.

<sup>68</sup> Professor Ames says (*Cas. Suretyship*, 156): "The doctrine that an agreement to give time to the principal discharges the surety in equity seems to be a comparatively modern notion. The editor has not discovered any earlier instances of the application of the doctrine than Lord Thurlow's decision in 1789, in the case of *Nisbet v. Smith*, 2 Bro. C. C. 579, which was followed by *Rees v. Berrington* (1795), 2 Ves. Jr. 540; *Boulton v. Stubbs* (1810), 18 Ves. 20; *Bowmaker v. Moore* (1816), 3 Price, 214; *Eyre v.*

*Bartrop* (1818), 3 Mad. 221. In all of the cases just cited the surety was a specialty obligor."

<sup>69</sup> See, *e. g.*, *per* Blackburn, J., in *Polak v. Everett*, 1 Q. B. D. 669.

<sup>70</sup> *Overend v. Oriental Financial Corp.*, L. R. 7 H. L. 348; *Clarke v. Birley*, 41 Ch. D. 422; *Bolton v. Salmon*, [1891], 2 Ch. 48; *Greenwood v. Francis* (1899), 1 Q. B. 312, 320; *Uniontown Bank v. Mackey*, 140 U. S. 220, 35 L. Ed. 485, 11 Sup. Ct. 844; *United States v. American Bonding & Trust Co.*, 89 Fed. 921, *aff'd* in 89 Fed. 925, 32 C. C. A. 420, 61 U. S. App. 584; *McMullen v. United States*, 167 Fed. 460, 93 C. C. A. 96; *Edwards*

Whether a particular agreement to give time is a tract, and therefore discharges the surety, only upon the terms of the creditor's promise, but the sufficiency of the consideration for it, if it is not. Since delay by the creditor in the enforcement does not discharge the surety,<sup>71</sup> and as an agreement to give time amounts merely to a revocable promise to defer performance, such an agreement does not

- v. Goode*, 228 Fed. 664, 143 C. C. A. 186; *Moses v. Home Bldg., etc., Assoc.*, 100 Ala. 465, 14 So. 412; *Kissire v. Plunkett-Jarrell Co.*, 103 Ark. 473, 145 S. W. 567; *Ward v. Nutt*, 120 Ark. 443, 179 S. W. 667; *Daneri v. Gazzola*, 139 Cal. 416, 73 Pac. 179; *Deming v. Norton*, Kirby, 397; *Clark v. Gerstley*, 26 Dist. Col. App. 205 (aff'd. 204 U. S. 504, 51 L. Ed. 589, 27 Sup. Ct. 337); *Bowen v. Darby*, 14 Fla. 202; *Randolph v. Fleming*, 59 Ga. 776; *Maydole v. Peterson*, 7 Idaho, 502, 63 Pac. 1048; *Skinner v. Sullivan*, 227 Ill. 93, 81 N. E. 11; *Lawrence v. Hammond*, 208 Ill. App. 31; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *State v. Adams (Ind.)*, 118 N. E. 60; *Diehl v. Davis*, 75 Kan. 38, 88 Pac. 532; *Farmers' Bank v. Wickliffe*, 131 Ky. 787, 116 S. W. 249; *Staib v. German Ins. Bank*, 179 Ky. 118, 200 S. W. 322; *Alter v. Zunts*, 27 La. Ann. 317; *Dunn v. Spalding*, 43 Me. 336; *First Nat. Bank v. Blake*, 113 Me. 313, 93 Atl. 840; *Berman v. Elm, etc., Assoc.*, 114 Md. 191, 78 Atl. 1104; *Schwartz v. American Surety Co.* 231 Mass. 490, 121 N. E. 424; *Walter A. Wood Co. v. Oliver*, 103 Mich. 326, 61 N. W. 507 (*cf. People v. Traves*, 188 Mich. 415, 154 N. W. 130); *Farmers' Supply Co. v. Weis*, 115 Minn. 428, 132 N. W. 917 (*cf. Standard Salt & Co. v. National Surety Co.*, 134 Minn. 121, 158 N. W. 802); *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517; *Shuler v. Hummel*, 1 Neb. (Unoff.) 204, 95 N. W. 350; *Wright v. Bartlett*, 43 N. H. 548; *National Park Bank v. Koehler*, 204 N. Y. 174, 97 N. E. 450; *First Nat. Bank v. Sw* 255, 39 S. E. 962; *McC* 376; *Bennett v. Odnea* 147 Pac. 1013; *Lasell* 147 Pac. 1013; *Appeal*, 108 Pa. 581; *41 S. C. 217*, 19 S. E. 41; *v. Taylor*, 10 S. Dak. 450; *Foy v. Sinclair*, 93 S. W. 28; *Wylie v. High* 306, 11 S. W. 1118; *Sp* (Tex. Civ. App.), 183 S. 223; *Short v. Shannon* (T 211 S. W. 463; *New* Richards, 35 Vt. 281; *C* Mott Iron Works, 117 V 12; *Everett v. Snyder* Pac. 643; *Glenn v. Mor* 467; *Welch v. Kukuk*, 107 N. W. 301; *Lawren* Wyo. 414, 64 Pac. 339. *Traves*, 188 Mich. 345, 1 the court declined to ap ciple in favor of a su where no material inj caused, though admit uncompensated surety charged. See also *Gu* Pressed Brick Co., 191 L. Ed. 242, 24 S. Ct. United States & Co., 117 N. E. 894; *Young v* 228 Pa. 373, 77 Atl. 623

<sup>71</sup> *Infra*, § 1231.

the surety.<sup>72</sup> For this reason where an agreement for time is obtained fraudulently by the debtor, the creditor has a right to rescind the agreement with the principal and still hold the surety.<sup>73</sup> The agreement from the outset has been voidable by the creditor, and should the surety at any time pay the debt, equally voidable by him. Clearly, also, where the contract is divisible and gives rise to a succession of debts giving time to the principal as to one will not discharge the surety's liability upon the others;<sup>74</sup> and probably this is true where time is given for part of an originally indivisible debt for which the surety was bound.<sup>75</sup> The surety's defence is equitable, and should only be available to the extent of his possible injury; but the rule tends to become formal and absolute and to be applied with little reference to such a limitation.

### § 1223. Surety's consent to extension of time.

If the surety assents to the extension of time either in his original contract or at any time before the extension is given, it seems clear, on the ground either of the terms of his contract or of waiver, that he will not be discharged;<sup>76</sup> and the surety's assent may be shown by parol though the contract extending the principal's time is in writing.<sup>77</sup> Moreover, one of the well-settled exceptional cases in which a promise without consideration to render a performance from which the promisor has al-

<sup>72</sup> *Harrell v. Kutz*, (Ga. App. 1918), 95 S. E. 717; *Olmstead v. Latimer*, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685, and see cases in the preceding note.

<sup>73</sup> *Hubbard v. Hart*, 71 Iowa, 668, 33 N. W. 233; *Bangs v. Strong*, 10 Paige, 11. See also *Scholefield v. Templer*, 4 D. G. & J. 429; *cf. Kirby v. Landis*, 54 Iowa, 150, 6 N. W. 173.

<sup>74</sup> *Croydon Commercial Gas Co. v. Dickinson*, 2 C. P. D. 46; *Coe v. Cassidy*, 72 N. Y. 133; *Provincial Bank v. Cussen*, L. R. 18 Ir. 382; *Commercial Bank v. Muirhead*, 12 U. C. Q. B. 39; *McLaughlin Carriage Co. v. Oland*, 34 Nova Scotia, 193.

<sup>75</sup> *Klein v. Long*, 27 N. Y. App. Div. 158, 50 N. Y. S. 419.

<sup>76</sup> *Mercantile Bank v. Taylor*, [1893] A. C. 317; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 48 L. Ed. 242, 24 S. Ct. 142; *Ward v. Nutt*, 120 Ark. 443, 179 S. W. 667; *State v. Adams*, (Ind. 1918), 118 N. E. 680; *Aldrich v. Rowell*, (Iowa, 1918), 166 N. W. 89; *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N. E. 982; *Barker v. United States & Co.*, 228 Mass. 421, 117 N. E. 894; *Chester v. Bank of Kingston*, 16 N. Y. 336.

<sup>77</sup> *Woodcock v. Oxford, etc., Ry.*, 1 Drew, 521; *Arlington Nat. Bank v. Bennett*, 214 Mass. 352, 101 N. E. 982; *Osgood v. Miller*, 67 Me. 174; *Chester v. Bank of Kingston*, 16 N. Y. 336; *Dean v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847.

that it is a fraud on the principal after having given him time to enforce the obligation immediately against the surety who will then come back upon the principal.<sup>33</sup> This reasoning, however, is even more inadequate in regard to giving time than in regard to giving an absolute release. Here, as in the case of the release, the facts by no means always justify the construction of the creditor's agreement that neither directly or indirectly will the creditor do anything to compel the principal debtor to pay either himself or the surety the amount of the debt. But even if the facts did justify such a construction of the agreement, there is no reason why the surety should be totally discharged in order to save the principal

<sup>33</sup> Thus Lord Eldon said in *English v. Darley*, 2 Bos. & P. 61, "If a holder enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then oblige a subsequent indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued."

In *Polak v. Everett*, 1 Q. B. D. 669, Blackburn, J., said: "It has been established for a very long time, beginning with *Rees v. Berrington*, 2 Ves. 540, to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor; and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether. The reason given for this, as stated in *Samuell v. Howarth*, by Lord Eldon, is

because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract. And he adds: 'The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety.' The principle being, as I understand it, that as it is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle, that if the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy. Whether that was a good or a just principle originally, is a matter which is far too late to think about now. I must own I have had considerable doubts about the justice of that principle, but from the time of *Rees v. Berrington*, 2 Ves. 540, it has been undisputed law, and nothing but the legislature can interfere to alter it."



surety, if he chooses, may pay immediately and be subrogated to the creditor's right. But though a promise may be so vague or uncertain in regard to the time of performance that it is incapable of enforcement,<sup>86</sup> this will by no means always be true where no definite time is agreed upon. An agreement for sufficient consideration to forbear without specification of time will rarely if ever be held a nullity, so far as the principal debtor is concerned. Generally the agreement will be interpreted as requiring forbearance for a reasonable time.<sup>87</sup> If the agreement is binding in favor of the debtor it must be effectual to discharge the surety, unless the general principle that giving time to the principal discharges the surety is to be discarded. To say that a contract with the principal debtor to forbear for a day discharges the surety but that a contract to forbear for a reasonable time has no such operation, is absurd.<sup>88</sup>

**§ 1227. Extension of time for an illegal or usurious consideration.**

Whether an agreement on the part of the creditor to give time is a binding contract and therefore a discharge of the surety, involves ordinarily merely an application of the principles governing the formation of contracts and these principles are sufficiently considered elsewhere. Illegality, however, may also be involved. The promise to extend time cannot well be illegal, but the consideration for it may be; and illegal consideration whether in the form of a promise or of an act will generally invalidate the promise for which

<sup>86</sup> See *supra*, § 38.

<sup>87</sup> *Supra*, § 136.

<sup>88</sup> In *Findley v. Hill*, 8 Or. 247, 34 Amer. Rep. 578, it was held that an agreement for consideration to forbear "until after harvest" would not discharge the surety, and a dictum to much the same effect is found in *Miller v. Stem*, 2 Pa. St. 286. But in *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621, an agreement made in summer to extend a note "until after threshing" was rightly held to discharge a surety and in *C. C. Slaughter Co. v. Eller* (Tex.

Civ. App.), 196 S. W. 704, an agreement to forbear until certain property could be sold was held to have the same effect. A case like *McGee v. Metcalf*, 12 Smedes & M. 535, 51 Am. Dec. 122, must be distinguished. There it was properly held that a direction to a sheriff "not to execute the execution until ordered to do so," would not discharge a surety for the reason that, "the time being indefinite, the stay could have been arrested at any time that the surety requested it to be done."

it was given.<sup>80</sup> But where usury is made illegal are not generally regarded as *in pari delicto*. The usury statutes differs in different States, and each should be considered; but generally if actual payment is made of usurious interest in order to secure an agreement, the creditor will be bound by his agreement, since he will not deprive the debtor of the promise for which he gave the surety. The surety will, therefore, be discharged.<sup>80</sup>

But where the effect of usury statutes is to make payment a partial discharge of the principal, this has been held, since part payment of a liquidated debt is not sufficient consideration to support a promise; and the same result follows in a bilateral contract if the creditor's promise to pay usury is regarded as the cause of the illegality of the consideration.<sup>81</sup>

Where a negotiable note containing or including interest is given for the creditor's promise of extension, the surety has been held discharged in a few cases;<sup>82</sup> this conclusion may be supported, where under the local law the note is not void, and if indorsed to a holder in due course it would be binding upon the debtor. But if the debtor made an executory non-negotiable promise to pay, and the creditor returned for the creditor's promise to give time, the

<sup>80</sup> See *infra*, § 1780.

<sup>81</sup> *Vary v. Norton*, 6 Fed. 808; *Kyle v. Bostick*, 10 Ala. 589; *Knight v. Hawkins*, 93 Ga. 709, 20 S. E. 266; *Myers v. First Nat. Bank*, 78 Ill. 257; *Beuton v. Dillon*, 63 Ill. App. 517, 521; *Lemmon v. Whitman*, 75 Ind. 318, 39 Am. Rep. 150; *Kenningham v. Bedford*, 1 B. Mon. 325; *Wild v. Howe*, 74 Mo. 551; *Commercial Bank v. Wood*, 56 Mo. App. 214; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Billington v. Wagoner*, 33 N. Y. 31; *Scott v. Harris*, 76 N. C. 205 (but see *Bank v. Lineberger*, 83 N. C. 454); *Osborn v. Low*, 40 Ohio St. 347; *Mann v. Brown*, 71 Tex. 241, 9 S. W. 111; *Turrill v. Boynton*, 23 Vt. 142; *Austin v. Dorwin*, 21 Vt. 38; *Parsons v. Harrold*, 46 W. Va. 122, 32

S. E. 1002; *Moulton v. Wis.* 169, 8 N. W. 621; *Parlin, etc., Co. v. Huts* 389, 65 N. E. 93.

<sup>82</sup> *Jenness v. Cutler*, 12 Polkinghorne v. Hendrick 366 (but see *Clayton v. Miss.* 499, 21 So. 565, 37 L. R. A. 771, 60 Am. S. Nightingale v. Meginnis, 461; *Hartman v. Danner*, Calvert v. Good, 95 Pa. Grayson's App., 108 Pa. well v. Holly, 5 Rich. 47; *McNabb*, 97 Tenn. 236 1091.

<sup>83</sup> *Scott v. Saffold*, 37 Ga. v. Gillespie, 12 Iowa, 55, 516; *Fay v. Tower*, 58 N. W. 558.

of usury by the debtor renders both promises unenforceable. The debtor can be protected by being freed from liability on his own promise, and the court will not go so far to aid him as to allow him to enforce the creditor's promise to give time, while denying the creditor any recovery on the debtor's promise. The surety is, therefore, not discharged.<sup>93</sup> And generally, the same principle has been applied where a note was given for the usurious interest.<sup>94</sup>

**§ 1228. Acceptance by the creditor of a confession of judgment at a future day by the principal.**

The acceptance by the creditor of an agreement for judgment at a future day against the principal has been held not to discharge the surety, where the agreement permitted the entry of judgment as soon or sooner than it could have been obtained by adversary proceedings against the debtor.<sup>95</sup> It is obvious, however, that if the date at which judgment may be entered under the agreement is sufficiently remote and the creditor is precluded by the agreement from seeking to get judgment at an earlier day, time is given to the principal and the surety should be discharged.

**§ 1229. A promise to give time supported by an oral counter promise within the Statute of Frauds.**

The severity of the rule that giving time to the principal

<sup>93</sup> *Cox v. Mobile &c. R.*, 37 Ala. 320; *Silmeyer v. Schaffer*, 60 Ill. 479; *Braman v. Howk*, 1 Blackf. 392; *Scott v. Hall*, 6 B. Mon. 285; *Berry v. Pullen*, 69 Me. 101; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Roberts v. Stewart*, 31 Miss. 664; *Fernan v. Doubleday*, 3 Lans. 216; *Thayer v. King*, 31 Hun, 437; *Payne v. Powell*, 14 Tex. 600; *Burgess v. Dewey*, 33 Vt. 618; *Meiswinkle v. Jung*, 30 Wis. 361, 11 Am. Rep. 572. See, however, *contra*—*Parmelee v. Williams*, 72 Ga. 42; *Wright v. Bartlett*, 43 N. H. 548, 551; *Draper v. Trescott*, 29 Barb. 401, 407.

<sup>94</sup> *Gilder v. Jeter*, 11 Ala. 256; *Anderson v. Mannon*, 7 B. Mon. 217;

*Duncan v. Reed*, 8 B. Mon. 382; *Roberts v. Stewart*, 31 Miss. 664; *Wilson v. Langford*, 5 Humph. 320; *Smith v. Woodbury*, 36 Vt. 303.

<sup>95</sup> *Price v. Edmunds*, 10 B. & C. 578; *Hulme v. Coles*, 2 Sim. 12; *Suydam v. Vance*, 2 McL. 99; *Fletcher v. Gamble*, 3 Ala. 335; *Barker v. M'Clure*, 2 Blackf. 14; *Gardner v. VanNorstrand*, 13 Wis. 543. An agreement to stay proceedings temporarily in an action against the principal was held not to discharge the surety in *Board of Comm'rs v. Clemens* (W. Va.), 100 S. E. 680. See also *Omaha Grain Exch. v. National Surety Co. (Neb.)*, 174 N. W. 426.

seem inconsistent with the general rule that releasing or giving time to the surety discharges the principal; or, if not, to involve a very strained construction of language. If reasonably construed, the agreement between the creditor and the principal debtor affects and varies the surety's risk. If this is so, it is obvious that the agreement of the creditor and principal debtor with one another that they will increase the surety's risk and that the creditor shall nevertheless hold him liable, should have no effect.

The common reasoning to support the rule is that the reservation is effectual "upon this principle—first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him."<sup>1</sup>

It is conceded in the cases that the reservation of rights against the surety can only be valid on the assumption that the rights of the surety also are reserved.<sup>2</sup> It is often assumed that this involves merely the preservation to the surety of his right to enforce any direct obligation of indemnity running to him from the principal, but it must also involve the preservation of the right to enforce by way of subrogation the creditor's claim against the principal. It is sometimes asserted that this is equivalent to saying that the agreement between creditor and principal is conditional on the assent of the surety and that since he may if he chooses pay the creditor and enforce the claim against the principal, he is not discharged.<sup>3</sup>

*Prout v. Branch Bank*, 6 Ala. 309;  
*Dean v. Rice*, 63 Kans. 691, 66 Pac.  
 992; *Sohier v. Loring*, 6 Cush. 537;  
*Hunt v. Knox*, 34 Miss. 655; *National*  
*Park Bank v. Koehler*, 65 N. Y. Misc.  
 390, 121 N. Y. S. 640, *affd.* 137 N.  
 Y. App. Div. 785, 122 N. Y. S. 490;  
*Hagey v. Hill*, 75 Pa. 108, 15 Am.  
 Rep. 583; *Kaufmann v. Rowan*, 180

Pa. 121, 42 Atl. 25; *Viele v. Hoag*, 24  
 Vt. 46; *Exchange Bldg. Co. v. Bayless*,  
 91 Va. 134, 21 S. E. 279; *Trust, etc.,*  
*Co. v. McKenzie*, 23 Ont. App. 167.

<sup>1</sup> *Parke, B.*, in *Kearsley v. Cole*, 16  
 M. & W. 128, 135.

<sup>2</sup> See cases in preceding notes.

<sup>3</sup> See for example *National Park*  
*Bank v. Koehler*, 65 N. Y. Misc. 390,

It is doubtless true that an agreement giving time that the surety assents thereto does not discharge and ought not to do so.<sup>5</sup> But it can only be said a reservation of rights as equivalent to this that a reasonable person in the position of the debtor can infer from a reservation of rights against the surety on being compelled to pay would have the effect over against himself to which their relation gave rise. He could hardly infer that the creditor's right against the principal also be kept alive for the benefit of the surety. It is not admissible to show that a release or receipt in a written contract with the principal releasing him, at the time was subject to a reservation of rights against

392, 121 N. Y. S. 640; *Hagey v. Hill*, 75 Pa. 108, 15 Am. Rep. 583.

<sup>4</sup> *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Kuhlman v. Leavens*, 5 Okl. 562, 50 Pac. 171; *Hamilton Nat. Bank v. Cook*, 130 Tenn. 465, 171 S. W. 86, L. R. A. 1915 C. 831.

<sup>5</sup> In *Prout v. Branch Bank*, 6 Ala. 309, the creditor reserved the right to bring action against the principal in case the surety so requested. This reservation, it was held, preserved the creditor's right against the surety.

<sup>6</sup> In *Spies v. National City Bank*, 68 N. Y. App. Div. 70, 74, 74 N. Y. S. 64 (affd. 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193), *Ingraham, J.*, said: "I know of no case, however, where the release itself was absolute upon its face, without any reservation against the other parties liable, that the creditor has been allowed to prove [such] an oral understanding, made contemporaneously with or prior to the execution of the release reserving his right to enforce the obligation as against the other parties liable thereon, as is sufficient to destroy the effect of the release of the principal, so far as it discharges the sureties."

In *Ex parte Glendenning*, 1 Buck, 517, Lord Eldon said: "The reservation must be upon the face of the

instrument by which the compromise; for it can be admitted to vary the effect of the instrument." *Overend v. Oriental Fire Ins. Co.*, L. R. 7 H. L. 348; *Meigs v. Taylor*, [1893] A. C. 519; *Ayer*, 24 Ga. 288; *Clark v. Spaulding*, 145 Mass. 534, 1 Am. St. 475; *Calder v. N. Y. 211*, 29 Am. Rep. 534; *Steindler*, 1 N. Y. Misc. S. 839; *Gorman v. I. Sup. Ct.* 87. In *Brooks v. Ga.* 288, 295, the creditor gave a receipt stating that he received from the principal one-half his claim in full. The creditor testified that at the time of the agreement he remarked "proceed to make the release of Bates (the surety) if you could," and that this was the understanding between himself and the principal. This testimony seems not disputed, but the release of the principal was held to discharge the surety. But see *contra*, *Bailey v. Mfg. Co.*, 86 Miss. 63, 30 S. W. 2d 100; *Massey v. Brown*, 4 S. W. 2d 100, § 1263, n. 44.

But if the evidence is clear of a parol agreement with the released debtor providing that the creditor's remedies against the other debtors should be reserved, a bill in equity to reform the written release should be sustained.<sup>7</sup> And when a settlement has been made by with the principal, it may be shown by parol that it was made subject to a reservation of rights against the surety.<sup>8</sup> The creditor cannot by virtue of a reservation of rights against the surety deprive him of any substantial right. Therefore, where a creditor who had judgment against the principal assigned the judgment, to a third person, as a partial payment of the latter's claim, a reservation of rights against the surety was held ineffectual, since the surety could not by paying the debt obtain control of the judgment against the principal.<sup>9</sup>

**§ 1231. Delay in enforcing the claim against the principal does not discharge the surety.**

However negligent the creditor may be in enforcing his claim against the principal debtor, this fact alone will not discharge the surety for "he might have paid the debt according to his undertaking and have sued the principal himself; or he might have gone into a court of equity after the debt became due and obtained a decree that the principal should pay it."<sup>10</sup>

Accordingly, even though the creditor loses altogether his right against the principal, because of the Statute of Limitations, or because of the statute requiring prompt presentment of claims against the estate of a deceased person, or of a bankrupt, the surety is not discharged.<sup>11</sup> It is, of course,

<sup>7</sup> *Bank of Montreal v. McFaul*, 17 Grant. Ch. (U. C.) 234.

<sup>8</sup> *Wyke v. Rogers*, 1 De G. McN. & G. 408; *Palmer v. Purdy*, 83 N. Y. 144. See also *Miller v. Beck*, 108 Ia. 575, 79 N. W. 344; *Louisville &c. Mail Co. v. Barnes*, 117 Ky. 860, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. 273; *McCrillis v. Hawes*, 38 Me. 566. These decisions last cited related to liability in tort but the principle seems general.

<sup>9</sup> *Spies v. National City Bank*, 68 N. Y. App. Div. 70, 74 N. Y. S. 64, *affd.* 174 N. Y. 222, 66 N. E. 736.

<sup>10</sup> *Villars v. Palmer*, 67 Ill. 204. See also, *e. g.*, *State v. Northrop*, (Conn. 1919), 106 Atl. 504; *Lewis v. Blume*, 226 Mass. 505, 116 N. E. 271, and cases in the following note.

<sup>11</sup> *Carter v. White*, 25 Ch. Div. 666, 672, *per* Lindley, L. J.; *Minter v. Mobile Branch Bank*, 23 Ala. 762, 58 Am. Dec. 315; *Darby v. Berney Nat. Bank*, 97 Ala. 643, 11 So. 881; *Sichel v. Carrillo*, 42 Cal. 500; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808; *Los Angeles County v. Lankershim*, 100 Cal. 525, 35 Pac. 153; *Villars v. Palmer*, 67 Ill.

possible to guarantee merely the collectibility and under such a guaranty a contrary conclusion reached;<sup>12</sup> and by statute the creditor may be exercise diligence in endeavoring to collect his claim principal.<sup>13</sup>

### § 1232. Surrender of security by the creditor dis surety pro tanto.

The obvious prejudice to a surety from the surrender of the creditor of security held by him has established that such a surrender discharges the surety to the value of the security surrendered.<sup>14</sup> There

204. See also *James v. Plank*, 159 Ill. App. 293; *Banks v. State*, 62 Md. 88; *Cohea v. Commissioners*, 15 Miss. 437; *Sibley v. McAllaster*, 8 N. H. 389; *Pfeiffer v. Crossley*, 91 N. J. L. 433, 103 Atl. 1000; *Moore v. Gray*, 26 Oh. St. 525; *Nashville Bank v. Campbell*, 7 Yerg. 353; *Marshall v. Hudson*, 9 Yerg. 57; *Charbonneau v. Bouvet*, 98 Tex. 167, 82 S. W. 460. But see *contra* *Auchampaugh, Admr., v. Schmidt*, 70 Iowa, 642, 27 N. W. 805; *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833; *Stull v. Davidson*, 12 Bush, 167; *contra* *Siebert v. Quesnel*, 65 Minn. 107, 67 N. W. 803. It was suggested in *Auchampaugh v. Schmidt*, 70 Ia. 642 (27 N. W. 805), that "a surety paying a debt after it had become barred as against the principal, would be remediless," but see the contrary decisions of *Hooks v. Branch Bank*, 8 Ala. 580; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Marshall v. Hudson*, 9 Yerg. 57. See also *Cohea v. Commissioners*, 15 Miss. 437.

<sup>12</sup> See this distinction referred to in *Pfeiffer v. Crossley*, 91 N. J. L. 433, 103 Atl. 1000, and cases there cited.

<sup>13</sup> See *infra*, § 1236.

<sup>14</sup> *Pearl v. Deacon*, 24 Beav. 186, 3 Juris. N. S. 879; *American Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557; *Hen-*

*derson v. Huey*, 45 Ala. 1; *Sturges v. Pace*, 34 Ark. 80; *State v. Smith*, 59 Ga. 701; *Kirkpatrick v. Smith*, Ill. 122; *Weik v. Pugh*, Ill. 300, 44 N. W. 558; *Union v. Cooley*, 27 La. Ann. 202; *Little*, 45 Me. 183; *Baker v. Pick*, 122, 19 Am. Dec. 3; *Sav. Bank v. Hayes*, 188 N. E. 311; *Durfee v. Keane*, 571, 117 N. E. 907; *Wiley v. Minn.*, 17; *Long v. Mason*, 200 S. W. 1062; *Lake v. Missouri Trust Co.*, 147 Mo. 126 S. W. 547; *New Hampshire v. Colcord*, 15 N. H. 119, 685; *Monroe v. DeForest*, 264, 31 Atl. 773; *Bixby v. Hun*, 275; *Guilford Lum. Co. v. Holladay* (N. C.), 101; *Brown v. Rathburn*, 10 Or. 1; *Derby Coal Co.*, 98 Pa. 1; *Trust Co. v. Morgan*, 259; *Atl.*, 367; *Otis v. Von Storch*, 41, 23 Atl. 39; *Cator v. B.*, 408; *Scott v. Llano Court*, Tex. 221, 89 S. W. 741; *Dutton*, 57 Vt. 515; *Loop v.*, 3 Rand. 511; *Parsons v. H.*, Va. 122, 32 S. E. 1002; *P.*, Gorman, 93 Wis. 560, 67. If the creditor has security to the surety, he cannot re-

a creditor has obtained a lien by attachment, judgment or execution against the principal's property, a surrender of this lien reduces the principal's claim against the surety to the extent of the value of the lien.<sup>15</sup> For the same reason a mortgagee who releases a portion of the mortgaged premises to a grantee of the mortgagor, without the mortgagor's consent, must account for the value of the released premises in any action against the mortgagor for a deficiency after foreclosure.<sup>16</sup> And where the creditor was a seller of goods to the principal and had an agreement with him that the

surrendering that belonging to the principal. *Hill v. Horskins*, 150 Fed. 236.

<sup>15</sup> *Mayhew v. Crickett*, 2 Swanst. 185; s. c. Wils. Ch. 418; *Winston v. Yeargin*, 50 Ala. 340; *Mulford v. Estudillo*, 23 Cal. 94; *Thomas v. Wason*, 8 Col. App. 452, 46 Pac. 1079; *Houston v. Hurley*, 2 Del. Ch. 247; *Rawson v. Gregory*, 59 Ga. 733; *Brinton v. Gerry*, 7 Ill. App. 238; *Sterne v. Vincennes Bank*, 79 Ind. 549; *Green v. Blunt*, 59 Iowa, 79, 12 N. W. 762; *Mount Sterling Inf. Co. v. Cockrell*, 24 Ky. L. Rep. 1151, 70 S. W. 842; *Darland v. First Nat. Bank*, 177 Ky. 261, 197 S. W. 826; *Comstock v. Cr  on*, 1 Rob. La. 528; *Chipman v. Todd*, 60 Me. 282, 284; *Moss v. Pettingill*, 3 Minn. 217; *Brown v. Kidd*, 34 Miss. 291; *Priest v. Watson*, 75 Mo. 310, 42 Am. Rep. 409; *Bronson v. McCormick Co.*, 52 Neb. 342, 72 N. W. 312; *Nelson v. Williams*, 2 Dev. & B. Eq. 118; *Smith v. McLeod*, 3 Ired. Eq. 390; *Day v. Ramey*, 40 Oh. St. 446; *Templeton v. Shapley*, 107 Pa. 370; *Hutton v. Campbell*, 10 Lea, 170; *Watson v. Read*, 1 Tenn. Ch. 196; *Jenkins v. McNeese*, 34 Tex. 189; *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601; *Shannon v. McMullin*, 25 Gratt. 211; *Hyde v. Rogers*, 59 Wis. 154, 17 N. W. 127; *Spencer v. Thompson*, 6 Ir. C. L. R. 537. But in a few States the surrender of an attachment does not affect the creditor's claim against the surety.

*Glazier v. Douglass*, 32 Conn. 393, 400; *Barney v. Clark*, 46 N. H. 514; *Morrison v. Citizens' Bank*, 65 N. H. 253, 280, 20 Atl. 300, 9 L. R. A. 282, 23 Am. St. Rep. 39; *Montpelier Bank v. Dixon*, 4 Vt. 587, 24 Am. Dec. 640; *Baker v. Marshall*, 16 Vt. 522, 42 Am. Dec. 528. See also *Page v. Webster*, 15 Me. 249, 33 Am. Dec. 608; *Lawson v. Snyder*, 1 Md. 71; *Bellows v. Lovell*, 4 Pick. 153, 5 Pick. 307; *Curtice v. Bothamly*, 8 Allen, 336. Where a creditor who had obtained an attachment joined in a petition in bankruptcy, upon which adjudication followed, dissolving the attachment, the surety was held not discharged. *Howard Nat. Bank v. Arbuckle*, (Vt. 1917), 102 Atl. 476.

<sup>16</sup> *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. 108; *Townsend Sav. Bank v. Munson*, 47 Conn. 390; *Worcester Sav. Bank v. Thayer*, 136 Mass. 459; *Meigs v. Tunnicliffe*, 214 Pa. 495, 63 Atl. 1019, 112 Am. St. 769. In *In re Hunter's Est.*, 257 Pa. 32, 101 Atl. 79, the court stated that "By such release the mortgagee assumes the risk of the unreleased portion of the property being of sufficient value to secure his debt." This would imply that the mortgagor was absolutely discharged in any event and not merely to the extent of his injury. Probably the case did not make the distinction important and it was not present in the mind of the court.





was valueless to the creditor,<sup>22</sup> or was of such a character as to make it speculative whether it would prove onerous or profitable.<sup>23</sup>

### § 1233. Impairment of security by creditor's negligent inaction.

Though negligent positive action by the creditor resulting in loss of security is a defence *pro tanto* to the surety, it has been held that mere negligent non-feasance on the part of the creditor in using security to the best advantage will not relieve the surety; as by failing seasonably to enforce a lien or mortgage on property not in the possession or under the care of the creditor;<sup>24</sup> by failing to protect a mortgage from destruction by a tax title;<sup>25</sup> by injudiciously failing to sell;<sup>26</sup> by failing to prove against the bankrupt estate of a principal debtor or co-surety,<sup>27</sup> or against the estate of a deceased principal debtor;<sup>28</sup> by failing to appropriate by way of set-off a balance due to the principal debtor;<sup>29</sup> by failing to insure mortgaged property, though authorized to do so in the mortgage,<sup>30</sup> or by otherwise allowing collateral to be destroyed or to deteriorate in value.<sup>31</sup>

also *Bedwell v. Gephart*, 67 Iowa, 44, 24 N. W. 585.

<sup>22</sup> *Hardwick v. Wright*, 35 Beav. 133; *Rainbow v. Juggins*, 5 Q. B. D. 422; *Lilly v. Roberts*, 58 Ga. 363; *Jones v. Hawkins*, 60 Ga. 52; *Armstrong v. Citizens &c. Bank*, 145 Ga. 861, 90 S. E. 44; *Green v. Blunt*, 59 Ia. 79, 12 N. W. 762; *Moss v. Pettingill*, 3 Minn. 217; *Blydenburgh v. Bingham*, 38 N. Y. 371, 98 Am. Dec. 49; *Loomis v. Fay*, 24 Vt. 240; *Farmers' State Bank v. Gray*, 94 Wash. 431, 162 Pac. 531. See also *Royal Indemnity Co. v. Beiseker*, 245 Fed. 346, 157 C. C. A. 538.

<sup>23</sup> *Coates v. Coates*, 33 Beav. 249.

<sup>24</sup> *Grisard v. Hinson*, 50 Ark. 229, 6 S. W. 906; *Fuller v. Tomlinson*, 58 Ia. 111, 12 N. W. 127; *Freaner v. Yingling*, 37 Md. 491; *Clopton v. Spratt*, 52 Miss. 251; *Sheldon v. Williams*, 11 Neb. 272, 9 N. W. 86; *Home Savings Bank v. Shallenberger*, 95 Neb. 593, 146 N. W.

993; *Schroeppel v. Shaw*, 3 N. Y. 446; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121; *Moorehead v. Daniels*, (Okl. 1915), 153 Pac. 623; *Baker v. Gaines Bros. Co.* (Okl. 1917), 166 Pac. 159; *Day v. Elmore*, 4 Wis. 190.

<sup>25</sup> *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621.

<sup>26</sup> *First Nat. Bank v. Waddell*, 74 Ark. 241, 85 S. W. 417; *Brick v. Freehold Nat. Banking Co.*, 37 N. J. L. 307; *Cherry v. Miller*, 7 Lea, 305. Cf. *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601.

<sup>27</sup> *Armstrong v. Citizens' &c. Bank*, 145 Ga. 861, 864, 90 S. E. 44, and see *infra*, § 1994.

<sup>28</sup> *Baker v. Gaines Bros. Co.*, (Okl. 1917), 166 Pac. 159.

<sup>29</sup> See *infra*, § 1235.

<sup>30</sup> *Willard v. Welsh*, 94 N. Y. App. D. 179, 88 N. Y. S. 173.

<sup>31</sup> *Loeb v. German Nat. Bank*, 88

On the other hand, the failure of the creditor to mortgage or transfer, whereby it is invalidated, has been held to excuse the surety to the extent of the loss of a chose in action assigned as secur-

Ark. 108, 113 S. W. 1017; *Kindt's Appeal*, 102 Pa. 441; *In re Searight's Est.*, 163 Pa. 210, 29 Atl. 800.

In *Durfee v. Kelly*, 228 Mass. 571, 117 N. E. 907, 908, the court said: "If the value of the collateral which the payee held not merely for its own security but in trust for the indemnity of the sureties has been lost through forbearance or delay, no wrongful conduct of the payee appears. The sureties did not move. They could have discharged the debt at any time before depreciation set in and received the security. But having remained inactive, and there being no evidence of any affirmative act of negligence by the payee which resulted in their injury, the defendant has not been discharged either wholly or partially. *American Surety Co. v. Cinton*, 224 Mass. 337, 339, 340, 112 N. E. 954; *Gray v. Farmers' Nat. Bank*, 81 Md. 631, 32 Atl. 518; *Benedict v. Olson*, 37 Minn. 431, 35 N. W. 10; *Newark v. Stout*, 52 N. J. L. 35, 18 Atl. 943; *Schroepell v. Shaw*, 3 N. Y. 466; *Hays v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *Otis v. Von Storch*, 15 R. I. 41, 23 Atl. 39; *Uniontown Bank v. Mackey*, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 485."

In *Rainbow v. Juggins*, L. R. 5 Q. B. 138, as security for an advance, the principal debtor deposited with the creditor a policy of life insurance, and subsequently became bankrupt, the advance remaining unpaid. The creditor proved against his estate the full amount of the advance without valuing the policy of life insurance as a security, which was in consequence claimed by the trustee in bankruptcy as part of the bankrupt's estate. It was contended by the surety in an action against him

by the creditor that he had no policy, and so deprive the benefit of it, the creditor charged him from all was held that the omission of the policy was at most a omission on the part of the creditor and as such did not discharge the defendant from all liability. The extent of the value of the policy will be observed, however, that the creditor's negligence was entirely nonfeasance. It is for the full claim a trustee a right to the policy.

<sup>22</sup> *Capel v. Butler*, 21 Watson v. Alcock, 1 S. D. M. & G. 242; *Wulff v. Q. B.* 756; *Evans v. J.* 828, 35 C. C. A. 28; *St.* 59 Ark. 47, 28 S. W. *Dickerson*, 37 Ga. 428; *Ship Machine Co.*, 94 G. 901; *Trammell v. S.* Works, 121 Ga. 778, 49 *Atlanta Bank v. Warren* 99 S. E. 797; *State Bank Mo.* 276, 21 S. W. 816; 2 Neb. 265; *Schroepell Y.* 446, 457; *Teaff v. R.* 469 (*cf.* *Coombs v. Pa.* 289, 49 Am. Dec. 45; *Bank v. Trexler*, 174 Pa. 195; *Bennett v. Taylor*, App. 30, 93 S. W. 704. *Philbrooks v. McEwen*, New York Nat. Ex. Ban. Daly, 248, 250-251; *Westgate Co. v. T. B. McIn.* N. Y. App. D. 446, 524, 384 (*cf.* *Auto Brokerage & Smith Auto Co.* 106 N. Y. 174 N. Y. S. 188); *Hamp.* 1 McC. Ch. 107; *Lang v. Strob.* Eq. 59.

to notify the obligor of the chose in action of its assignment.<sup>32</sup> And where the creditor is in possession of property mortgaged or pledged to him, he is held to stricter accountability on that account. Thus the negligent failure to collect an assigned claim,<sup>34</sup> or the failure to charge an indorser on negotiable paper held as security,<sup>35</sup> or to exercise reasonable care in regard to perishable property,<sup>36</sup> excuses the surety to the extent of the loss. Where the principal is not charged with the consequences of his negligent inactivity, the reason generally given is that the surety might by his own activity in paying the debt and becoming subrogated to the security save himself from loss. It has been said that "so long as the surety chooses to remain passive, the creditor may also remain passive as regards the collection of his debts."<sup>37</sup> But the surety's defence in such cases must depend on equitable considerations. If the debt is due, and the surety knows about the facts it is true that he can protect himself by paying the debt and taking charge of the security himself, but if the debt is not due, or if the surety is ignorant of the existence of the collateral security, this argument loses its force. Moreover, in regard to matters of elementary business propriety, may not the surety assume, even though he knows the circumstances and might protect himself by paying the debt and yet fails to do so, that the creditor will not omit to exer-

In *Magney v. Roberts*, 129 Ia. 218, 222, 105 N. W. 430, the court said: "If a person of ordinary prudence would have avoided the error in the order of confirmation and preserved his lien by taking and recording a sheriff's deed, or, in event of proceeding to review, exacted adequate security, then Hendryx should have done so, and the surety was released to the extent of the loss occasioned by such failure."

<sup>32</sup> *Strange v. Fooks*, 4 Giff. 408.

<sup>34</sup> *Fennell v. McGowan*, 58 Miss. 261; *Shippen's Adm. v. Clapp*, 36 Pa. 89.

<sup>35</sup> *City Bank v. Young*, 43 N. H. 457, 462.

<sup>36</sup> In *Freaner v. Yingling*, 37 Md. 491, 499, the court said: "If . . . the creditor surrenders or abandons the fund or security, or, in case of the security consisting of perishable property, he allows it to be taken out of his possession and destroyed, or for the want of ordinary care and attention he suffers it to perish and become worthless in his hands, then, it is clear upon the plainest principles of justice, whatever loss is sustained should fall upon the creditor rather than the surety. The case of *Baker v. Briggs*, 8 Pick. 122, is an instance of this class."

<sup>37</sup> *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621.

cise some degree of care, though he cannot be held to strict duties of a trustee?<sup>38</sup>

**§ 1234. Whether surrender of security of less value than claim ever totally discharges the surety.**

Though the statements are general that loss of security by the creditor involves the loss only of the value of his claim against the surety as equals the value of the security lost or surrendered, a distinction has been made in an English decision<sup>39</sup> between securities given to the creditor at the time of the original contract with the surety and securities given to the creditor later or under other circumstances. In the former case, it is said that the loss of the securities involves a change in the surety's contract, which, like any alteration of risk, discharges the surety altogether. This seems a harsh rule. It may be contended that a change of risk imposing an uncertain addition to the liability on the surety can only be dealt with in fairness to the surety by discharging him altogether. But where the security is merely a readily ascertainable sum of money, there seems no reason for imagining the surety has

<sup>38</sup> In *City Bank v. Young*, 43 N. H. 457, 461, the court said: "If, then, ordinary diligence is required in the case of a pawn, pledge, or mortgage, as between the immediate parties; and if the pawnee, pledgee, or mortgagee, must account to the principal for any loss caused by the want of such diligence, much more should he be held to account to the surety against whom the claim is one rather of strict law than otherwise. Indeed it would be absurd to hold that the surety would not be discharged by the negligence which would discharge the principal; and it would be equally absurd to contend that the duty of the creditor to use ordinary care was lessened by the fact that there was a surety. . . . Between this class of cases, namely, the release of securities by the direct

act of the creditor, and the loss of securities by want of ordinary care, if destroyed, we are unable to see any solid distinction."

<sup>39</sup> *Polak v. Everett*, 11 Q. B. 361.

<sup>40</sup> If the security were a negotiable instrument, for instance, of the retention of the security by the creditor doubtless is of great importance as a means of pressure on the debtor, and as a means of security. It has more saleable value; but such a distinction is exceptional, and not suggested by the facts in *Polak v. Everett*, 11 Q. B. 369, where the securities consisted of claims having a value of £4,000. The loss of the securities to the creditor was held to discharge the surety from liability on a bond for £6,000.

loss beyond that sum, and if he has not, it is obvious injustice to discharge him to a greater extent.<sup>41</sup>

**§ 1235. Creditor's refusal of tender by the principal discharges the surety.**

Actual tender of payment by the debtor discharges the surety.<sup>42</sup> The same consequences follow from refusal by the creditor of tender by the surety,<sup>43</sup> since the surety's rights against the principal may be impaired by delay. Anything short of actual tender by the principal, it has been said, will not discharge the surety. Thus a statement by the creditor that he does not care to have the debt paid at once is not of itself sufficient.<sup>44</sup> If the rule is not to be one of pure technicality, however, it should be held that if the creditor by positive word or act prevents the receipt of payment, which otherwise would have come to him, without demand or activity on his part, the surety should be excused.<sup>45</sup> The precision of a tender should be immaterial in defining an equitable defence. But a creditor is bound to no positive action to collect his claim. Therefore the failure by a creditor bank to appropriate the balance of a checking account as a set-off against a matured obligation,<sup>46</sup> or to appropriate a subsequent deposit,<sup>47</sup> will

<sup>41</sup> There seems no disposition in England to extend the decision of *Polak v. Everett*, 1 Q. B. D. 669, beyond its special facts. See *Rainbow v. Juggins*, 5 Q. B. D. 138; *Greenwood v. Francis*, [1899] 1 Q. B. 312, 322; *Taylor v. Bank of New South Wales*, 11 App. Cas. 596, 602. But cf. *infra*, § 1243.

<sup>42</sup> *Bartholow v. Bean*, 18 Wall. 635, 642, 21 L. Ed. 866; *Curiac v. Packard*, 29 Cal. 194; *Bonner v. Nelson*, 57 Ga. 433, 437; *Spurgeon v. Smith*, 114 Ind. 453, 17 N. E. 105; *Fisher v. Stockebrand*, 26 Kan. 565; *Sears v. Van Dusen*, 25 Mich. 351; *Johnson v. Ivey*, 4 Cold. 608, 94 Am. Dec. 206; *Watson v. Reed*, 1 Tenn. Ch. 196, 198; *Joslyn v. Eastman*, 46 Vt. 258. Cf. *State v. Alden*, 12 Ohio, 59.

<sup>43</sup> *Sharp v. Miller*, 57 Cal. 415;

*O'Connor v. Morse*, 112 Cal. 31, 44 Pac. 305.

<sup>44</sup> *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606. See also *White v. Life Association*, 63 Ala. 419, 35 Am. Rep. 45; *Life Association v. Neville*, 72 Ala. 517.

<sup>45</sup> See *Spurgeon v. Smitha*, 114 Ind. 453, 456, 17 N. E. 105; *Johnson v. Mills*, 10 Cush. 503.

<sup>46</sup> So the failure of a creditor corporation to refuse to transfer the debtor's stock until the debt was paid (as the corporation had power to do), did not discharge a surety. *Perrine v. Firemen's Ins. Co.*, 22 Ala. 575.

<sup>47</sup> *Strong v. Foster*, 17 C. B. 201; *Voss v. German-American Bank*, 83 Ill. 599, 25 Am. Rep. 415; *Second Nat. Bank v. Hill*, 76 Ind. 223, 40 Am. Rep.

has matured prior to the request,<sup>53</sup> and that the principal is within the jurisdiction where the creditor resides.<sup>54</sup>

The excuse of non-residence has been held not lost by presence of property of the principal in the creditor's jurisdiction.<sup>55</sup> In some jurisdictions an offer to indemnify the creditor against costs of the suit must be made;<sup>56</sup> and in others, the request must state in terms that unless complied with the surety will no longer be liable.<sup>57</sup> Involuntary sureties or those who become such for their own advantage, as indorsers of negotiable paper who did not indorse for accommodation, are denied the privilege.<sup>58</sup> Apart from statute most courts have altogether

47 Pa. 476, it was held that the burden was on the creditor, who had been duly notified, to show that suit would have been futile.

<sup>53</sup> *Skales v. Cox*, 106 Ind. 261, 6 N. E. 622; *Hunt v. Purdy*, 82 N. Y. 486, 37 Am. Rep. 587; *Conrad v. Foy*, 68 Pa. 381; *Fidler v. Hershey*, 90 Pa. 363, 366.

<sup>54</sup> *Davie v. Hatcher*, 1 Woods, C. C. 456; *Hightower v. Ogletree*, 114 Ala. 94, 21 So. 934; *Conklin v. Conklin*, 54 Ind. 289; *Phillips v. Riley*, 27 Mo. 386; *Warner v. Beardsley*, 8 Wend. 194; *Seattle Crocker Co. v. Haley*, 6 Wash. 302, 33 Pac. 650. In *Alcorn v. Commonwealth*, 66 Pa. 172, an instruction that if the principal at the time of the notice had moved out of the county and taken all his property with him the surety was not discharged, but that otherwise he was, was held as favorable to the surety as he could require. But in *Hayward v. Fullerton*, 75 Ia. 371, 39 N. W. 651, and *Meriden, etc., Co. v. Flory*, 44 Ohio St. 430, 7 N. E. 753, the court construed the local statutes which gave the surety his right as applicable even though neither the principal, nor so far as appears any property belonging to him, was within the creditor's State.

<sup>55</sup> *Conklin v. Conklin*, 54 Ind. 289. But see *contra*, *Hancock v. Bryant*, 2 Yerg. 476.

<sup>56</sup> *Huey v. Pinney*, 5 Minn. 310;

*Benedict v. Olson*, 37 Minn. 431, 35 N. W. 10; *Dillon v. Russell*, 5 Neb. 484.

<sup>57</sup> *Campbell v. Sherman*, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735; *Jackson v. Huey*, 10 Lea, 184, 42 Am. Rep. 301.

<sup>58</sup> See *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081; *Fensler v. Prather*, 43 Ind. 119; *Boatmen's Savings Bank v. Johnson*, 24 Mo. App. 316.

In *Wells v. Mann*, 45 N. Y. 327, 330 (6 Am. Rep. 93), the court said: "This case [*Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369] was regarded as introducing a new rule, and while the rule has been adhered to in cases strictly analogous, the courts have been disinclined to extend it. (*Trimble v. Thorn*, 16 Johns. 152; *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415; *Herrick v. Borst*, 4 Hill, 650; *Pitt v. Congdon*, 2 Comst. 352, 51 Am. Dec. 299.) In *Trimble v. Thorn*, the court refused to apply it in an action by the holder of a promissory note against an indorser, who had indorsed and transferred it for value, on the ground that although an indorser is in the nature of a surety, he is answerable upon an independent contract. Nor has it been extended to engagements which, though collateral in form, were entered into for the benefit of the surety, subsequent to the original transaction, and upon a new or independent consideration."

**§ 1237. A surety is not entitled to notice of the principal's default.**

An indorser of negotiable paper is liable only upon condition that demand has been made at maturity upon the party primarily liable, and prompt notice given to the indorser of that party's default. This, however, is a rule peculiar to indorsers and has no general application to the law of suretyship. An accommodation maker though he would be discharged by inequitable dealing of the holder with an indorser known by the holder to be the principal debtor,<sup>61</sup> is not entitled to have demand first made upon the indorser or to notice that the indorser has failed to fulfil the duty of such an indorser to such a maker of paying the note at maturity.<sup>62</sup> And aside from the case of parties secondarily liable on negotiable paper, there is little authority for treating the obligation of any surety as either conditional upon prior demand<sup>63</sup> upon the principal debtor, or excused by the creditor's failure to make such a demand, unless the obligation is either made so in express terms<sup>64</sup> or by necessary implication as in a guarantee of collectibility.<sup>64</sup> Nor, except in the case of a guarantor, is

<sup>61</sup> See *infra*, § §1259, 1260.

<sup>62</sup> Neg. Inst. Law, Sec. 60, *infra*, § 110.

<sup>63</sup> *Walton v. Mascal*, 13 M. & W. 72, 452; *Avery Drug Co. v. Ely Robertson-Barlow Drug Co.*, 194 Ala. 507, 69 So. 931; *Crawford v. Chattanooga Sav. Bank*, (Ala. 1919), 82 So. 163; *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62; *Booth v. Irving Nat. Exch. Bank*, 116 Md. 668, 674, 82 Atl. 652; *Carr v. Card*, 34 Mo. 513; *Allen v. Rightmere*, 20 Johns. 365, 11 Am. Dec. 288; *Eccleston v. Sands*, 108 N. Y. App. Div. 147, 95 N. Y. S. 1107; *First Nat. Bank v. Story*, 53 N. Y. Misc. 429, 103 N. Y. S. 233; *Haynes v. Synnott*, 160 Pa. 180, 28 Atl. 832; *Wallace v. Richards*, 16 Utah, 52, 50 Pac. 804; *Essex v. Park*, 11 Up. Can. C. P. 473. But see *contra* *Smith v. Bainbridge*, 6 Blackf. 12; *Howe v. Nickels*, 22 Me. 175.

<sup>64</sup> *First Nat. Bank v. Story*, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154.

<sup>64</sup> It has been held in Pennsylvania that a guaranty without more amounts simply to a guaranty of collectibility. *Islett v. Hoge*, 2 Watts, 128; *Brown v. Brooks*, 25 Pa. 210; *Hoffman v. Bechtel*, 52 Pa. 190; *National Loan, etc., Society v. Lichtenwalner*, 100 Pa. 100, 45 Am. Rep. 359; *Hartman v. First Nat. Bank*, 103 Pa. 581; *Tissue v. Hanna*, 158 Pa. 384, 27 Atl. 1104. But the Federal court in deciding a case involving Pennsylvania law, asserted that the question was one of general commercial law, Court in holding a general guaranty of payment depended upon the exercise of due diligence in collecting from the principal debtor, was anomalous and not to be followed. *Johnson v. Charles D. Norton Co.*, 159 Fed. 361, 86 C. C. A. 361. The Pennsylvania



principal's default. Where the performance is indefinite in amount or time, though many cases sustain the same rule,<sup>68</sup> there is much authority supporting the guarantor's right to notice of default.<sup>69</sup> On principle it seems that the latter decisions are right wherever the situation is such as to bring the guaranty within the rule that "where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."<sup>70</sup>

685; *Volts v. Harris*, 40 Ill. 155; *Frash v. Polk*, 67 Ind. 55; *Kline v. Raymond*, 70 Ind. 271 (but see *Gaff v. Sims*, 45 Ind. 262; *Ward v. Wilson*, 100 Ind. 52; *Welch v. Walsh*, 177 Mass. 555, 59 N. E. 440, 52 L. R. A. 782, 83 Am. St. Rep. 302 (overruling expressions in earlier decisions); *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 94 N. E. 803; *Snyder v. Click*, 112 Ind. 293, 13 N. E. 581; *Douglass v. Howland*, 24 Wend. 35; *Barhydt v. Ellis*, 45 N. Y. 107; *Conant v. Jones*, 50 N. Y. App. D. 336, 64 N. Y. S. 189; *Weiler v. Henarie*, 15 Oreg. 28, 13 Pac. 614; *Bank v. Hammond*, 1 Rich. 281; *Carroll County Savings Bank v. Strother*, 28 S. C. 504, 6 S. E. 313; *Hunter v. Dickinson*, 10 Humph. 37 (but see *Kannon v. Neely*, 10 Humph. 288; *Rhodes v. Morgan*, 1 Baxt. 360); *Mallory v. Lyman*, 3 Pinn. (Wis.) 443. But see *contra*—*Ringgold v. Newkirk*, 3 Ark. 96.

<sup>68</sup> *Treeweek v. Howard*, 105 Cal. 434, 39 Pac. 20 (statutory); *Redfield v. Haight*, 27 Conn. 31; *Kincheloe v. Holmes*, 7 B. Mon. 5, 45 Am. Dec. 41; *Lowe v. Beckwith*, 14 B. Mon. 184, 58 Am. Dec. 659; *Heyman v. Dooley*, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257; *Booth v. Irving Nat. Exch. Bank*, 116 Md. 668, 82 Atl. 652; *Farmers' &c. Bank v. Kercheval*, 2 Mich. 504; *Grant v. Hotchkiss*, 26 Barb. 63; *Yancey v.*

*Brown*, 3 Sneed, 89; *Train v. Jones*, 11 Vt. 444; *Noyes v. Nichols*, 28 Vt. 159.

<sup>69</sup> *Reynolds v. Douglass*, 12 Pet. 497, 9 L. Ed. 1171; *Wildes v. Savage*, 1 Story, 22; *Dunbar v. Brown*, 4 McL. 166; *Cahusac v. Samini*, 29 Ala. 288; *McCullum v. Cushing*, 22 Ark. 540 (see *Falls City Const. Co. v. Boardman*, 111 Ark. 415, 163 S. W. 1134); *Mayberry v. Bainton*, 2 Harringt. 24; *Mamerow v. National Lead Co.*, 206 Ill. 626, 69 N. E. 504, 99 Am. St. Rep. 196 (see also *Fort Dearborn Nat. Bank v. Miller*, 178 Ill. App. 450); *Smith v. Bainbridge*, 6 Blackf. 12; *Furst, etc., Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504; *Stewart v. Knight, etc., Co.*, 166 Ind. 498, 76 N. E. 743; *Young v. Merle &c. Mfg. Co.*, 184 Ind. 403, 110 N. E. 669; *Davis Sewing Mach. Co. v. Mills*, 55 Iowa, 543, 8 N. W. 356; *Howe v. Nickels*, 22 Me. 175; *American Agr. Chem. Co. v. Ellsworth*, 109 Me. 195, 83 Atl. 546; *Clark v. Remington*, 11 Met. 361; *Vinal v. Richardson*, 13 All. 521; *Bishop v. Eaton*, 161 Mass. 496, 501, 37 N. E. 665, 42 Am. St. Rep. 437; *Montgomery v. Kellogg*, 43 Miss. 496, 5 Am. Rep. 508; *Rankin v. Childs*, 9 Mo. 665; *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735; *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382.

<sup>70</sup> *Vyse v. Wakefield*, 6 M. & W. 442. See *supra*, § 894.

But generally it is held, where notice to the surety that the lack of it is an excuse which he has the burden of proving, rather than the existence of notice a condition which the creditor must prove.<sup>71</sup> Failure to give notice, when such notice is held necessary, has no effect to afford appellant a defence to the extent of the sustained loss or damage as a result of such failure on his part;<sup>72</sup> unless an express stipulation in the contract has a greater effect.<sup>73</sup> It should be observed, however, that notice may be made an express condition of the contract; and the contracts of compensated sureties often contain such a condition.<sup>74</sup>

**§ 1238. Notice when required must be given within a reasonable time.**

Where lack of notice of default may discharge a creditor in order to protect himself must not only be given but the notice must be sent within a reasonable

<sup>71</sup> See cases cited in next to the last note.

<sup>72</sup> *Swisher v. Deering*, 204 Ill. 203, 206, 68 N. E. 517. To the same effect see *Davis v. Wells, Fargo & Co.*, 104 U. S. 159, 26 L. Ed. 686; *Illinois Surety Co. v. Huber*, 57 Ind. App. 408, 107 N. E. 298; *McClure v. Freeborn & Co.*, 97 Kans. 695, 156 Pac. 692; *American Ag. Chem. Co. v. Ellsworth*, 109 Me. 195, 197, 83 Atl. 546; *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 433, 94 N. E. 803; *Peerless Casualty Co. v. Howard*, 77 N. H. 355, 92 Atl. 165; *Bross v. McNicholas*, 66 Oreg. 42, 133 Pac. 782, Ann. Cas. 1915 B. 1272.

<sup>73</sup> See *American Indemnity Co. v. Board* (Tex. Civ. App.), 200 S. W. 592.

<sup>74</sup> *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, 46 L. Ed. 1193, 22 Sup. Ct. 833; *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623; *United States Fidelity, etc., Co. v. Rice*, 148 Fed. 206, 78 C. C. A. 164; *United States v. Fidelity, etc., Co.*, 224 Fed.

866, 140 C. C. A. 288; *Fidelity & Co. v. Wells*, 42, 160 C. C. A. 182; *Fi v. Robertson*, 136 Ala. 3 Bankers' Surety Co. v. 492, 177 S. W. 20; *Sc Cook Brewing Co.*, 11 S. E. 413; *Savannah I Fidelity & Co.*, (Ga. S. E. 113; *Hughes v. Gl Co.*, 139 Minn. 417, 16 Hurley v. Fidelity, etc. App. 88, 68 S. W. 958; *Illinois Surety Co.*, 170 261, 155 N. Y. S. 1041; *S (Oreg.)*, 179 Pac. 488; *Co. v. Heinzerling*, 39 Pac. 742; *Montreal missioners v. Guarantee Sup. Ct. 542. See also land Casualty Co.*, 71 Atl. 900, 93 Am. St. Rep.

<sup>75</sup> *Mamerow v. Natio* 206 Ill. 626, 69 N. E. 5 Rep. 196; *Furst, etc., Black*, 111 Ind. 308, 315

notice is given promptly the analogy of the law governing notice to parties secondarily liable on negotiable paper, makes the inference strong that the notice is sufficient although by chance, events follow one another so quickly that the surety loses an opportunity to protect himself. On the other hand, though notice is long delayed, unlike the rule for parties secondarily liable on negotiable instruments, the guarantor is not discharged if in fact no injury is caused him by the delay;<sup>76</sup> unless the contract itself makes the giving of notice within a specified time or immediately an express condition. If so, the condition must be fulfilled.<sup>77</sup>

**§ 1239. Variation or alteration of the contract between creditor and principal if it varies the surety's contract discharges him.**

The surety can be held only to the contract which he has made. This contract may be in terms identical with the contract of the principal, as where both sign an obligation absolute in terms; or the surety's contract though not identical in terms with the principal's may adopt as part of itself the contract with the principal; as where the surety guarantees the principal's performance of a specific contract. It is obvious that in either of such cases a change in the contract agreed upon by creditor and principal without the consent of the surety will discharge the latter from any liability for a subsequent breach of the altered contract.<sup>78</sup> He cannot

*Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 334; *Sentinel Co. v. Smith*, 143 Wis. 377, 380, 127 N. W. 943.

<sup>76</sup> See cases cited in the preceding section, and in the first note in this section.

<sup>77</sup> *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, 46 L. Ed. 1193, 22 Sup. Ct. 833; *Fidelity, etc., Co. v. Robertson*, 136 Ala. 379, 34 So. 933; *Bankers' Surety Co. v. Watt*, 118 Ark. 492, 177 S. W. 20; *Larrabee v. Title Guaranty, etc., Co.*, 250 Pa. 135, 95 Atl. 416; *Montreal Harbor Commissioners v. Guarantee Co.*, 22 Can. Sup. Ct. 542.

<sup>78</sup> But a new contract between principal and creditor though relating to the same matter does not necessarily discharge the original contract. The second may be collateral or cumulative; *Stewart v. Johnson*, 87 Ga. 97, 13 S. E. 258; *State v. Mitchell*, 132 Ind. 461, 32 N. E. 86; *Abshire v. Rowe*, 112 Ky. 545, 66 S. W. 394, 56 L. R. A. 936, 99 Am. St. Rep. 302; *Brooks v. Whitmore*, 142 Mass. 399, 8 N. E. 117; as where a note taken from a principal debtor who is in default is taken as collateral security. *Barker v. United States Fidelity & Co.*, 228 Mass. 421, 117 N. E. 894.

cases the surety's defence, if he has one, is equitable and not *stricti juris*. That he has an equitable defence, if the change in the principal's contract materially affects the risk of his own and the creditor was a party to this change of risk, will appear from the following sections. It is true that it will not often be important whether the surety's defence is equitable or is based on an insistence on the strict terms of his contract, and it is also true that the line dividing the two classes of cases is shadowy, since it is not always easy to say whether or not the surety's promise incorporates by reference into itself all the terms of the principal's contract.<sup>82</sup> Nevertheless, it is desirable to make the distinction in order to protect the creditor in some instances from loss of his claim against the surety, where the terms of the latter's contract are not sought to be varied, and the change in the contract of principal and creditor has no material effect upon the surety's risk.<sup>83</sup>

<sup>82</sup> The distinction is suggested in *Museum of Fine Arts v. American Bonding Co.*, 211 Mass. 124, 127, 97 N. E. 633. "If the agreement between the plaintiff and Stannard, for the due performance of which by Stannard the defendants severally bound themselves as sureties, was materially changed by the action of the plaintiff and Stannard without the knowledge and consent of the defendants, they would be discharged from any further liability. *Warren v. Lyons*, 152 Mass. 310, 312, 25 N. E. 721; *Germania Fire Ins. Co. v. Lange*, 193 Mass. 67, 69, 78 N. E. 746. If without such change the plaintiff gave up or parted with any security which it had from Stannard, or any means of payment to which under its contract it was entitled for the satisfaction of whatever demand might accrue to it against him by virtue of the contract between them or any right which otherwise would have been available to the defendants as an indemnity or a protection to diminish their loss under their respective contracts of suretyship, then their liability

would be diminished to the extent of what was thus parted with. They would not be wholly discharged unless the value of what had been given up equalled the total amount of their liability; but they would be relieved *pro tanto*. *Guild v. Butler*, 127 Mass. 386; *St. John's College v. Aetna Indemnity Co.*, 201 N. Y. 335, 94 N. E. 994."

<sup>83</sup> In *Ward v. National Bank*, 8 App. Cas. 755, the variation of contract was made with M, a co-surety of the defendant, not with the principal debtor, but since, as between M and the defendant each was a principal as to part of the debt, and a surety as to the remainder, the question involved is the same as if M had been a principal debtor. See *infra*, § 1263. The change in question, however, an increase in the amount which M guaranteed if it affected the defendant at all, would increase rather than diminish his right of contribution, and the court held the defendant's liability to the creditor unaffected.

## § 1240. Variation of risk by change in the principal

Under the principles stated in the preceding the creditor varies the terms of his agreement with the principal, a surety who has contracted only to answer for performance of the original contract will be discharged of liability for breaches of the altered contract.<sup>84</sup> The

In *Gansevoort Bank v. Empire State Surety Co.*, 123 N. Y. App. Div. 331, 107 N. Y. S. 998, the plaintiff bank, when requested to discount a note, demanded security for its payment and the defendant executed an undertaking conditioned that if the discount were made it would pay such part of the indebtedness as the maker of the note failed to discharge. The note was discounted and the proceeds credited to the maker's account, but immediately thereafter the bank demanded that the maker give his check for a portion of the amount in order that a balance should remain on deposit, which check the maker gave under protest. In an action against the surety after the maker's default in payment, it was held that there was no variance of the terms of the guaranty sufficient to release the surety.

<sup>84</sup> *Whitcher v. Hall*, 5 B. & C. 269; *Northwestern Ry. Co. v. Whinray*, 10 Ex. 77; *United States v. Freel*, 186 U. S. 309, 46 L. Ed. 1177, 22 Sup. Ct. 875; *Mundy v. Stevens*, 61 Fed. 77, 9 C. C. A. 366, 17 U. S. App. 442; *St. Louis Co. v. Hayes*, 71 Fed. 110, 17 C. C. A. 634, 30 U. S. App. 529; *United States v. McIntire*, 111 Fed. 590; *Parke & Lacy Co. v. White River Lumber Co.*, 110 Cal. 658, 43 Pac. 202; *Rowan v. Sharps' Rifle Mfg. Co.*, 33 Conn. 1; *Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397; *State v. Spittler*, 79 Conn. 470, 65 Atl. 949; *Bethune v. Dozier*, 10 Ga. 235; *Little Rock Furniture Co. v. Jones*, 13 Ga. App. 502, 79 S. E. 375; *Zimmerman v. Judah*, 13 Ind. 286, 22 Ind. 388;

*Hubbard v. First State*, 1916, 114 N. E. (2d) 101, 114 N. E. (1st) 101, 1 Kans. App. 611, 101 Kan. 289, 51 P. S. 289; *International La. 409*, 37 So. 10; *Plu Sewing Machine Co.*, 36 Atl. 115; *Schwartz Surety Co.*, 231 Mass. 424; *Erickson v. Br.*, 10, 55 N. W. 62; *Wynwestern Co. (Miss.)*, 8 Mo. 179, 22 S. W. 620; *E. 125 Mo. 72*, 28 S. W. 125; *Inv. Co. v. Kansas C Scales Co. (Mo.)*, 20 Mo. 1104; *Johannes v. St. Reg.*, 188 S. W. 1104; *Sheldon*, 35 Neb. 1104; *Watriss v. Pierce*, 7 Hil. 64, 4 N. Y. 315; *I. 137 N. Y. 307*, 33 N. Y. 307; *Smith v. M. Y. 241*, 42 N. E. 669; *ence Iron Co.*, 222 N. E. 629; *New York L. In*, 81 N. Y. App. D. 92, 137 N. Y. App. D. 442, 137 N. Y. App. D. 442; *Northern Light Lodge*, 7 N. D. 146, 73 N. D. 146; *Dulaney (Okl.)*, 1 Okl. 162, 162 Pac. 185; *Co. v. Banigan*, 36 R. I. 101, 101 R. I. 101; *Lane v. Scott*, 57 Tex. 25, 57 Tex. 25; *Watson*, 76 Tex. 25, 76 Tex. 25; *Holdenfelds v. School*, 182 S. W. 182, 182 S. W. 182; *land Life Ins. Co. v.*

of a building contractor will be discharged by any material change agreed upon between owner and contractor.<sup>85</sup> A change in the covenants of a lease without the consent of a guarantor will discharge him.<sup>86</sup>

A fidelity bond for a "clerk and storekeeper" will not bind the surety for the fidelity of the employee after he has been made merely "clerk" at a reduced salary, the office of storekeeper being given to another.<sup>87</sup> A change in the person who undertakes the performance as principal for which the surety has bound himself is also fatal. A surety's agreement to be answerable for A's default under a contract which does not contemplate assignment will not bind the surety for a default of A's assignee.<sup>88</sup> And a surety for the debts

Civ. App.), 211 S. W. 460; *Nichols v. Palmer*, 48 Wis. 110, 4 N. W. 137; *Titus v. Durkee*, 12 Up. Can. C. P. 367.

<sup>85</sup> *Miller v. Friedheim*, 82 Ark. 592, 102 S. W. 372; *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, 111 Pac. 760; *State v. Hillis* (Ind. App.) 124 N. E. 515; *Bartlett v. Illinois Surety Co.*, 142 Ia. 538, 119 N. W. 729; *Police Jury, etc., of Vernon v. Johnson*, 111 La. 279, 35 So. 550; *Schwartz v. American Surety Co.*, 231 Mass. 490, 121 N. E. 424; *Norwegian Congregation v. United States Fidelity, etc., Co.*, 83 Minn. 269, 86 N. W. 330; *Poe v. Cameron*, 130 Minn. 15, 153 N. W. 129 (*cf. Milavets v. Oberg*, 138 Minn. 215, 164 N. W. 910); *Utterson v. Elmore*, 154 Mo. App. 646, 136 S. W. 9; *St. Johns College v. Aetna Indemnity Co.*, 201 N. Y. 335, 94 N. E. 994; *Enterprise Hotel Co. v. Book*, 48 Or. 58, 85 Pac. 333; *Zang v. Hubbard, etc., Co.* (Tex. Civ. App.), 125 S. W. 85 (*cf. Garrett v. Dodson* (Tex. Civ. App.), 199 S. W. 675); *Kracht v. Enterprise State Surety Co.*, 62 Wash. 339, 113 Pac. 773. The change may be so immaterial that the surety will not be discharged. *Bankers' Surety Co. v. Elkhorn &c. Dist.*, 214 Fed. 342, 130 C. C. A. 650; *Kennett v.*

*Katz Const. Co.*, 273 Mo. 279, 202 S. W. 558; *Maryland Casualty Co. v. Wellston*, 47 Okl. 417, 148 Pac. 691; *O'Neil Engineering Co. v. Lehigh* (Okl.) 182 Pac. 659. Nor will he be if the changes are made before the surety signs his contract and are known to the surety. *Columbia Security Co. v. Aetna Accident &c. Co.* (Wash.), 183 Pac. 137.

<sup>86</sup> *Ziegler v. Hallahan*, 126 Fed. 788; *Berman v. Shelby*, 93 Ark. 472, 125 S. W. 124; *New York v. Clark*, 84 N. Y. App. Div. 383, 82 N. Y. S. 855. *Cf. Laskey v. Bew*, 22 Cal. App. 393, 134 Pac. 358. Accepting for several months a reduced rent and giving the tenant a receipt in full will not release the sureties on the tenant's bond from liability for other defaults. *Dodge v. Chapman* (Cal. App.), 183 Pac. 966. A guarantee of a sublease is not discharged by the sublessor's surrender of his lease, and the acquisition of his interest by others to whom the sublessee paid the rent. *Brewster Cigar Co. v. Atwood* (Wash.), 182 Pac. 564.

<sup>87</sup> *King v. Herron* [1903] 2 I. R. 474. *Cf. Marshall v. Brainerd*, 253 Pa. 35, 97 Atl. 1057.

<sup>88</sup> *Northern Minn. Drainage Co. v. Equitable Surety Co.*, 131 Minn.

of a co-partnership is not liable for debts incurred in the firm;<sup>89</sup> or after the assumption of by a receiver of the debtor.<sup>90</sup> Nor will engager acts of an individual continue when another is associated with him as partner.<sup>90a</sup>

Likewise a guaranty given to a firm covering to it arising from dealings with another will not be affected by a change of partnership arising from such dealings after a change of partnership of the firm.<sup>90b</sup> A mere formal change, not fatal. Thus in the case of a continuing change simply in the name of a corporation has not to affect the guaranty,<sup>91</sup> and there is a di-

243, 154 N. W. 1092; *Standard Sewing Mach. Co. v. Smith*, 51 Mont. 245, 152 Pac. 38. See also *Schoonover v. Osborne*, 108 Ia. 453, 79 N. W. 263; *Brill v. Friedhoff*, 102 N. Y. Misc. 565, 169 N. Y. S. 193; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13.

<sup>89</sup> *Backhouse v. Hall*, 6 B. & S. 507; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867; *Burch v. De Rivera*, 53 Hun, 367, 24 N. Y. St. Rep. 770; *Standard Oil Co. v. Arnestad*, 6 N. Dak. 255, 69 N. W. 197, 34 L. R. A. 861. See also *Peery v. Merrill* (Ok.), 179 Pac. 28. Cf. *Palmer v. Bagg*, 56 N. Y. 523; *Hayden v. Hill*, 52 Vt. 259.

In *Richardson v. Steuben County*, 226 N. Y. 13, 122 N. E. 449, however, a guaranty of performance by the "George W. Hallock Bank" was held not invalidated by a change of membership of the partnership owning the bank. It was found that the surety did not know whether the bank was a partnership or a corporation, and the court held that the contract was made with reference to the bank as an institution, relying upon *Barclay v. Lucas*, 1 T. R. 292; *Metcalf v. Bruin*, 12 East, 400.

<sup>90</sup> *Hanna v. Florence*, N. Y. 290, 118 N. E. 6.

<sup>90a</sup> *Spokane Union v. Maryland Casualty Co.*, 108 Pac. 3.

<sup>90b</sup> *Myers v. Edge, Strange v. Lee*, 3 East, 4; *Oakes*, 4 Russ. Ch. Plum, 75 N. J. L. 883, L. R. A. (N. S.) 1231; *Watson*, 16 Johns. 100; *Montgomery*, 3 Tex. 199; *Cox & Maltin Co. v. Starr*, 57 N. W. 1015, 42 Am. the court held that a name of a corporation guarantee ran, invalid future dealings—an unsuit, opposed to cases cit-

<sup>91</sup> *Scovill Mfg. Co. v. Ill.* 462, 114 N. E. 181, 1918 E. 602; citing *City v. Phelps*, 97 N. Y. 44, 49. See also *Bradford Oldcliffe*, [1918] 2 K. B. 833; *Co. v. John Davis Co.*, 37 Sup. Ct. 614, 61 L. Ed. v. Backus, 117 N. Y. 196. *Springfield Lighting Co.* 98 Mo. App. 227, 68 S. v. King, 74 S. Car. 251, But see *Crane Co. v. S.*

treat slight variations in the contract less strictly in favor of a compensated surety than in favor of a gratuitous surety.<sup>92</sup> If the creditor has not assented to a discharge of the original debtor the surety will be liable for the debtor's failure to perform as well where he attempts performance by an assignee or agent as where he undertakes to continue the work himself;<sup>93</sup> and where the performance guaranteed is merely the payment of money, an assignment by the principal of the right to enjoy the consideration for which the money is payable, the principal still remaining liable to pay this, will not discharge the surety.<sup>94</sup>

A surety is none the less discharged by a change in the terms of the principal's contract, for the performance of which the surety has bound himself, when the change might not be thought disadvantageous to him.<sup>95</sup> But an agreement merely to remit part of the performance due from the principal without changing its character, as by lessening the amount of rent to be paid under a guaranteed lease,<sup>96</sup> or by providing for a lower rate of interest on a debt than the contract provides for,<sup>97</sup> or by waiving a portion of the perform-

123, 57 N. W. 1015, 42 Am. St. Rep. 562.

<sup>92</sup> Justice v. Empire State Surety Co., 209 Fed. 105; American Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300; Doyle v. Faust, 187 Mich. 108, 153 N. W. 725; Butts v. United States Metal Products Co., 255 Pa. 53, 99 Atl. 169. See also People v. Traves, 188 Mich. 345, 154 N. W. 130; Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623; and *supra*, § 625.

<sup>93</sup> Los Angeles Stone Co. v. National Surety Co., 178 Cal. 247, 173 Pac. 79; First Baptist Church v. Hendricks, 107 Miss. 267, 65 So. 244.

<sup>94</sup> Johnson v. Bernstein (Ia.), 155 N. W. 266 (guaranty of rent under a lease). See also Brewster Cigar Co. v. Atwood (Wash.), 182 Pac. 564.

<sup>95</sup> Blest v. Brown, 8 Jur. N. S. 602, 603; Clark v. Gerstley, 28 Dist. Col. App. 205, *affd.* in 204 U. S. 504, 27

Sup. Ct. 337; Cartmel v. Newton, 79 Ind. 1; Schwartz v. American Surety Co., 231 Mass. 490, 121 N. E. 424; Poe v. Cameron, 130 Minn. 15, 153 N. W. 129; Neuwirth v. Moydell, 188 Mo. App. 467, 174 S. W. 206; Bangs v. Strong, 7 Hill, 250, 42 Am. Dec. 64; American Bonding Co. v. Kelly, 172 N. Y. App. D. 437, 153 N. Y. S. 812; Bauschard Co. v. Fidelity &c. Co., 25 Pa. Super. 370; Dey v. Martin, 78 Va. 1; Spokane Union Stockyards Co. v. Maryland Casualty Co. (Wash.), 178 Pac. 3; Leonard v. County Court, 25 W. Va. 45; Titus v. Durkee, 12 U. C. (C. P.) 367.

<sup>96</sup> Preston v. Huntington, 67 Mich. 139, 34 N. W. 279; Dodd v. Vucovich, 38 Mont. 188, 99 Pac. 296.

<sup>97</sup> Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193. Cf. decisions holding even a beneficial alteration of the writing itself discharges a party to it. *Infra*, § 1903.



the defendant guaranteed that a flock of sheep leased with certain premises should be returned at the expiration of the lease in good condition, a surrender, agreed upon by the tenant and landlord, of a field belonging to the leased premises discharged the surety.<sup>3</sup>

**§ 1242. A variation of the contract between creditor and principal impliedly authorized by the original contract between them will not discharge a surety.**

A variation of the principal's contract which under the terms of the original agreement should have been anticipated as a possibility, will not discharge the surety. Thus where a lease contained a provision allowing subletting with the written consent of the lessor, a subsequent subletting with the consent of the lessor does not excuse a guarantor.<sup>4</sup> So when a building contract provided that alteration in the plans might be made, or payments made otherwise than the contract provided, reasonable alterations in the plans<sup>5</sup> or changes in the times of payment,<sup>6</sup> will not release a surety; and illustrations in other contracts may be found.<sup>7</sup> This principle has been held applicable by some courts to the obligation of sureties on the bonds of tax collectors. A change by the legislature, after the making of the bond, of the time allowed for the collection of taxes has been held not to discharge the surety on the ground

<sup>3</sup> *Holme v. Brunskill*, 3 Q. B. D. 495. See also *Nazareth &c. Mach. Co. v. Marshall &c. Co.*, 258 Pa. 558, 569, 102 Atl. 268.

<sup>4</sup> *Sagal v. Mann*, 89 Conn. 576, 580, 95 Atl. 6. See also *Benjamin v. Hillard*, 64 U. S. 149, 165, 16 L. Ed. 518, 521; *Jones v. Hoyt*, 25 Conn. 374; *Lowry v. Adams*, 22 Vt. 180; *Bothfeld v. Gordon*, 190 Mass. 567, 572, 573, 77 N. E. 639, L. R. A. (N. S.) 794, 112 Am. St. Rep. 341.

<sup>5</sup> *Graham v. United States*, 231 U. S. 474, 58 L. Ed. 319, 34 Sup. Ct. 148; *Dunne Inv. Co. v. Empire State Surety Co.*, 27 Cal. App. 208, 150 Pac. 405, rehearing denied in Supr. Ct., 150 Pac. 411; *Equitable Surety Co. v. Connors*, 27 Colo. App. 213, 147 Pac. 438; *School*

*District v. United States, etc., Guaranty Co.*, 96 Kan. 499, 152 Pac. 668; *Doyle v. Faust*, 187 Mich. 108, 153 N. W. 725; *Lackland v. Renshaw*, 256 Mo. 133, 165 S. W. 314; *Kennett v. Kats Const. Co.*, 273 Mo. 279, 202 S. W. 558; *Burt County v. Lewis*, 93 Neb. 690, 141 N. W. 1032; *Johnson v. Merten*, 95 Neb. 174, 145 N. W. 264; *Coyle v. United States Gypsum Co.*, (Okla. 1917), 166 Pac. 439.

<sup>6</sup> *Justice v. Empire State Surety Co.*, 209 Fed. 105; *Zang v. Hubbard, etc., Realty Co. (Tex. Civ. App.)*, 125 S. W. 85.

<sup>7</sup> *United States, etc., Guaranty Co. v. Travellers', etc., Mach. Co.*, 167 Ky. 382, 180 S. W. 815, 169 Ky. 158, 183 S. W. 492.

that the surety must be assumed to have signed knowledge that the legislature might alter the doctrine, however, is not accepted by other States.<sup>9</sup> been held that sureties on a fidelity bond are presumed contracted with reference to additional duties so imposed on the official whose fidelity is guaranteed. Trouble with this is the extent to which it logically carried if accepted at all. If the surety is charged with knowledge that any material alterations may be on the principal's obligation, there seems very little limit to the changes to which the surety must be deemed assented in advance. Such presumption of assent beyond the slight changes naturally incident to business is obviously based on fiction. Where performance contract with a corporation "its successors and assigns" guaranteed, it was held that there was no implied guarantee performance by a receiver of the corporation.

**§ 1243. The creditor's variation in the performance contract with the principal may discharge the surety.**

It may now be supposed that the contract between the creditor and principal remains unchanged but that the performance is not in accordance with its terms. The surety is naturally nothing in the words of the surety's contract with him here. He has agreed that a certain performance shall be rendered, and has inserted ordinarily no express condition that his obligation shall depend upon the exact performance.

<sup>9</sup> *State v. Carleton*, 1 Gill, 249; *State v. Swinney*, 60 Miss. 39, 45 Am. Rep. 405; *Prairie v. Worth*, 78 N. C. 169; *Worth v. Cox*, 89 N. C. 44; *Commonwealth v. Holmes*, 25 Gratt. 771; *Smith v. Commonwealth*, 25 Gratt. 780; *Bennett v. Auditor*, 2 W. Va. 441. See also as to statutory bonds to secure payment of those employed to work on public buildings, *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206.

<sup>10</sup> *Davis v. People*, 6 Ill. 409; *People v. McHatton*, 7 Ill. 638; *State v. Roberts*, 68 Mo. 234, 30 Am. Rep. 788;

*Schuster v. Weiss*, 114 N. Y. 21 S. W. 438, 19 L. R. A. 388.

<sup>11</sup> *Melville v. Dodge*, 6 Ill. 450; *Minor v. Mechanics'*, 40, 73, 7 L. Ed. 47; *Fidelity v. Gate City Nat. Bank*, 9 S. E. 392, 33 L. R. A. 82; *Rep. 440*; *Richmond & Kasey*, 30 Gratt. 218; *Weststead Bldg. Assoc.*, 76 W. S. E. 637. Cf. *Bassett Surety Co.*, 210 Ill. App. 4.

<sup>12</sup> *Hanna v. Florence I.*, N. Y. 290, 118 N. E. 629.

the creditor of his contract with the principal. Nevertheless it is obvious that the surety's risk may be varied by the creditor's conduct, and, if it is, the surety should be discharged. Therefore, any breach by the creditor of his contract with the principal, if he thereby varies the surety's risk, discharges him. Thus, a failure to insure premises, the building of which the surety guaranteed, was held to excuse him where the contract between the creditor and the principal required, not merely permitted, the creditor to insure.<sup>12</sup> Even though the creditor's variation from his promise is favorable to the principal, so that he could make no objection, the surety may be freed. A common illustration of this arises where premature payment is made to a contractor whose performance has been guaranteed. Such payment in larger amounts, or at earlier times than the contract between the principal and his employer fixed discharges the surety.<sup>13</sup> But the basis of the rule is

<sup>12</sup> *Watts v. Shuttleworth*, 5 H. & N. 235, 7 H. & N. 353. See also the following cases where the creditor's failure to comply with the terms of his contract with the principal discharges the surety. *Watson v. Allcock*, 4 D. M. & G. 242; *Lawrence v. Walmsley*, 12 C. B. (N. S.) 799 *Pioneer Savings, etc., Co. v. Freeburg*, 59 Minn. 230, 61 N. W. 25; *Morrison v. Arons*, 65 Minn. 321, 68 N. W. 33; *Carson Association v. Miller*, 16 Nev. 327; *Belfast Banking Co. v. Stanley, Jr.* R. 1 C. L. 693, 698. Cf. *Pittsburg Buffalo Co. v. American Fidelity Co.*, 219 Fed. 818, 135 C. C. A. 488.

<sup>13</sup> *Calvert v. London Dock Co.*, 2 Keen, 638; *General Steam Navigation Co. v. Rolt*, 6 C. B. (N. S.) 550; *Prairie Bank v. United States*, 164 U. S. 227, 41 L. Ed. 412, 17 Sup. Ct. 142; *Board of Commissioners v. Branham*, 57 Fed. 179; *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623; *Shelton v. American Surety Co.*, 127 Fed. 736, 131 Fed. 210, 66 C. C. A. 94; *Fidelity, etc., Co. v. Agnew*, 152 Fed. 855, 82 C. C. A. 103; *Justice v. Empire State Surety*

*Co.*, 218 Fed. 902, 134 C. C. A. 490; *Wells v. National Surety Co.*, 222 Fed. 8, 137 C. C. A. 546; *Equitable Surety Co. v. Tippah County*, 231 Fed. 33, 145 C. C. A. 221; *First Nat. Bank v. Fidelity, etc., Co.*, 145 Ala. 335, 40 So. 415, 5 L. R. A. (N. S.) 418, 117 Am. St. Rep. 45; *National Surety Co. v. Long*, 79 Ark. 523, 96 S. W. 745; *Bragg v. Shain*, 49 Cal. 131; *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695; *Chester v. Leonard*, 68 Conn. 495, 35 Atl. 397, *Gato v. Warrington*, 37 Fla. 542, 19 So. 883; *Lowndes Alliance Warehouse Co. v. Greene*, 17 Ga. App. 542, 87 S. E. 826; *Finney v. Condon*, 86 Ill. 78; *Chicago v. Agnew*, 182 Ill. App. 499; *Queal v. Stradley*, 117 Iowa, 748, 90 N. W. 588; *St. Mary's College v. Meagher*, 11 Ky. L. Rep. 112, 11 S. W. 608; *Maine Central R. Co. v. National Surety Co.*, 113 Me. 465, 94 Atl. 929, L. R. A. 1916 A. 881; *Backus v. Archer*, 109 Mich. 666, 67 N. W. 913; *Simonsen v. Grant*, 36 Minn. 439, 31 N. W. 861; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Southern Real Estate Co. v.*

surety's defence, also, if the owner overpays the contractor on forged or mistaken estimates, in the honest belief in their correctness, the surety is not discharged;<sup>18</sup> and the mere permission by the creditor to the principal to perform the contract between them in a different way from that originally agreed upon, will not discharge the surety if there was no binding agreement for variation between creditor and principal, and the change permitted is not material to the surety's risk.<sup>17</sup>

Where a surety has received compensation for his undertaking, it has been held that he is discharged by such an unauthorized payment only if his contract with the creditor makes a stipulation in regard to the time of payments,<sup>18</sup> or if it can be affirmatively shown that the surety was injured.<sup>19</sup> It is hard to justify such distinctions.<sup>20</sup> The interpretation of an ambiguous contract may depend on whether the surety was compensated;<sup>21</sup> but the liability under an unambiguous one should not vary.

*Martin v. Whites*, 128 Mo. App. 117, 106 S. W. 608; *Southwestern Surety Ins. Co. v. Minnetonka Lumber Co.*, 46 Okl. 701, 148 Pac. 1038. Unless this can be shown the surety will be discharged by payment without the certificate. *Fidelity, etc., Co. v. Agnew*, 152 Fed. 955, 82 C. C. A. 103; *Chester v. Leonard*, 68 Conn. 495, 509, 37 Atl. 397; *Harris v. Taylor*, 150 Mo. App. 291, 129 S. W. 995; *Kuns v. Boll*, 140 Wis. 69, 121 N. W. 601. See also *St. Johns College v. Aetna Indemnity Co.*, 201 N. Y. 335, 94 N. E. 994. In *Alabama Fidelity, etc., Co. v. Alabama, etc., Iron Co.*, 190 Ala. 397, 67 So. 318, the waiver by the creditor of a provision in his contract with the principal requiring the latter to make monthly statements and payments was held to discharge the surety. But where the contract provided for payments on the 15th of each month or certificates delivered on or before the 5th, variation from those dates without more will not discharge the surety. *New Haven v. National Steam Econo-*

*miser Co.*, 79 Conn. 482, 65 Atl. 959. See also *People v. Banhagel*, 151 Mich. 40, 114 N. W. 669.

<sup>18</sup> *New Haven v. National Steam Economizer Co.*, 79 Conn. 482, 65 Atl. 959; *Chicago v. Agnew*, 264 Ill. 288, 106 N. E. 252; *Van Buren County v. American Surety Co.*, 137 Ia. 490, 115 N. W. 24, 126 Am. St. Rep. 290; *Wakefield v. American Surety Co.*, 209 Mass. 173, 95 N. E. 350.

<sup>17</sup> *George A. Fuller Co. v. Doyle*, 87 Fed. 687; *Martin v. Whites*, 128 Mo. App. 117, 106 S. W. 608.

<sup>18</sup> *Young Men's Christian Assoc. v. United States, etc., Guaranty Co.*, 90 Kan. 332, 133 Pac. 894, L. R. A. 1915 C. 170; *School District v. DeLano* (*United States, etc., Guaranty Co.*), 96 Kan. 499, 152 Pac. 668.

<sup>19</sup> *Manhattan Co. v. United States Fidelity, etc., Co.*, 77 Wash. 405, 137 Pac. 1003.

<sup>20</sup> See *National Surety Co. v. Long*, 79 Ark. 523, 96 S. W. 745.

<sup>21</sup> See *supra*, § 625.

**§ 1244. When non-compliance with a condition on which a contract is delivered by a surety relieves him from liability.**

If the surety delivers his contract to the creditor upon a condition<sup>26</sup> or in return for a counter promise,<sup>27</sup> and the creditor fails to observe the condition or to keep his promise, he cannot hold the surety; but often the surety's contract is not delivered by him directly to the creditor, but to the principal or to a co-surety to whom some condition is stated. It is a common situation for a surety to have signed a bond or other contract, and the principal or a co-surety who was expected to join in the contract, and whose name is perhaps recited in the instrument as a party, to have failed to execute it. The signature of the principal or co-surety may be altogether lacking, or it may appear but be signed without authority.

Whether the surety is bound depends (1) upon whether he has ever made a contract, or is bound by estoppel with similar effect, and (2) if this is true, whether the circumstances are such as to render it inequitable for the creditor to enforce liability thereon. Lack of delivery may prevent the formation of a formal contract, and lack of mutual assent may prevent the formation of a simple contract. Delivery as a completed instrument is necessary for the validity of a bond; so that if a surety delivers an incomplete bond with the condition that the signature of another surety or of the principal shall thereafter be obtained, and that then, and not before, the instrument shall become valid, the delivery is merely in escrow.<sup>28</sup>

Yet in the absence of notice of the surety's intention either

<sup>26</sup> See *infra*, § 1246.

<sup>27</sup> *Fay v. Jenks*, 93 Mich. 130, 53 N. W. 163. See also *Hermitage Nat. Bank v. Carpenter*, 131 Tenn. 136, 174 S. W. 263.

<sup>28</sup> In *Horton v. Stone*, 32 R. I. 490, 80 Atl. 1, 3, the court said of such a bond: "No valid delivery of the bond was ever made, so as to make it a binding obligation upon this defendant. As shown above, it is the undisputed testimony that the defendant, when signed as surety,

at the request of Wood, did so upon the express condition that the plaintiff in replevin, Stone, should sign the bond as principal before it should become binding. The delivery of the bond upon this condition to Wood was a mere delivery in escrow, and Wood had no authority to deliver this paper to anybody until it had been signed by Stone." See also *Pawling v. United States*, 4 Cranch, 219, 2 L. Ed. 601.

### § 1245. Reasons for charging the surety.

The decisions are rested "either on the ground of estoppel or on the ground of apparent authority,"<sup>21</sup> but they are not easy to reconcile with the general principle of the common law denying validity to a sealed instrument delivered only in escrow and coming into the obligee's hands when the condition of the escrow had not been performed.<sup>22</sup> If the writing in question purported to be a non-negotiable simple contract<sup>23</sup> the difficulty of finding mutual assent is as great as that of finding a valid delivery in the case of a sealed instrument, and intrusting the creditor with an unsealed writing with a signature thereon can give no greater ground for estoppel to deny authority than if the instrument were sealed; and the circumstances on which any argument of estoppel or constructive authority is based do not seem essentially different from those which always exist where one holding a sealed instrument in escrow delivers it to an innocent obligee in violation of the condition of the escrow. Indeed, the only difference is that the person intrusted with the instrument is an interested party to it. But though the common law denied a right to trust the grantee with a deed in escrow, there is no qualification in the early books limiting the right to deliver in escrow to one interested other than as grantee. Moreover, even though the obligation is intrusted to a stranger, a surety has, nevertheless, been held liable to an obligee who subsequently takes the instrument without notice that an additional signature was contemplated.<sup>24</sup>

The results reached by the majority of decisions may be defended on grounds of practical convenience and justice. In truth, the common-law rule in regard to delivery in escrow

St. 299, 314, 48 N. E. 1100; *Fowler v. Allen*, 32 So. Car. 229, 10 S. E. 947, 7 L. R. A. 745; *Merritt v. Duncan*, 7 Heisk. 156, 19 Am. Rep. 612; *Bowman v. Van Kuren*, 29 Wis. 209, 9 Am. Rep. 554; *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621; *Cross v. Currie*, 5 Ont. App. 31.

<sup>21</sup> *Fuller v. Dupont*, 183 Mass. 596, 598, 67 N. E. 662.

<sup>22</sup> See *supra*, § 212.

<sup>23</sup> If the contract is a negotiable

bill or note there is no difficulty in fixing the surety with liability to a holder in due course.

<sup>24</sup> *Taylor County v. King*, 73 Iowa, 153, 34 N. W. 774, 5 Am. St. Rep. 666; *McCormick, etc., Co. v. McKee*, 51 Mich. 426, 16 N. W. 796. But see the contrary dicta or decisions—*Millett v. Parker*, 2 Metc. (Ky.) 608; *Horton v. Stone*, 32 R. I. 499, 80 Atl. 1; *Nash v. Fugate*, 24 Gratt. 202, 18 Am. Rep. 640.

is one which offers such opportunity of defrauding persons, that the strict enforcement of it is u

Whatever difficulty may exist in theory in h surety when his delivery of the obligation was c certainly if he imposes no condition either beca concluded to waive the signature by other par names are recited in the body of the instrument, he trusts to luck or to their promises that they will can be no doubt of his liability.<sup>35</sup>

**§ 1246. If the creditor is party to the fraud, or has 1 from the form of the instrument, he cann**

If the creditor has represented to the surety th will become co-surety, and this statement is not n the surety will not be bound.<sup>36</sup> And though the cre no representation, if he had knowledge, before he credit, of representations made to the surety by the the result is the same.<sup>37</sup> The creditor's notice m

<sup>35</sup> In *Guaranty Trust Co. v. Koehler*, 195 Fed. 669, 115 C. C. A. 475, the court said: "The true rule and the conclusion is that the failure of some of the obligors named in the body of the contract of guaranty or of suretyship to execute it, or their unauthorized execution of it, constitutes no defence to the liability of other obligors named therein who with knowledge that the former are not bound thereby execute and deliver the contract to the obligee, and thereby induce him to part with the consideration thereof." Citing *Smith v. United States*, 2 Wall. 219, 17 L. Ed. 788; *St. Louis Brewing Assoc. v. Hayes*, 97 Fed. 859, 38 C. C. A. 449; *United States Fidelity, etc., Co. v. Haggart*, 163 Fed. 801, 809, 91 C. C. A. 289, 297; *Empire State Surety Co. v. Carroll County*, 194 Fed. 593, 114 C. C. A. 435; *United States Fidelity Co. v. Union Trust, etc., Co.*, 142 Ala. 532, 38 So. 177; *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297; *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. 531; *Trustees of Schools v. Sheik*, 119 Ill. 579, 8 N. E.

189, 192, 59 Am. Rep. *Deering v. Moore*, 86 Me 988, 41 Am. St. Rep. *Johnson*, 63 Mich. 671, 3 *Woodman v. Calkins*, 11 34 Pac. 187, 40 Am. St. R *v. Bowman*, 10 Ohio, 44 *Johnson*, 31 Ohio St. 131 *v. Watson*, 54 Tex. 2 *County v. Bardon*, 79 N. W. 969." See also *Am Co. v. Pangburn*, 182 I N. E. 769, Ann. Cas. 1910

<sup>36</sup> *Rice v. Gordon*, 11 *Evans v. Bremridge*, 2 K De G. M. & G. 101; *McCowan*, [1898] 2 Ir. *Provincial Bank v. Brac T. L. R. 797*; *Jordan v. L 547*; *Deering, etc., Co. Ind. App. 400*, 45 N. E. 8 *v. Cole*, 102 Ia. 109, 71 *Selma Sav. Bank v. Hink 200*, 166 N. W. 748; *Goff 35 Miss. 518*.

<sup>37</sup> *Husak v. Clifford*, 1 100 N. E. 466; *Wharto*

structive as well as actual. Where the names of a number of obligors are recited in the instrument and the instrument is not signed by all those whose names are recited, the obligee is put upon inquiry, and if in fact the delivery was conditional on the missing signature being secured, the parties who signed conditionally are not liable.<sup>38</sup> The absence of the signature of one whose name is recited in the body of the instrument as a surety creates no presumption, however, that delivery by other sureties who signed was conditional; the condition must be proved as a fact in order to excuse them.<sup>39</sup> Where, however, the principal's signature is lacking, there is a presumption without further evidence that the surety's delivery was con-

Mut. L. Ins. Co. (Tex. Civ. App.), 156 S. W. 539; *Williams v. Hitchcock*, 86 Wash. 536, 150 Pac. 1143; *New Home Sewing Mach. Co. v. Simon*, 104 Wis. 120, 80 N. W. 71.

<sup>38</sup> *Guaranty Trust Co. of New York v. Koehler*, 195 Fed. 669, 675, 115 C. C. A. 475, citing *Smith v. United States*, 2 Wall. 219, 230, 17 L. Ed. 788; *United States v. O'Neill*, 19 Fed. 567; *Arnold v. Scharbauer*, 116 Fed. 492; *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297; *Barber v. Burrows*, 51 Cal. 473, 474; *Weir v. Mead*, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46; *Waggenman v. Bracken*, 52 Ill. 468, 470; *Wild Cat Branch v. Ball*, 45 Ind. 213; *Novak v. Pitlick*, 120 Iowa, 286, 94 N. W. 916, 98 Am. St. Rep. 360; *Fish v. Johnson*, 16 La. Ann. 29; *Wood v. Washburn*, 2 Pick. 24; *Andrews v. Etheridge*, 9 Mass. 383; *Bean v. Parker*, 17 Mass. 591, 604; *Russell v. Annable*, 109 Mass. 72, 73, 12 Am. Rep. 665; *Goodyear Dental Co. v. Bacon*, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486; *Johnston v. Kimball Township*, 39 Mich. 187, 33 Am. Rep. 372; *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487; *Bjoin v. Anglim*, 97 Minn. 526, 107 N. W. 558; *School District v. Lapping*, 100 Minn. 139, 110 N. W. 849, 12 L. R. A. (N. S.) 1105; *Gay v. Murphy*, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep.

496; *Sharp v. United States*, 4 Watts, 21, 23, 28 Am. Dec. 676; *McDaniel v. Anderson*, 19 So. Car. 211; *Board of Education v. Sweeney*, 1 S. D. 642, 48 N. W. 302, 36 Am. St. Rep. 767; *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614. See also *Williams v. Hitchcock*, 86 Wash. 536, 540, 150 Pac. 1143.

<sup>39</sup> *City of Los Angeles v. Mellus*, 59 Cal. 444; *Union Pacific Tea Co. v. Dick*, 89 Atl. 204 (reported without opinion in 87 Conn. 711); *Towns v. Kellett*, 11 Ga. 286; *Johnson v. Weatherwax*, 9 Kans. 75; *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *Gay v. Murphy*, 134 Mo. 98, 106, 34 S. W. 1091, 56 Am. St. Rep. 496; *Mullen v. Morris*, 43 Neb. 596, 62 N. W. 74; *Williams v. Springs*, 7 Ired. 384; *Whitaker v. Richards*, 134 Pa. 191, 19 Atl. 501, 7 L. R. A. 749, 19 Am. St. Rep. 684; *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749. In some cases it has even been held necessary to prove that the obligee had actual notice of the condition. *Byers v. Gilmore*, 10 Col. App. 79, 50 Pac. 370; *Smith v. Board of Peoria County*, 59 Ill. 412; *Hart v. Mead Co.*, 53 Neb. 153, 73 N. W. 458. (Compare, however, *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Mullen v. Morris*, 43 Neb. 596, 62 N. W. 74.)



ditional on the signature of the principal.<sup>40</sup> But in a case the circumstances may be such as to esto

\* *Weir v. Mead*, 101 Cal. 125 35, Pac. 567, 40 Am. St. Rep. 46 (obligation was joint); *Wild Cat Branch v. Ball*, 45 Ind. 213; *Clements v. Cassilly*, 4 La. Ann. 380; *Goodyear Co. v. Bacon*, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486; *Dole Co. v. Cosmopolitan Co.*, 167 Mass. 481, 46 N. E. 105; *Johnston v. Kimball Township*, 39 Mich. 187, 33 Am. Rep. 372; *Hall v. Parker*, 39 Mich. 287, 37 Mich. 590, 26 Am. Rep. 540; *Cahill's Appeal*, 48 Mich. 616, 12 N. W. 877; *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. 751; *Safranski v. St. Paul, etc., Ry. Co.*, 72 Minn. 185, 75 N. W. 17; *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425; *Gay v. Murphy*, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496; *Board of Education v. Sweeney*, 1 S. Dak. 642, 48 N. W. 302, 36 Am. St. Rep. 767. But not a few decisions hold that it must be proved that the delivery was in fact conditional. *Cooper v. Evans*, L. R. 4 Eq. 45; *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413 (obligation was joint and several); *Hickman v. Fargo*, 1 Kas. App. 695, 42 Pac. 381; *Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; *Bollman v. Pasewalk*, 22 Neb. 761, 36 N. W. 134; *Parker v. Bradley*, 2 Hill, 584; *Choteau v. Suydam*, 21 N. Y. 179; *Dillon v. Anderson*, 43 N. Y. 231; *Russell v. Freer*, 56 N. Y. 67; *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131; *Williams v. Marshall*, 42 Barb. 524; *O'Hanlon v. Scott*, 89 Hun, 44; *Eureka Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Douglas Co. v. Bardon*, 79 Wis. 641, 49 N. W. 969. In a few States, the surety must show not only that the delivery was conditional but actual notice on the part of the obligee of the condition. *Woodman v. Calkins*, 13 Mont. 363, 34 Pac. 187, 40 Am. St. Rep. 449; *Cockrill v. Davis*, 14 Mont. 131, 35 Pac. 958; *State v. Bowman*, 10

Ohio, 445; *Johnson v. Ohio St.* 131.

<sup>41</sup> In *Dole Bros. C. Preserving Co.*, 167 Mass. 46, 46 N. E. 105, 57 Am. St. Rep. 481, the court said: "The corporation purports to be a principal, and Lettice is worth as sureties, and sealed by the hand of an agent. It had no authority to execute the bond."

"It is well settled that the face of the paper and above, without more, appear to be liable. The corporation is supposed to be a principal, and Lettice is worth as sureties as a contract. The principal as well as the sureties. They may rely upon the right to proceed against the corporation upon their own right. It is not under the instrument compelled to pay for Bean v. Parker, 17 N. E. 111; Herrick v. Johnson, 11 N. E. 111; sell v. Annable, 109 Mass. 665; Mattoon v. Bacon, 24 N. E. 404, 8 L. R. A. 486. The remaining question upon the findings of case is taken out of it above stated. It is felt that the agent knew, or had reason to know, that the agent had to execute the bond in the corporation. This is enough to justify the fusing to rule, as matter the defendants were

It has sometimes been held that if a statute or regulation under which a bond was given did not require the signature of the principal, or that if the principal being bound by law to perform certain duties, was as fully liable for his defaults as if he had signed the bond, and equally liable to indemnify his sureties, no reason forbids charging the surety on his contract, though the name of the principal was recited in the instrument.<sup>42</sup> Likewise where the bond is filed in court and is not naturally inspected by the creditors for whose benefit it is filed, this principle of constructive notice is inapplicable.<sup>43</sup>

they knew that the bond was improperly executed, when from the circumstances it would naturally be inferred that the plaintiff was relying upon it as properly signed, and binding upon both the principal and sureties, they ought to be estopped from setting up the invalidity of their promise. The judge went further and ruled, as matter of law, upon the facts found that they were liable. He did not find that they had any knowledge of the agent's want of authority, but only that they had reasonable cause to know it. If in fact they had no knowledge or belief of it, they are not culpable in their dealings with the plaintiff."

In *LaBelle Iron Works v. Quarter Savings Bank*, 74 W. Va. 569, 82 S. E. 614, 617, the court said:—"To be binding on a surety a bond of indemnity purporting to be the bond of both principal and surety must be signed by the principal, or be executed on his behalf by some one duly authorized, or the unauthorized act be subsequently ratified, or the principal be bound independently of the bond for breaches thereof, unless the surety has otherwise agreed to be bound thereby, or by his act he has estopped himself from denying his liability. *Star Grocery Co. v. Bradford*, 70 W. Va. 496, 74 S. E. 509, 39 L. R. A. (N. S.) 184; *School District v. Lapping*, 100 Minn. 139,

110 N. W. 849, 12 L. R. A. (N. S.) 1105; *Bowditch v. Harmon*, 183 Mass. 290, 67 N. E. 333; *Novak v. Pitlick*, 120 Ia. 286, 94 N. W. 916, 98 Am. St. Rep. 360; *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297; *Mitchell v. Hydraulic Building Stone Co.* (Tex. Civ. App.), 129 S. W. 148; *Wright v. Jones*, 55 Tex. Civ. App. 616, 120 S. W. 1139; *Bjoin v. Anglim*, 97 Minn. 526, 107 N. W. 558." See also *American Surety Co. v. Pangburn*, 182 Ind. 116, 105 N. E. 769.

"*United States Fidelity, etc., Co. v. Haggart*, 163 Fed. 801, 809, 91 C. C. A. 289, 297; *Empire Surety Company v. Carroll County*, 194 Fed. 593, 114 C. C. A. 435; *Adams Co. v. Nesbit*, 58 S. Dak. 6, 159 N. W. 869.

"In *Williams v. Hitchcock*, 86 Wash. 536, 150 Pac. 1143, it was held that sureties on a receiver's bond, who intrusted the bond to the receiver for the purpose of securing the signature of the wife of one of them before filing, and who failed to examine the record and repudiate their liability for failure to secure the signature, cannot be heard to say that creditors, not parties to the suit, for whose benefit the bond was given, should have examined the record so as to know that the bond was defective; and the sureties, as the one of two innocent parties who made the injury possible, must suffer the loss.

fraud or duress on the part of the principal in securing the surety's signature unless the fraud or duress is of such a character as to make totally void a writing obtained thereby.<sup>47</sup> Illustrations of cases where the surety has been held not excused may be found where the surety's signature was induced by the presence on the instrument of the signature of another party which in fact had been forged or signed without authority.<sup>48</sup> And similarly the indorser of negotiable paper is not excused by the forgery of a prior party.<sup>49</sup> So the surety is not discharged by the fact that his signature was obtained by the principal's fraudulent representations of any description,<sup>50</sup> or by his duress,<sup>51</sup> or by the fact that the principal

<sup>47</sup> As to the exceptional cases where fraud or duress renders a contract totally void, see *Carlisle, etc., Banking Co. v. Bragg*, [1911] 1 K. B. 489; *Spring Garden Ins. Co. v. Lemmon*, 117 Ia. 691, 86 N. W. 35; *Potts v. First State Bank (Okl.)*, 151 Pac. 859. Also *infra*, § 1488.

<sup>48</sup> *Veach v. Rice*, 131 U. S. 293, 318, 33 L. Ed. 163, 9 Sup. Ct. 730; *Ex parte Goldberg*, 191 Ala. 356, 67 So. 839, L. R. A. 1915, F, 1157; *Stoner v. Millikin*, 85 Ill. 218; *Stern v. People*, 102 Ill. 540; *Helms v. Wayne Agricultural Co.*, 73 Ind. 325, 38 Am. Rep. 147; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555; *Cook v. Boyd*, 16 B. Mon. 556; *Hall v. Smith*, 14 Bush, 604. (But see *Commonwealth v. Campbell*, 20 Ky. L. Rep. 54, 45 S. W. 89.) *York County M. F. Ins. Co. v. Brooks*, 51 Me. 506; *Chase v. Hathorn*, 61 Me. 505; *Graves v. Tucker*, 18 Miss. 9; *State v. Hewitt*, 72 Mo. 603; *Kansas City, etc., Co. v. Murphy*, 49 Neb. 674, 68 N. W. 1030; *Mosher v. Carpenter*, 13 Hun, 602; *Vass v. Riddick*, 89 N. Car. 6; *Bigelow v. Comegys*, 5 Ohio St. 256; *Loew v. Stocker*, 68 Pa. 226; *Cimini v. Zambarano*, 36 R. I. 122, 89 Atl. 295, 711; *Mitchell v. Burton*, 2 Head, 613. But see contrary decisions

(where the forged signature was that of the principal), *Dole Bros. Co. v. Cosmopolitan Co.*, 167 Mass. 481, 46 N. E. 105, 57 Am. St. Rep. 477; *Green v. Kindy*, 43 Mich. 279, 5 N. W. 297.

<sup>49</sup> 2 Ames's Cas. Bills and Notes, 169, 231, 233, note 3; *Daniel on Negotiable Instruments*, § 1357.

<sup>50</sup> *Stone v. Compton*, 5 Bing. N. C. 142; *Maitland v. Irving*, 15 Sim. 437; *Wallace v. Wilder*, 13 Fed. 707; *Marks v. First Bank*, 79 Ala. 550, 58 Am. Rep. 620; *Stiewel v. American Surety Co.*, 70 Ark. 512, 68 S. W. 1021; *A. S. Ripley Building Co. v. Coora*, 37 Colo. 78, 84 Pac. 817; *Davis Sewing Machine Co. v. Buckles*, 89 Ill. 237; *Lucas v. Owens*, 113 Ind. 521, 16 N. E. 196; *Monroe Bank v. Anderson Co.*, 65 Iowa, 692, 22 N. W. 929; *Spring Garden Ins. Co. v. Lemmon*, 117 Iowa, 691, 86 N. W. 35; *Martin v. Campbell*, 120 Mass. 126; *Hudson v. Miles*, 185 Mass. 582, 71 N. E. 63, 102 Am. St. 370; *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589; *Saginaw Medicine Co. v. Batey*, 179 Mich. 651, 146 N. W. 329; *Graves v. Tucker*, 18 Miss. 9; *Linn Co. v. Farris*, 52 Mo. 75, 77, 14 Am. Rep. 389; *McWilliams v. Mason*, 31 N. Y. 294;

<sup>51</sup> *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446.

rule is applicable unless there is some fact of such vital importance to the risk that the creditor must have been aware that the non-disclosure would in effect amount to a representation to the surety.<sup>57</sup>

For it has been said that "both on authority and on principle, when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part."<sup>58</sup> This statement does not go beyond holding the creditor for natural inferences from actual representations, though they are given a liberal construction; but to some extent at least the creditor owes a positive duty of disclosure not merely a negative duty to refrain from misrepresentation. If the creditor "knows, or has good grounds for believing that the surety is being deceived or misled, or

*v. Harbin*, 125 Ia. 174, 180, 100 N. W. 629.

<sup>57</sup> In *North British Ins. Co. v. Lloyd*, 10 Ex. 523, non-disclosure of the fact that the defendant's guaranty was taken in substitution of a previous guarantee of another which had been withdrawn, was held not to excuse the surety. So non-disclosure that the principal debtor was in poor financial condition, *Magee v. Manhattan L. Ins. Co.*, 92 U. S. 93, 23 L. Ed. 699; *Van Arsdale v. Howard*, 5 Ala. 596; *Ham v. Greve*, 34 Ind. 18; *Farmers' Bank v. Braden*, 145 Pa. 473, 22 Atl. 1045; or in default on previous indebtedness. *Hamilton v. Watson*, 12 C. &

F. 109; *Southwestern Co. v. Wynnegar*, 111 Miss. 412, 71 So. 737; *Palatine Ins. Co. v. Crittenden*, 18 Montana, 413, 45 Pac. 555; *Royal Bank v. Greenshields*, [1914] Sc. Sess. Cas. 259. *Cf. Park Paving Co. v. Kraft*, 262 Pa. 178, 105 Atl. 39. See also the following cases where non-disclosure of material facts was held not to discharge the surety. *Booth v. Storrs*, 75 Ill. 438; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231; *Warren v. Branch*, 15 W. Va. 21. *Cf. First Nat. Bank v. Clark's Est.*, 59 Colo. 455, 149 Pac. 612.

<sup>58</sup> Per Blackburn, J., in *Lee v. Jones*, 14 C. B. (N. S.) 386.

that he was induced to enter into the contract of facts materially increasing the risks, of which he was ignorant, and he has an opportunity, before accepting, to inform him of such facts, good faith requiring demand that he should make such disclosure if he accepts the contract without doing so, that he afterwards avoid it." <sup>59</sup> This principle has frequently been applied in regard to non-disclosure of present or criminal misconduct of one for whose failure to perform of his duties, the surety binds himself. <sup>60</sup>

<sup>59</sup> *Bank of Monroe v. Anderson, etc.*, 65 Iowa, 692, 22 N. W. 929. See also *Owen v. Homan*, 4 H. L. C. 997, 1035; *First Nat. Bank v. Clark*, 59 Colo. 455, 149 Pac. 612; *Selma Savings Bank v. Harlan*, 167 Iowa, 673, 149 N. W. 882; *Hatfield v. Jackway*, 102 Neb. 831, 170 N. W. 181; *Damon v. Empire State Surety Co.*, 161 N. Y. App. D. 875, 146 N. Y. S. 996; *Park Paving Co. v. Kraft*, 262 Pa. 178, 105 Atl. 39; *Warren v. Branch*, 15 W. Va. 21; *Jungk v. Holbrook*, 15 Utah, 198, 49 Pac. 305, 62 Am. St. Rep. 921. See also *infra*, § 1497.

<sup>60</sup> In *Railton v. Matthews*, 10 C. & F. 934, non-disclosure of the fraudulent misconduct of an employee in a previous employment was held to excuse a surety for his fidelity, and in the following cases non-disclosure of previous fraud or embezzlement of various kinds was recognized as a valid excuse for a surety. *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72; *National Bank v. Fidelity, etc., Co.*, 89 Fed. 819, 32 C. C. A. 355; *Guardian Fire & Life Assur. Co. v. Thompson*, 68 Cal. 208, 9 Pac. 1; *Anaheim Water Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048; *Wilson v. Monticello*, 85 Ind. 10; *Bank v. Anderson Mining & Ry. Co.*, 65 Iowa, 692, 22 N. W. 929; *Sherman v. Harbin*, 125 Ia. 174, 182, 100 N. W. 629; *Bellevue Loan & B. Assoc. v. Jeckel*, 104 Ky. 159, 46 S. W. 482; *Franklin*

*Bank v. Cooper*, 34 542; *Charles Lawre* 117 Me. 570, 104 Thomas, 84 Md. Hudson v. Miles, 1 71, N. E. 63, 102 Capital Ins. Co. v. 387, 79 N. W. 60 Owen, 101 Mo. 55 St. Charles Sav. (Mo.), 205 S. W. Jersey, 39 N. J. L. etc., Co. v. Walker 50 Pac. 353, 923; E v. Farrington, 82 N States Life Ins. C Hun, 535, 36 N. Y. N. Y. 682, 51 N. E v. Tidball, 34 Ohio Josselyn, 40 Ohio S Commercial Bank, 5 Brewing Co. v. Rile 46 Atl. 71; Atlas B 9 R. I. 168, 11 Am mington, etc., R. Co. 116; *Screwmen's Be* Smith, 70 Tex. 168 Connecticut Gen. L. 72 Vt. 176, 47 Atl. 510; *East Zorra v. D* Ch. 462; *Peers v. O* Ch. 472. See also *W v. National Surety C* N. W. 697. The su less discharged beca ment in which the dis was with a third p

warranty, however, by the creditor, and if he is ignorant himself of the employee's fraud his non-disclosure of the fact will not excuse the surety though he was guilty of negligence in failing to know;<sup>61</sup> nor will the surety be excused even though the employer suspected the employee of dishonesty, and did not disclose his suspicions.<sup>62</sup> And the mere fact's that one whose fidelity is guaranteed has been negligent or inaccurate previously in the performance of his duties in ways not affecting his moral character, and these circumstances have not been disclosed to the surety though known to the creditor, will not excuse the surety.<sup>63</sup>

& Ohio Live Stock Ins. Co. v. Bender, 32 Ind. App. 287, 69 N. E. 691; Capital Fire Ins. Co. v. Watson, 76 Minn. 387, 79 N. W. 701, 77 Am. St. 657; Ottawa Agricultural Ins. Co. v. Canada Guarantee Co., 30 U. Can. C. P. 360. The same principle was held applicable to a failure to disclose a prior breach of a construction contract for the performance of which the surety bound himself, in Park Paving Co. v. Kraft, 262 Pa. 178, 105 Atl. 39, though the ignorance of the creditor regarding the breach prevented the defence from arising in that decision. Cf. Peerless Casualty Co. v. Howard, 77 N. H. 355, 92 Atl. 165, and cases cited *supra*, n. 57 *ad. fin.* An exception has been made in some cases in regard to the bonds of public officials. State v. Rushing, 17 Fla. 226; State v. Dunn, 11 La. Ann. 549; Frownfelter v. State, 66 Md. 80, 5 Atl. 410; Lawder v. Lawder, Ir. R. 7 C. L. 57; Byrne v. Muzio, L. R. 8 Ir. 396. And where the creditor did not himself obtain the signature of the surety, recovery was allowed in Cawley v. People, 95 Ill. 249; Aetna Life Ins. Co. v. Mabbett, 18 Wis. 667. It should be observed, however, that the principle on which recovery is denied, namely, that the non-disclosure by a creditor in view of the character of the contract proposed is itself a rep-

resentation, is applicable though the creditor did not directly induce the signature of the surety.

<sup>61</sup> Anaheim Union Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1048; McMullen v. Winfield & Co. Assoc., 64 Kans. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236; Tapley v. Martin, 116 Mass. 275; Newburyport v. Davis, 209 Mass. 126, 95 N. E. 110; St. Charles Sav. Bank v. Denker (Mo.), 205 S. W. 208; Bowne v. Mt. Holly Bank, 45 N. J. L. 360; Bostwick v. Van Voorhis, 91 N. Y. 353; Wayne v. Commercial Bank, 52 Pa. 343; Park Paving Co. v. Kraft, 262 Pa. 178, 105 Atl. 39; Wait v. Homestead Building Assoc., 76 W. Va. 431, 85 S. E. 637, and see *infra*, n. 66.

<sup>62</sup> National Provincial Bank v. Glanusk, [1913] 3 K. B. 335; Bank of Scotland v. Morrison, [1911] Sc. Sess. Cas. 593.

<sup>63</sup> Home Ins. Co. v. Holway, 55 Iowa, 571, 8 N. W. 457, 39 Am. Rep. 179; Charles Lawrence Co. v. Bussell (Me.), 104 Atl. 631; Peerless Casualty Co. v. Howard, 77 N. H. 355, 92 Atl. 165; Howe Machine Co. v. Farrington, 82 N. Y. 121; Bostwick v. Van Voorhis, 91 N. Y. 353; Screwmen's Benevolent Assoc. v. Smith, 70 Tex. 168, 7 S. W. 793; Peers v. Oxford, 17 Grant Ch. 472. But see *contra*—Smith v. Josselyn, 40 Oh. St. 409.

surety;<sup>69</sup> nor will the creditor's mere indulgence in failing to terminate the contract because of such a breach by the principal as would justify it, excuse the surety.<sup>70</sup>

**§ 1251. The surety's right to set off a claim of the principal against the creditor.**

To an attempt by a surety to set off a cross-claim of the principal which the latter could have set up against the creditor's claim, four objections have been suggested:<sup>71</sup>

1. That the cross-right is not a mere failure of consideration, but an independent claim, and not being due to the defendant, cannot be claimed by him.

2. That the principal has a right of election whether his damages shall be claimed by recoupment or counterclaim, or reserved for a cross-action.

3. That if the surety is allowed to set up the counterclaim it must bar a future action by the principal, and that as the cross-claim might be greater than the creditor's demand, the surety, if allowed to set up the claim merely to defeat the action against him, would also destroy a right of the principal.

4. That where there are a number of sureties severally liable, if one may set a counterclaim, another ought to have the same privilege.

These reasons have generally been thought conclusive: and when the surety is sued alone he has not been allowed to use

<sup>69</sup> *Williams v. Lyman*, 88 Fed. 237, 60 U. S. App. 25, 31 C. C. A. 511; *Alabama Fidelity &c. Co. v. Alabama Fuel &c. Co.* (Ala.), 79 So. 57; *Wilkerson v. Crescent Ins. Co.*, 64 Ark. 80, 82, 40 S. W. 465; *Sherman v. Harbin*, 125 Ia. 174, 100 N. W. 629; *Charles Lawrence Co. v. Bussell* (Me.), 104 Atl. 631; *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Cumberland Assoc. v. Gibbs*, 119 Mich. 318, 78 N. W. 138; *Lancashire Ins. Co. v. Callanan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; *Atlantic & Pacific Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *Wilmington, etc., R. Co. v. Ling*, 18 So. Car. 116; *Richmond & P. R. Co. v.*

*Kasey*, 30 Gratt. 218. The contract with the surety, however, may make notice in such a case a condition of the surety's promise. *Clydebank &c. Trustees v. Fidelity & Deposit Co.*, 53 Scotch L. R. 103.

<sup>70</sup> *Alabama Fidelity &c. Co. v. Alabama &c. Iron Co.*, 190 Ala. 397, 67 So. 318; *Young Coal Co. v. Hill*, 112 Ark. 180, 165 S. W. 292; *McKecknie v. Ward*, 58 N. Y. 41, 17 Am. Rep. 281. But it seems that after such a breach the surety might by giving notice terminate a continuing guaranty. *Emery v. Balts*, 94 N. Y. 408, 414, and see *infra*, § 1252.

<sup>71</sup> By *Selden, J.*, in *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355.

matter of recoupment, counterclaim, or set-off by the principal against the creditor.<sup>72</sup> With the consent, however, set-off has been allowed in some jurisdictions. The impropriety of allowing the surety the right to set-off in an action at law to which the principal is not a party is obvious. And though the English court has allowed the defence as an equitable plea,<sup>74</sup> there seems to be no impropriety in allowing it as an equitable defence as all legal defences, unless the principal is made a party. The surety is entitled to be heard in any litigation which affects the existence and amount of a claim which he may have against the creditor, since the decision will inevitably affect him on the other hand it is to be said that the rule in equity is that if the creditor have security, the surety is entitled to the benefit thereof.<sup>75</sup> If instead of having security, the creditor has lost the principal part of the amount, the effect of this is to leave the creditor, and the surety should by some procedure

<sup>72</sup> *Osborne v. Bryce*, 23 Fed. 171; *Beard v. Union, etc., Publishing Co.*, 71 Ala. 60; *Scholze v. Steiner*, 100 Ala. 148, 14 So. 552; *Stockton Society v. Giddings*, 96 Cal. 84, 30 Pac. 1016, 31 Am. St. Rep. 181; *Thalheimer v. Crow*, 13 Colo. 397, 22 Pac. 779; *Glasier v. Douglass*, 32 Conn. 393; *Mordecai v. Stewart*, 37 Ga. 364; *Graff v. Kahn*, 18 Ill. App. 485; *Purdy v. Forstall*, 45 La. Ann. 814, 13 So. 95; *Becker v. Northway*, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Morgan v. Smith*, 7 Hun. 244, 245; *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355; *Lasher v. Williamson*, 55 N. Y. 619; *Elliott v. Brady*, 192 N. Y. 221, 000 N. E. 000; *Ettlinger v. National Surety Co.*, 221 N. Y. 467, 117 N. E. 945; *Newton v. Lee*, 139 N. Y. 332, 34 N. E. 905; *Jarratt v. Martin*, 70 N. C. 459; *Clark v. Sullivan*, 2 N. Dak. 103, 49 N. W. 416; *Phoenix &c. Co. v. Rhea*, 98 Tenn. 461, 40 S. W. 482 (affirming 38 S. W. 1079); *Lamoille Co. Nat. Bank v. Bingham*, 50 Vt. 105, 28 Am. St. Rep. 490; *Baltimore & Annapolis Co. v. Newton*, 30 Wis. 864; *Gray v. Smith*, 6 Wis. 241. A few jurisdictions, however, allow the surety a remedy. *Morgan v. Smith*, 115 Ill. App. 435; *Seaton v. Engine, etc., Co. v. Porter*, 113 Ind. 592, 15 N. E. 173, 29 N. E. 444; *Sorenson v. Aultman*, 16 Mo. 419; *Tex. 54*, 2 S. W. 241. *Assignee v. Harper*, 31 Tex. 241.

<sup>73</sup> *Scholze v. Steiner*, 100 Ala. 148, 14 So. 552; *Reeves v. Bromberg (La.)*, 170 La. 170, 13 So. 170; *Sley v. Hoffman*, 13 Pa. 13; *nix, etc., Co. v. Rhea*, 40 S. W. 482 (affirming 38 S. W. 1079); *Bechervaise v. Lewis*, 372; *Murphy v. Glass*, 408. See also *Alcoy, Greenhill*, [1896] 1 Ch. 1.

<sup>74</sup> See *infra*, §§ 1266, 1267.



the benefit of it. Where both principal and surety are joined as defendants in the same action the right to set off the claim has generally been allowed in favor of the surety.<sup>76</sup> Even though the surety is sued alone, it seems that he should be allowed by equitable proceedings to bring the principal before the court and utilize the security of the cross-right.<sup>77</sup>

An argument not stated in the cases for discharging the surety may be suggested where the creditor subjects himself, after the creation of the suretyship contract, to a right of set-off by the principal debtor,—namely that the creditor has impaired the surety's right of subrogation.

### § 1252. Termination of surety's liability.

If a surety becomes bound for the performance of a contract and the principal fails to perform at the time, or in the manner agreed, though the delay of the creditor in enforcing his rights against the principal will not discharge the surety,<sup>78</sup> it has been held in New York at least that if this default is sufficient

<sup>76</sup> *Livingston v. Marshall*, 82 Ga. 281, 11 S. E. 542; *Waterman v. Clark*, 76 Ill. 428; *Himrod v. Baugh*, 85 Ill. 435; *Ronehel v. Lofquist*, 46 Ill. App. 442; *Slayback v. Jones*, 9 Ind. 470; *Park v. Ensign*, 66 Kan. 50, 71 Pac. 230, 97 Am. St. Rep. 352; *Reeves v. Chambers*, 67 Iowa, 81, 24 N. W. 602; *Rumley Co. v. Welcher*, 23 Ky. L. Rep. 1745, 66 S. W. 7; *Spencer v. Almoney*, 56 Md. 551; *M'Hardy v. Wadsworth*, 8 Mich. 349; *Becker v. Northway*, 44 Minn. 61, 46 N. W. 210; *St. Paul & M. Trust Co. v. Leck*, 57 Minn. 87, 58 N. W. 826; *Raymond v. Green*, 12 Neb. 215, 10 N. W. 709; *Concord v. Pillsbury*, 33 N. H. 310; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Loring v. Morrison*, 15 N. Y. App. D. 498, 44 N. Y. S. 526; *Wagner v. Stocking*, 22 Ohio St. 297; *Willoughby v. Ball*, 18 Okla. 535, 90 Am. St. Rep. 1017; *Hollister v. Davis*, 54 Pa. 508; *People's Bank v. Legrand*, 103 Pa. 309, 316, 49 Am. Rep. 126; *Guggenheim v. Rosenfeld*, 9 Baxt. 533; *Downer v. Dana*, 17

Vt. 518; *Wartman v. Yost*, 22 Gratt. 595; *Edmunds' Assignee v. Harper*, 31 Gratt. 637; *Baltimore Co. v. Bitner*, 15 W. Va. 455, 36 Am. Rep. 820. But see *contra*, *Joyce v. Corkrill*, 92 Fed. 838, 35 C. C. A. 38; *Noble v. Anniston Nat. Bank*, 147 Ala. 697, 41 So. 136; *Woodruff v. State*, 7 Ark. 333; *Leach v. Lambeth*, 14 Ark. 668; *Banks v. Pike*, 15 Me. 268; *Walker v. Leighton*, 11 Mass. 140; *Warren v. Wells*, 1 Met. 80; *Robbins v. Brooks*, 42 Mich. 62, 3 N. W. 256; *Paine v. Lewis*, 64 Miss. 96, 8 So. 207; *Dart v. Sherwood*, 7 Wis. 523, 76 Am. Dec. 228. Sometimes it has been held that the principal should not only be a party but be insolvent in order to justify the set-off. *Becker v. Northway*, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543; *Willoughby v. Boll*, 18 Okla. 535, 90 Pac. 1017.

<sup>77</sup> See *Hiner v. Newton*, 30 Wis. 640.

<sup>78</sup> See *supra*, § 1231.

they may extend.<sup>81</sup> From such cases are to be distinguished those where the guarantor without any present consideration guarantees a series of future sales or credits. If no seal is attached to such a writing, it has been held, and it seems rightly, that such a promise is in effect a series of continuing offers, which will be successively accepted as each credit of the contemplated series is given. Either express revocation or death, therefore, would terminate such of these offers as had not already been accepted, and it is so generally held.<sup>82</sup> It has been suggested that the parties can provide effectively in the guaranty itself that a special notice of the guarantor's death is necessary in order to work a revocation.<sup>83</sup> But if the guarantor's prom-

<sup>81</sup> The leading case for this point is *Lloyd's v. Harper*, 16 Ch. Div. 290. There the defendant's testator signed a guaranty, promising in consideration of the admission of his son to Lloyd's as an underwriter to guarantee all his engagements in that capacity. The son was accordingly admitted, and though many years elapsed before he made any default, and though the guarantor died before such default, it was held that his estate was liable. See also *In re Crace*, *Balfour v. Crace*, [1902] 1 Ch. 733; *Aiken v. Lang's Adm.*, 106 Ky. 652, 51 S. W. 154. The law is the same in regard to sureties on an official bond. *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581, 3 M. & Ry. 124 (collecting clerk); *In re Crace*, [1902] 1 Ch. 733 (agent and receiver); *Broome v. United States*, 15 How. 143 (collector), 14 L. Ed. 636; *McClaskey v. Barr*, 79 Fed. 408, 415-16; *Moore v. Wallis*, 18 Ala. 458 (guardian); *Hightower v. Moore*, 46 Ala. 387 (administrator); *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427 (insurance agent); *Voris v. State*, 47 Ind. 345 (guardian); *Mowbray v. State*, 88 Ind. 324 (City Treasurer); *Royal Ins. Co. v. Davies*, 40 Iowa, 469, 20 Am. Rep. 581 (insurance agent); *Green v. Young*, 8 Me. 14, 22 Am. Dec. 218 (deputy

sheriff); *Wood v. Leland*, 1 Met 387 (guardian); *Andrus v. Bealls*, 9 Cow. 693 (deputy sheriff); *Lawyers' Surety Co. v. Ayrault*, 165 N. Y. App. D. 254, 150 N. Y. S. 800; *White v. Commonwealth*, 39 Pa. 167 (trustee); *Shackamaxon Bank v. Yard*, 143 Pa. 129, 22 Atl. 908, 24 Am. St. Rep. 521, 150 Pa. 351, 24 Atl. 635, 30 Am. St. Rep. 807 (cashier); *Snyder v. State*, 5 Wyo. 318, 40 Pac. 441, 63 Am. St. Rep. 60 (Clerk of Court). See also *McCluskey v. Barr*, 79 Fed. Rep. 408, 415; *Kernochan v. Murray*, 111 N. Y. 306, 309, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744; *cf. La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Reilly v. Dodge*, 131 N. Y. 153, 158, 29 N. E. 1011; *Ricketson v. Lisotte*, 90 Vt. 386, 98 Atl. 801. If, however, one whose fidelity is guaranteed is guilty of dishonesty the surety may terminate his liability by giving notice. *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180; *Emery v. Balta*, 94 N. Y. 408.

<sup>82</sup> *Offord v. Davies*, 12 C. B. (N. S.) 748; *White Sewing Mach. Co. v. Courtney*, 141 Calif. 674, 75 Pac. 296; *Jeudevine v. Rose*, 36 Mich. 54; *Union Central L. Ins. Co. v. Smith*, 105 Mich. 353, 63 N. W. 438; and see *supra*, § 58.

<sup>83</sup> *Coulthart v. Clementson*, 5 Q.

the contract fixes no definite time for its continuance, either by reference to a date or some anticipated event.<sup>87</sup> The right of revocation has been extended to sureties other than guarantors.<sup>88</sup> Where the guarantee is held revocable, there seems some difference of opinion whether the guarantor's death operates as an immediate revocation or whether notice of the death is requisite.<sup>89</sup>

**§ 1254. It is immaterial that the surety's obligation has been reduced to judgment.**

Even a creditor who has obtained judgment against the surety must still respect his rights, and though a release of the principal or suspension of remedy against him gave the surety no defence at law,<sup>90</sup> it is well settled in the United States that such inequitable conduct by the creditor as would discharge the surety had no judgment been rendered against him affords ground in equity for relief against the judgment; and will do so at law where equitable defences are allowed.<sup>91</sup>

steps he remains liable." And to similar effect see *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818; *Kernochan v. Murray*, 111 N. Y. 306, 309, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744; *National Eagle Bank v. Hunt*, 16 R. I. 148, 13 Atl. 115. See also *Hecht v. Weaver*, 34 Fed. 111.

<sup>87</sup> *Jeudevine v. Rose*, 36 Mich. 54; *Emery v. Balts*, 94 N. Y. 408, 414; *Vidi v. United Surety Co.*, 155 N. Y. App. D. 502, 140 N. Y. S. 612.

<sup>88</sup> In *Ricketson v. Lizotte*, 90 Vt. 386, 98 Atl. 801, the court said: "The rule applicable to a continuing guaranty, that the guarantor can terminate his liability on notice to the obligee is also applicable to a continuing suretyship, in favor of the surety, though the instrument is under seal."

<sup>89</sup> In *Coulthart v. Clementson*, 5 Q. B. D. 42, the court said: "A guaranty like the present is not a mere mandate of authority revoked

*ipso facto* by the death of the guarantor." And this view was taken in *Gay v. Ward*, 67 Conn. 147, 156. See also *Valentine v. Donohoe-Kelly Banking Co.*, 133 Cal. 191, 65 Pac. 381, but in Massachusetts death without notice is effective. *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. Rep. 305; *Hyland v. Habich*, 150 Mass. 112, 22 N. E. 765, 6 L. R. A. 383.

<sup>90</sup> *Pole v. Ford*, 2 Chitty, 125; *Bray v. Manson*, 8 M. & W. 668; *La Farge v. Herter*, 3 Denio, 157.

<sup>91</sup> *In re McDonald*, 14 N. B. R. 477; *Carpenter v. Devon*, 6 Ala. 718; *Dampkibsktieselskabet Høbil v. United States, etc., Co.*, 142 Ala. 363, 367, 39 So. 54; *Morley v. Dickinson*, 12 Cal. 561; *Curan v. Colbert*, 3 Ga. 239, 46 Am. Dec. 427; *Trotter v. Strong*, 63 Ill. 272; *New York Bank Note Co. v. Kerr*, 77 Ill. App. 53; *Graff v. Fox*, 204 Ill. App. 598; *Gipson v. Ogden*, 100 Ind. 20; *Sherraden v. Parker*, 24 Iowa, 28; *Gustine v. Union Bank*, 10 Rob. (La.) 412; *Carpenter*

surety by the terms of his promise has agreed to perform if the principal fails to make the stated payment or performance, however valid the reason for his failure; and, therefore, the surety's defence, if he has any, must be based on equitable grounds. But if the surety merely promises to answer for the principal's debts or defaults, a judgment in the principal's favor at the suit of the creditor conclusively shows that as between them there has been no debt or default, and the surety by the very terms of his promise can be under no liability, unless indeed the judgment was based on a personal discharge founded on bankruptcy or the statute of limitations or the like.<sup>98</sup>

Where the surety by the terms of his promise is liable, but the creditor has previously suffered an adverse judgment in an action against the principal, it has been said: "It is obvious that if the rule of *res inter alios acta* is applied to a case in which the principal has been discharged, there may be a judgment against a surety who will either have no indemnity against his principal, or if he has, then the principal will be indirectly subjected to a liability from which he had been legally discharged."<sup>99</sup> The solution of the difficulty is this. If the reason why judgment went against the creditor was due to the infancy, coverture, or discharge in bankruptcy of the principal, or to any other circumstances which actually existed and for which the creditor was not to blame, the surety has no equitable defence; but if in the later litigation with the surety, it is found as a fact that the principal was not an infant, a married woman, or discharged in bankruptcy, or did not have on the actual facts a defence to the action against him, the creditor must be deemed in fault for having suffered judgment to go against him, and

<sup>98</sup> *State v. Parker*, 72 Ala. 181; *Brown v. Bradford*, 30 Ga. 927; *Price v. Carlton*, 121 Ga. 12, 24, 48 S. E. 721, 68 L. R. A. 736; *Cook v. King*, 7 Ill. App. 549; *Baker v. Merriam*, 97 Ind. 539; *Stevens v. Carroll*, 131 Ia. 170, 105 N. W. 653; *Crum v. Wilson*, 61 Miss. 233; *State v. Coste*, 36 Mo. 437; *People v. Metropolitan Surety Co.*, 171

N. Y. App. Div. 15, 156 N. Y. S. 1027; *Gill v. Morris*, 11 Heisk. 614, 27 Am. Rep. 744; *Sonnenthal v. Trust Co.*, 23 Tex. Civ. App. 436, 56 S. W. 143. Most of these cases were suits on official bonds.

<sup>99</sup> *Gill v. Morris*, 11 Heisk. 614, 621, 27 Am. Rep. 744.

admissible evidence of the facts litigated, since they were established in an action to which the surety was not a party; and many authorities sustain this view.<sup>1</sup> By the weight of authority in the United States, however, the judgment against the principal is *prima facie* evidence in an action against the surety that the principal was rightly held liable, and that, therefore, the surety is bound to answer for the principal's default;<sup>2</sup> and in a few States the judgment against the principal has even been held conclusive against the surety.<sup>3</sup>

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<sup>1</sup> King v. Norman, 4 C. B. 884; *Ex parte* Young, 17 Ch. D. 668; Lucas v. Governor, 6 Ala. 826; Fireman's Co. v. McMillan, 29 Ala. 147; Arrington v. Porter, 47 Ala. 714; Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647; Governor v. Shelby, 2 Blackf. 26; McConnell v. Poor, 113 Ia. 133, 84 N. W. 968, 52 L. R. A. 312; Lartigue v. Baldwin, 5 Martin (La.), 193; Bailey v. Butterfield, 14 Me. 112; Rodini v. Lytle, 17 Mont. 448, 43 Pac. 501, 52 L. R. A. 165; DeGreiff v. Wilson, 30 N. J. Eq. 435; Moss v. McCullough, 5 Hill, 131; Berry v. Schaad, 50 N. Y. App. Div. 132, 63 N. Y. S. 349; Miano v. Empire State Surety Co., 153 N. Y. App. D. 423, 138 N. Y. S. 475; McKellar v. Bowell, 4 Hawks, 34; Giltinan v. Strong, 64 Pa. 242; State v. Cason, 11 S. Car. 392; Ballantine v. Fenn, 84 Vt. 117, 78 Atl. 713, 40 L. R. A. (N. S.) 698.

<sup>2</sup> Drummond v. Prestman, 12 Wheat. 515, 6 L. Ed. 712; Moses v. United States, 166 U. S. 571, 41 L. Ed. 1119, 17 Sup. Ct. 682; Equitable Surety Co. v. Board, 256 Fed. 773; State v. Martin, 20 Ark. 629; Price v. Carlton, 121 Ga. 12, 48 S. E. 721; 68 L. R. A. 736; Charles v. Haskins, 14 Ia. 471, 83 Am. Dec. 378; Graves v. Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Fay v. Edmiston, 25 Kans. 439; Topeka v. Ritchie, 102 Kan. 384, 170 Pac. 1003; Heath v. Shrempp, 22 La. Ann. 167; Macready v. Schenck,

41 La. Ann. 456, 6 So. 517; Dane v. Gilmore, 51 Me. 544; McPharlin v. Fidelity, etc., Co., 162 Mich. 141, 127 N. W. 307 (if the surety had notice of the proceeding); Beauchaine v. McKinnon, 55 Minn. 318, 56 N. W. 1065 (see also Milavetz v. Oberg, 138 Minn. 215, 164 N. W. 910); Iglehart v. Mackubin, 2 Gill & J. 235 (overruling Beall v. Beck, 3 Har. & McH. 342); Leppert v. Flaggs, 101 Md. 71, 60 Atl. 450; Baltimore, etc., R. Co. v. Howard County, 111 Md. 176, 73 Atl. 656, 40 L. R. A. (N. S.) 1172; Lowell v. Parker, 10 Met. 309, 43 Am. Dec. 436; People v. Mersereau, 74 Mich. 687, 42 N. W. 153; Hursey v. Marty, 61 Minn. 430, 63 N. W. 1090; Calhoun v. Gray, 150 Mo. App. 591, 131 S. W. 478; Commissioners v. Butt, 2 Oh. 348; State v. Jennings, 14 Oh. St. 73; Perry v. Merrill (Okl.), 179 Pac. 28; Connor v. Corson, 13 S. Dak. 550, 618, 83 N. W. 588, 84 N. W. 191; Atkins v. Baily, 9 Yerg. 111; Barksdale v. Butler, 6 Lea, 450; Carr v. Meade, 77 Va. 142; Stephens v. Shafer, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793. Many cases on the general topic are collected in a note in 40 L. R. A. (N. S.) 698.

<sup>3</sup> Tracy v. Goodwin, 5 Allen, 409; Dennie v. Smith, 129 Mass. 143; Pasewalk v. Bollman, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399; Thomas v. Markmann, 43 Neb. 823, 62 N. W. 206; McMicken v. Common-

mistake, the creditor is given the same equitable relief as if the surety were a principal.<sup>7</sup> Equity will not, however, relieve against the rule of survivorship in joint obligations where a deceased obligor was a surety.<sup>8</sup>

**§ 1258. Injurious action by the creditor will discharge a surety, though the creditor when the obligation was created was ignorant of the suretyship relation.**

When two or more persons apparently bound as principal debtors arrange, either at the time when the debt was contracted or subsequently, that, *inter se*, one of them shall be liable only as a surety, the creditor after he has had notice of the arrangement must do nothing to prejudice the interests of the surety by any such dealing with his co-debtors, or with securities as would have been fatal had the suretyship relation existed when the debt was created, and the creditor had known of it.<sup>9</sup> This rule undoubtedly allows matter

*Berg v. Radcliff*, 6 Johns. Ch. 302, 307; *Harrison v. Field*, 2 Wash. (Va.) 155; *Kerney v. Kerney*, 6 Leigh, 478.

<sup>7</sup> *Crosby v. Middleton*, Prec. Ch. 309; *United States v. Cushman*, 2 Sumn. 434; *Percival v. McCoy*, 13 Fed. 379; *Olmsted v. Olmsted*, 38 Conn. 309; *Edwards v. Schoeneman*, 104 Ill. 278; *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359 (overruling *Trustees v. Otis*, 85 Ill. 179); *Stevens v. Pendleton*, 105 Mich. 519, 63 N. W. 655; *State v. Frank*, 51 Mo. 98; *Berge v. Radcliff*, 6 Johns. Ch. 303, 308; *Clute v. Knies*, 102 N. Y. 377, 7 N. E. 181; *Sikes v. Truitt*, 4 Jones Eq. 361; *Neininger v. State*, 50 Oh. St. 394, 34 N. E. 633; *Moser v. Libenguth*, 2 Rawle, 428; *Weaver v. Shryock*, 6 S. & R. 262, 264; *Rutland v. Paige*, 24 Vt. 181. So where the creditor took in renewal of a note signed by principal and surety a note signed by the principal on which he had forged the surety's name, the creditor was allowed recovery against the sure-

ty on the original note though it had been cancelled. *Severy State Bank v. Hoyt*, 103 Kans. 44, 172 Pac. 994. In *Citizens' Trust & Co. v. Goff*, 81 W. Va. 366, 94 S. E. 756, the creditor was denied relief on account of laches.

<sup>8</sup> *Supra*, § 344.

<sup>9</sup> Lord Watson in *Rouse v. Bradford Banking Co.*, [1894] A. C. 586. To the same effect see—*Oakeley v. Paabeller*, 4 Cl. & F. 207, 10 Bligh, N. S. 548, s. c.; *Oakford v. European & American S. S. Co.*, 1 H. & M. 182; *Overend Gurney & Co., Ltd., v. Oriental Financial Corp., Ltd.*, L. R. 7 H. L. 348, 360; *Wilson v. Lloyd*, 16 Eq. 60; *Vary v. Norton*, 6 Fed. 806; *Home Bank v. Waterman*, 134 Ill. 461, 467, 29 N. E. 503; *McTaggart v. Dolan*, 86 Ind. 314; *Smith v. Sheldon*, 35 Mich. 42, 24 Am. Rep. 529; *Cornwell v. Megins*, 39 Minn. 407, 40 N. W. 610; *Patterson v. Camden*, 25 Mo. 13; *Millard v. Thorn*, 56 N. Y. 402; *Palmer v. Purdy*, 83 N. Y. 144; *Hall v. Johnston*, 6 Tex. Civ. App. 110, 24 S. W. 861; *Gates v. Hughes*, 44 Wis.

he became such was discharged by any inequitable dealing on the part of the holder with the acceptor or maker who as between himself and his co-debtor was the principal.<sup>12</sup> So

<sup>12</sup> The following excellent summary of authorities is from Professor Henning's article in 59 *University of Pennsylvania Law Review*, 532. Joint acceptors or makers were discharged in *Liquidation of Overend & Co. v. Liquidators of Oriental, etc., Co.*, 1 L. R. 7 H. L. 348; *Taylor v. Burgess*, 5 H. & N. 1; *Pooley v. Harradine*, 7 El. & Bl. 431; *Hall v. Wilcox*, 1 Mood. & Rob. 58; *Vary v. Norton*, 6 Fed. 808 (extension of time); *Scott v. Scruggs*, 60 Fed. 721, 9 C. C. A. 246; *Bruce v. Edwards*, 1 Stew. (Ala.) 11, 18 Am. Dec. 33 (notice to sue under statute); *Branch Bank, etc., v. Darrington*, 9 Ala. 949; *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17 (extension of time); *Byers v. Hussey*, 4 Col. 515 (semble); *Drescher v. Fulham*, 11 Col. App. 62, 52 Pac. 685 (extension of time); *Fraser v. McConnell*, 23 Ga. 368 (notice to sue under statute); *Mathewson v. Jones*, 30 Ga. 306, 76 Am. Dec. 647 (fraud as to collateral fact known to plaintiff indorsee); *Perry v. Hodnett*, 38 Ga. 103 (extension of time); *McCarter v. Turner*, 49 Ga. 309 (failure to sue under statute); *Stewart's Adm. v. Parker*, 55 Ga. 656 (extension of time); *Flynn v. Mudd*, 27 Ill. 323; *Ward v. Stout*, 32 Ill. 399 (obiter); *Voss v. German-American Bank*, 83 Ill. 599 (obiter), 25 Am. Rep. 415; *Trustees, etc., v. Southard*, 31 Ill. App. 359 (semble); *Core v. Wilson*, 40 Ind. 204 (joint maker entitled to statutory privilege as to execution); *Hamilton v. Winterrowd*, 43 Ind. 393; *Holland v. Johnson*, 51 Ind. 346 (extension of time and surrender of collateral); *Buck v. Smiley*, 64 Ind. 431 (extension of time); *Sample v. Cochran*, 84 Ind. 594 (surrender of collateral); *Kelly v. Gillespie*, 12 Ia. 55, 79 Am. Dec. 516; *Coriell v. Allen*, 13 Ia. 289 (extension of time); Cham-

bers *v. Cochran*, 18 Ia. 159; *Piper v. Newcomer*, 25 Ia. 221; *Kirby v. Landis*, 54 Ia. 150, 6 N. W. 173; *Wendling v. Taylor*, 57 Ia. 354, 10 N. W. 675 (extension of time); *Lambert v. Shitler*, 62 Ia. 72, 17 N. W. 187, s. c. 71 Ia. 463, 32 N. W. 424 (discharge of attachment); *Ross v. Madden*, 1 Kans. 445; *Rose v. Williams*, 5 Kans. 483 (extension of time); *Roberson v. Blevins*, 57 Kans. 50, 45 Pac. 63 (extension of time); *Neel v. Harding*, 2 Met. (Ky.) 247; *Weller v. Ralston*, 28 Ky. L. Rep. 572, 89 S. W. 698; *Adle v. Metoyer*, 1 La. Ann. 254; *Jones v. Fleming*, 15 La. Ann. 522; *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 Am. Dec. 673 (extension of time); *Springer v. Toothaker*, 43 Me. 381, 69 Am. Dec. 66 (abandonment of lien of execution); *Cummings v. Little*, 45 Me. 183 (by surrender of collateral); *Horne v. Bodwell*, 5 Gray, 457 (extension of time); *Harris v. Brooks*, 21 Pick. 195, 32 Am. Dec. 254 (statement of creditor that he will look to principal only); *Guild v. Butler*, 122 Mass. 498, 23 Am. Rep. 378; *Barron v. Cady*, 40 Mich. 259 (extension of time); *Fuller v. Quesnel*, 63 Minn. 302, 65 N. W. 634; *Kaufman v. Barbour*, 98 Minn. 153, 107 N. W. 1128; *Smith v. Clopton*, 48 Miss. 66; *Young v. Cleveland*, 33 Mo. 126, 82 Am. Dec. 155; *Coats v. Swindle*, 55 Mo. 31; *German, etc., Ass'n v. Helmrick*, 57 Mo. 100; *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517 (extension of time); *O'Howell v. Kirk*, 41 Mo. App. 523 (notice to sue under statute); *Lee v. Bruggmann*, 37 Neb. 232, 55 N. W. 1053 (extension of time); *Wheat v. Kendall*, 6 N. H. 504; *Merrimack County Bank v. Brown*, 12 N. H. 320; *Rochester Savings Bank v. Chick*, 64 N. H. 410; *Draper v. Trescott*, 29 Barb. 401; *Billington v. Wagoner*, 33

it might be shown by parol that the drawer or indorser of negotiable paper was the principal debtor, and the acceptor or maker was discharged by extension of time or other inequitable dealing with the drawer or indorser, if the holder knew when he became such of the suretyship relation.<sup>14</sup>

N. Y. 31; *Hubbard v. Gurney*, 64 N. Y. 457; *Welfare v. Thompson*, 83 No. Car. 276 (local statute of limitations applicable to sureties is shorter than that applicable to other debtors. Short period held controlling); *Osborn v. Low*, 40 Oh. St. 347 (extension of time); *McComb v. Kittridge*, 14 Ohio, 348 (extension of time); *Holt v. Bodey*, 18 Pa. 207; *Diffenbacher's Estate*, 31 Pa. Sup. 35; *Zapalac v. Zapp*, 22 Tex. Civ. App. 375, 54 S. W. 938; *Kempner v. Patrick*, 43 Tex. 216, 95 S. W. 51; *Turrill v. Boynton*, 23 Vt. 142 (joint maker of note discharged by extension to other joint maker); *Harmon v. Hale*, 1 Wash. Ter. 422 (false information by creditor as to payment); *Glenn v. Morgan*, 23 W. Va. 467 (admitting defence good at law except in specialty contracts, but deciding specialty contracts not dischargeable by parol at law); *Riley v. Gregg*, 16 Wis. 666; *Irvine v. Adams*, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817; *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621. Contrary decisions are: *Kritzer v. Mills*, 9 Cal. 21; *California, etc., Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38 (practically overruling *Capital Savings Bank v. Reel*, 62 Cal. 419); *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283 (denying the defence at law, but by *dictum* admitting relief to be in equity); *Anthony v. Fritts*, 45 N. J. L. 1 (held that the defence is inadmissible in a court of law but a ground of equitable relief). See *Westervelt v. Frech*, 33 N. J. Eq. 451.

<sup>14</sup> Professor Hening summarizes the cases as follows: *Laxton v. Peat*, 2 Camp. 185; *Davies v. Stainbank*, 6 De G. M. & G. 679 (accommodation

acceptor discharged by extension); *Daggett v. Whiting*, 35 Conn. 566, (maker of check held surety without recourse to him); *Hall v. Capital Bank*, 71 Ga. 715; *Lacy v. Lofton*, 26 Ind. 324 (statutory duty of creditor when so ordered to levy and exhaust principal's property, practically overruling *Lambert v. Sandford*, 2 Black. 137, 18 Am. Dec. 149); *Morehead v. Citizens' Bank*, 130 Ky. 414, 113 S. W. 501, 23 L. R. A. (N. S.) 141 (extension of time, practically overruling *Anderson v. Anderson*, 4 Dana, 352); *Guild v. Butler*, 122 Mass. 498, 23 Am. Rep. 378; *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214 (maker treated in equity as surety for anomalous indorser to payee and discharged *pro tanto* by loss of securities); *Canadian Bank, etc., v. Coumbe*, 47 Mich. 358, 11 N. W. 196 (accommodation acceptor discharged by extension of time to drawer); *Meggett v. Baum*, 57 Miss. 22 (accommodation acceptor); *Boatmen's Savings Bank v. Johnson*, 24 Mo. App. 316; *St. Joseph F. & M. Ins. Co. v. Hauck*, 71 Mo. 465; *Hoffman v. Habighorst*, 38 Or. 261, 63 Pac. 610, 53 L. R. A. 908 (maker of note surety for third person not a party to the paper); *Marsh v. Consolidation Bank*, 48 Pa. 510 (maker of note surety for indorsee). Contrary decisions are: *Wilson v. Isbell*, 45 Ala. 142; *Bank v. Walker*, 9 S. & R. 229, 11 Am. Dec. 709; *Walker v. Bank of Montgomery*, 12 S. & R. 382 (time given to the accommodated indorser held to be no discharge to the accommodating maker by the holder, who subsequently learned of



The law was less certain where the holder took the instrument in ignorance of the suretyship relation, but became aware of it before the dealings in question with the principal debtor. Here too, however, the weight of authority supported the view that the surety, though primarily liable by the terms of the instrument, would be discharged by inequitable dealing with the party who, though secondarily liable on the instrument, was in fact the principal debtor.<sup>15</sup>

### § 1260. Effect of the Negotiable Instruments Law.

To what extent the principles stated in the preceding section remain applicable under the Negotiable Instruments Law is uncertain. The language of the statute is not clear.<sup>16</sup> And by a somewhat doubtful construction the courts generally have held that an accommodation maker is not released by an extension of time to a co-maker or an indorser who is in fact the principal debtor, and known by the holder to be such.<sup>17</sup> Whether inequitable dealing with collateral,

the suretyship); *White v. Hopkins*, 3 W. & S. 99, 37 Am. Dec. 542; *Stephens v. Bank*, 88 Pa. St. 157, 32 Am. Rep. 438; *Fourth Nat. Bank v. Frasier*, 9 Phil. 213; Delaware, etc., Co. v. Haser, 199 Pa. 17, 48 Atl. 694, but in *Holt v. Bodey*, 18 Pa. 207, one joint obligor of a bond was permitted to prove his suretyship by parol and obtained a discharge by showing the release of security by the creditor.

<sup>15</sup> Professor Henning thus summarizes the decisions: *Ewin v. Lancaster*, 6 B. & Sm. 571 (accommodation acceptor discharged by time given by holder to the accommodated drawer; knowledge existed only at time of extension; *Crompton, J.*, said: "that is the time to be looked at, because it is the time when the equity arises"); *Laxton v. Peat*, 2 Camp. 185; *Bailey v. Edwards*, 4 B. & S. 761 (accommodation acceptor surety for indorser); *Lauman v. Nichols*, 15 Iowa, 161 (joint maker discharged by extension of time); *Fuller v. Quessel*, 63 Minn. 302, 65

N. W. 634; *Smith v. Clopton*, 48 Miss. 66; *Valley Nat. Bank v. Meyers*, 17 Nat. Bank. Rep. 257 (D. C. E. Dist. of Mo.) (maker of note surety for indorser discharged by extension of time); *Wheat v. Kendall*, 6 N. H. 504; *Westervelt v. Frech*, 33 N. J. Eq. 451 (maker of note surety to payee for indorser discharged by extension of time). Contrary decisions are: *Diversy v. Moor*, 22 Ill. 330, 74 Am. Dec. 157 (accommodation acceptor not discharged by statutory notice to sue drawer); *Gano v. Heath*, 36 Mich. 441 (joint makers); *Heath v. Derry Bank*, 44 N. H. 174 (the note reading "all as principals promise to pay"); *Hoge v. Lansing*, 35 N. Y. 136 (maker accommodating the payee); *Farmers', etc., Bank v. Rathbone*, 26 Vt. 19, 58 Am. Dec. 200 (*obiter* acceptor in fact not for accommodation).

<sup>16</sup> Sections 119 and 120 are the sections especially involved. See *supra*, §§ 1189, 1190.

<sup>17</sup> *Cowan v. Ramsey*, 15 Ariz. 533,



accommodation parties are indorsers. The form of the instrument then does not always, though it does sometimes, give any indication whether one obligation was to precede the other. Several cases may be supposed.

If a note is made payable to A and B, and indorsed by them for the accommodation of the maker, they are clearly not successive indorsers, but joint indorsers.<sup>20</sup> On the other hand, where a note is payable to A, and indorsed by A and then by B, it is apparent from the terms of the instrument that the indorsements must be regarded as successive, and that by the terms of the instrument A is bound to indemnify B. If the note is payable to A and indorsed by A, B, and C, A, according to the form of the instrument, is the primary obligor as compared with B and C, but it is as consistent with the form of the instrument that B and C are joint indorsers as that they are successive indorsers. The cases thus far supposed have been cases of two regular indorsements as distinguished from anomalous indorsements by one never even in form a holder of the instrument. Such indorsements are now, under the Negotiable Instruments Law, treated as imposing the obligation of an indorser.<sup>21</sup> Where two or more, therefore, indorse anomalously for accommodation, they are indorsers, but whether joint or successive is not in any way indicated by the form of the document. Prior to the passage of the Negotiable Instruments Law, some States held that all anomalous indorsers were co-makers; and if they signed for accommodation, were co-sureties, since one co-maker so far as the instrument indicates stands on a parity with others.<sup>22</sup>

**§ 1262. Liability of accommodation indorsers on negotiable instruments is presumably successive.**

It will be seen, therefore, that whether two accommoda-

393; *Heintzelman v. L'Amoureux*, 3 Nev. 377; *Laubach v. Pursell*, 35 N. J. 434; *Gomez v. Lazarus*, 1 Dev. Eq. 205; *Dawson v. Pettway*, 4 Dev. & B. 396; *Williams v. Bosson*, 11 Oh. 62; *Barnet v. Young*, 29 Oh. St. 7, 12.

<sup>20</sup> Such a case is *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853.

<sup>21</sup> Negotiable Instruments Law, § 64.

<sup>22</sup> See, e. g., *Keyser v. Warfield*, 100 Md. 72, 59 Atl. 189.

tion indorsers appear from the instrument to liable instead of jointly liable depends upon For this reason those who indorse for pay less attention probably to the order names appear than those who sign for respectively as maker and indorser. Thou of proof may by the Negotiable Instruments on a prior signer who asserts that he is a consequent signor,<sup>24</sup> the burden should be satissence of evidence of a contrary intention b the two had agreed to become sureties for The fact that one signed as maker, and the o is doubtless evidence of a contrary intentio evidence of a contrary intention where the signs a note without previous arrangement, ready been signed by the first indorser. U cumstances the second indorser certainly h assume the liability of surety for the first than that of surety with him, and he must have intended the smaller obligation.<sup>25a</sup> But

<sup>22</sup> The Negotiable Instruments Law undoubtedly states, Section 68, that "indorsers are liable *prima facie*, in the order in which they indorse." But this has no specific reference to co-sureties, and certainly does not mean that where parties intend a joint liability this intention will not be given effect, even though for convenience one may sign before the other; and it is only by extrinsic circumstances not by the form of the instrument that it is possible to tell in many cases whether the indorsement is joint or several.

<sup>24</sup> *Porter v. Huie*, 94 Ark. 333, 126 S. W. 1069, 28 L. R. A. (N. S.) 1039. See also *M'Donald v. Magruder*, 3 Pet. 470, 7 L. Ed. 744.

<sup>25</sup> See cases cited *supra*, note 19.

<sup>25a</sup> *Weacott v. Stevens*, 85 Me. 325, 329, 27 Atl. 146. "If the maker presented the note, already indorsed by the payee, to the plaintiff, with a request to become a party to the note,

he had the choice become bound. He to sign as maker; effect, he handed and took the note sult of his contra plain that he inten ment, to look to when he indorsed otherwise he wou different capacity. did, he accommod the same, gave cu and looked to the r He became bound was the contract the order of ind shown to be differ appear to be. Such the writing was wh what the written c "Coolidge v. Wi precisely in point. payee, and plai

quite different where the indorsement of both parties was part of an arrangement in which both shared but one indorsed before the other. Yet even in such a case the weight of authority holds the first indorser bound to indemnify the second.<sup>28</sup> It has even been held that the fact that in succes-

dorsed the maker's note for his accommodation, and, in the absence of an agreement between them to be sureties merely, they were held bound to each other as successive indorsers. There, the indorsements were both at the request of the maker. Here, if plaintiff's indorsement was at the request of the maker, without any agreement with defendant, whose name was already on the note, *a fortiori* the defendant should be held to a completed contract, on which plaintiff paid his money."

See also to the same effect *McCarty v. Roots*, 21 How. 432, 16 L. Ed. 162; *Kirschner v. Conklin*, 40 Conn. 77; *Hamilton v. Johnston*, 82 Ill. 39; *Armstrong v. Harshman*, 61 Ind. 52, 28 Am. Rep. 665; *Coolidge v. Wiggin*, 62 Me. 568; *Rhinehart v. Schall*, 69 Md. 352, 16 Atl. 126; *Shaw v. Knox*, 98 Mass. 214; *Lewis v. Monahan*, 173 Mass. 122, 53 N. E. 150; *McGurk v. Huggett*, 56 Mich. 187, 22 N. W. 308; *Harrah v. Doherty*, 111 Mich. 175, 69 N. W. 242; *Smith v. Smith*, 1 Dev. Eq. 173; *Pitkin v. Flannagan*, 23 Vt. 160, 56 Am. Dec. 61; *Hogue v. Davis*, 8 Gratt. 4.

But in *Stovall v. Border Grange Bank*, 78 Va. 188, the court said: "It is of no consequence in this case whether Stovall knew that Lee had signed it or not, for where successive endorsers all endorse for accommodation of the maker, though at different times and without communication or mutual understanding, they are in equity co-sureties and subject to common contribution."

<sup>28</sup> In the following cases, so far as appears, the second indorser's signa-

ture was not induced by the supposed liability of a previous indorser. The court apparently did not consider this a material circumstance. The fact that one indorsement preceded the other in position (and presumably in time though only a very short time), being regarded as controlling. *Moody v. Findley*, 43 Ala. 167; *Pomeroy v. Clark*, 1 MacArth. 606; *Scott v. Doneghy*, 17 B. Mon. 321; *Gasquet v. Oakey*, 15 La. 537; *Woodward v. Severance*, 7 Allen, 340; *Johnson v. Crane*, 16 N. H. 68; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109; *Bradford v. Corey*, 5 Barb. 461; *Wolf v. Hostetter*, 182 Pa. 292, 37 Atl. 988; *Crompton v. Spencer*, 20 R. I. 330, 38 Atl. 1002; *Marr v. Johnson*, 9 Yerg. 1; *Farmers' Bank v. Vanmeter*, 4 Rand. 553, 563; *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515.

In the following cases it appears affirmatively that the indorsements were approximately simultaneous, or that the second indorsement was before that of the payee; or that the first signed subject to an agreement that the second also should sign, and the second was aware of the agreement, yet the liability of the indorsers was held to be successive. *Moore v. Cushing*, 162 Mass. 594, 39 N. E. 177, 44 Am. St. Rep. 393; *Bacon v. Burnham*, 37 N. Y. 614, 616; *Cogswell v. Hayden*, 5 Oreg. 22; *Aiken v. Barkley*, 2 Speer L. 747, 42 Am. Dec. 397.

But in *Hagerthy v. Phillips*, 83 Me. 336, 22 Atl. 223, A, being in financial straits, made a note to his own order, signed by his firm as makers and indorsed by him, and procured three of his friends to indorse the same with him

better view is that an agreement to become accommodation indorsers for another, in the absence of other circumstances, of itself implies an agreement to share the loss equally.<sup>31</sup>

**§ 1263. Release or inequitable dealing with one co-surety partially discharges others.**

Each of several co-sureties is in legal effect as against the others a principal for his proportion of the debt and a surety as to the rest, and a release of one is therefore a release of one who is in part a principal. The same is true where several co-debtors are all principals. In both cases as to part of the debt as between one another each is a principal and as to part he is a surety. If the law of suretyship is logically followed, releasing or giving time to one co-surety or to one of several principal debtors, will discharge the others in respect to the portion of the debt as to which the party released or given time to is a principal. As has been previously seen,<sup>32</sup> the law of co-debtors is old, that of principal and surety is modern, and the old law that a co-debtor who is a principal as to part is not discharged by giving time to a co-principal still persists;<sup>33</sup> although if they are bound jointly or jointly and severally a release or any absolute discharge of one discharges the others.<sup>34</sup> But in the case of co-sureties, the equitable principles of suretyship are observed, and accordingly each must be treated as between himself and his co-

contract in so many words to sign as co-sureties. It was sufficient if it appeared, taking all the circumstances into account, that that was the nature of the liability which as between themselves the parties intended to assume and did assume. *Clapp v. Rice*, 13 Gray, 403, 74 Am. Dec. 639; *Mansfield v. Edwards*, 136 Mass. 15, 49 Am. Rep. 1; *Mulcare v. Welch*, 160 Mass. 58, 35 N. E. 97; *Hagerthy v. Phillips*, 83 Me. 336, 22 Atl. 223; *Macdonald v. Whitfield*, 8 App. Cas. 733."

<sup>31</sup> *Whitehouse v. Hanson*, 42 N. H. 9; *Love v. Wall*, 1 Hawks, 313; *Daniel v. McRae*, 2 Hawks, 590, 11 Am. Dec. 787; *Richards v. Sims*, 1 Dev. & B.

48; *Douglass v. Waddle*, 1 Oh. 413, 422, 13 Am. Dec. 630; *Marquardt's Est.*, 251 Pa. 73, 95 Atl. 917; *United States Bank v. Beirne*, 1 Gratt. 234, 269, 42 Am. Dec. 551.

<sup>32</sup> *Supra*, § 339.

<sup>33</sup> Nor can a co-principal who has paid the portion of the obligation, which, as between himself and the other co-principals, he should pay demand that the creditor shall thereafter treat him as a surety. *Fitzgerald v. Nolan*, 102 Iowa, 283, 71 N. W. 224; *Jump v. Johnson*, 12 Ky. L. Rep. 100, 135 S. W. 343. But see *supra*, § 1258.

<sup>34</sup> See *supra*, §§ 333, 334.

The problem is somewhat complicated by the uncertainty which may exist as to the extent of a co-surety's right of contribution against another co-surety. Where there are a number of co-sureties, the ultimate amount which one who has paid more than his share can recover from another co-surety, depends on whether the co-sureties are solvent.<sup>40</sup> The extent, therefore, to which an injured co-surety is discharged from liability to the creditor will depend on whether all the co-sureties are solvent, since a discharge of a solvent co-surety injures another co-surety in proportion to the number of solvent co-sureties who still remain liable.<sup>41</sup>

A creditor who discharges one co-surety either in full or in part, may reserve his right against a co-surety either for the entire claim,<sup>42</sup> or for the portion equitably due from such co-surety.<sup>43</sup> And where a co-surety, jointly liable with others, has been released only as to his proportion of the debt, courts seek to construe the agreement as reserving the creditor's right as against other co-sureties for their proportion.<sup>44</sup>

575; *Dunn v. Slee*, 1 Moore, 2 Holt N. P. 399; *Gosserand v. Lacour*, 8 La. Ann. 75; *Ide v. Churchill*, 14 Ohio St. 372. But see *Greenwood v. Francis*, [1899] 1 Q. B. 312.

<sup>40</sup> See *infra*, §§ 1271, 1277.

<sup>41</sup> *Dodd v. Winn*, 27 Mo. 501; *Wetmore & Morse Granite Co. v. Ryle* (Vt. 1919), 107 Atl. 109.

<sup>42</sup> *Deering v. Moore*, 86 Me. 181, 29 Atl. 988; *Morgan v. Smith*, 70 N. Y. 537.

<sup>43</sup> *Hood v. Hayward*, 124 N. Y. 1, 26 N. E. 331.

<sup>44</sup> *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Smith v. State*, 46 Md. 617; *State v. Matson*, 44 Mo. 305; *Massey v. Brown*, 4 S. Car. 85.

## CHAPTER XXXV

### SURETIES' RIGHTS AND REMEDIES

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#### § 1264. Sureties' equitable rights.

Though a creditor is generally entitled to resort to any securities or obligations which he holds in the manner which may seem most to his advantage, it is the duty of the court, especially a court of equity, to adjust the rights of the parties so far as possible, so that the ultimate result shall accord with the equitable position of the parties. The manner by which this is accomplished is by the enforcement of the equitable principles of (1) subrogation of the creditor; (2) reimbursement of a surety.



pal debtor of whatever loss the surety has suffered from his suretyship; (3) exoneration by the principal debtor of the surety from his liability to the creditor before it has been enforced against him, and (4) contribution among several sureties.

### § 1265. Subrogation.

Subrogation is generally understood to mean putting one to whom a right does not legally belong in the position of the legal owner of the right. Sometimes, however, subrogation may involve the creation of a new right in favor of the party entitled to be subrogated, not the enforcement of the original right, for sometimes the original right has been cancelled by payment or otherwise, before subrogation takes place, and moreover the party subrogated generally enforces his claim in his own name without joining the creditor as a party defendant. But the original right measures the extent of the new right. Suretyship does not furnish the only application of the doctrine, but it furnishes the commonest one. A surety who has paid the debt is entitled to the right for the purpose of charging property or persons equitably bound to pay the debt before himself. The justice of the principle will be apparent if it is observed that in this way the creditor is denied the power of throwing the ultimate payment of the debt in one way or another as suits his caprice. Subrogation does not depend upon contract, but on the equities of the situation.<sup>1</sup> Therefore, a surety who did not become such at the request of the principal, and who has no privity of contract with him, is not thereby deprived of subrogation on payment of the debt.<sup>2</sup>

<sup>1</sup> *Duncan v. North and South Wales Bank*, 6 App. Cas. 1; *Ohmer v. Boyer*, 89 Ala. 273, 7 So. 663; *Talbot v. Wilkins*, 31 Ark. 411; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373; *Bishop v. Rowe*, 71 Me. 263; *Stevens v. King*, 84 Me. 291, 24 Atl. 850; *Amory v. Lowell*, 1 Allen, 504; *Stewart v. Parcher*, 91 Minn. 517, 98 N. W. 650; *Union, etc., Banking Co. v. Peters*,

72 Miss. 1058, 18 So. 497, 30 L. R. A. 829; *Philbrick v. Shaw*, 61 N. H. 356; *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 78 N. E. 179; *Moring v. Privott*, 146 N. C. 558, 60 S. E. 509; *In re Hoge's Estate*, 188 Pa. 527, 533, 41 Atl. 621, 1119; *Royalton Nat. Bank v. Cushing*, 53 Vt. 321.

<sup>2</sup> *Howard v. Burns*, 279 Ill. 256, 116 N. E. 703; *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373; *Matthews v. Aikin*, 1 N. Y. 595; *Bishop v. Rowe*, 71

**§ 1266. The surety is entitled to be subrogated held by the creditor.**

On paying the debt the surety is entitled to be subrogated to securities held by the creditor.<sup>3</sup> The equities of the right is shown by the fact that it is immaterial whether the securities in question were given after the contract was entered into.<sup>4</sup> Or that the surety was ignorant of the existence of security at that time.<sup>5</sup> Nor is the right confined to ordinary kinds of collateral security. One who has entered into a contract to purchase land on paying the latter's obligation, the vendor's lien on the land.<sup>6</sup> So if the creditor has a lien to secure

Me. 263; *Burns v. Huntington Bank*, 1 Pen. & W. 395.

<sup>3</sup> *Yonge v. Reynell*, 9 Hare, 809; *Fawcetts v. Kimmey*, 33 Ala. 261; *Beaver v. Slanker*, 94 Ill. 175; *Howard v. Burns*, 279 Ill. 256, 116 N. E. 703; *Josselyn v. Edwards*, 57 Ind. 212; *Rand v. Barrett*, 66 Iowa, 731, 24 N. W. 530 (but see *Bockholt v. Kraft*, 78 Iowa, 661, 43 N. W. 539); *Storms v. Storms*, 3 Bush, 77; *Hardy Buggy Co. v. Paducah Banking Co. (Ky.)*, 210 S. W. 452; *Interstate Trust & Co. v. Young*, 135 La. 465, 65 So. 611; *Maine Central R. v. National Surety Co.*, 113 Me. 465, 94 Atl. 929, L. R. A. 1916 A. 881; *Torp v. Gulseth*, 37 Minn. 135, 33 N. W. 550; *Taylor v. Tarr*, 84 Mo. 420; *Guthrie v. Ray*, 36 Neb. 612, 54 N. W. 971; *Ætna Ins. Co. v. Thompson*, 68 N. H. 20, 40 Atl. 396, 73 Am. St. Rep. 552; *Young v. Vough*, 23 N. J. Eq. 325; *State Bank v. Smith*, 155 N. Y. 185, 49 N. E. 680; *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684, (but see *Browning v. Porter*, 116 N. C. 62, 20 S. E. 961); *Wills v. Fuller (Okl.)*, 150 Pac. 693; *Gossin v. Brown*, 11 Pa. 527; *Klopp v. Lebanon Bank*, 46 Pa. 88; *Beaver Trust Co. v. Morgan*, 259 Pa. 567, 103 Atl. 367; *Lowndes v. Chisholm*, 2 McC. Ch. 455, 16 Am. Dec. 667; *James v. Jaques*, 26 Tex. 320, 82 Am. Dec. 613; *National Bank v.*

*Cushing*, 53 Vt. 321; 17 Ir. Ch. 251. *Cf. Innes & Co.*, 225 Fed. 618.

<sup>4</sup> *Brandon v. Brandon*, 524; *Lake v. Brutton*, 440; *Havens v. Willis*, 3 N. E. 313; *Riverside*, 11 N. Y. S. 519; *Scott v. Meigs*, 169; *Scott v. (Ir.)*, 778.

<sup>5</sup> *Mahew v. Crickett*, 8 D. Lake v. Brutton, 8 D. Duncan, etc., Co. v. Wales Bank, 6 App. McLeod, 3 Ired. Eq. Bush, 18 Oh. St. 376; 17 W. Va. 474; *Scott v. (Ir.)*, 778. The right to securities given after the contract, as well as to the securities held by the creditor at the time the surety became bound.

<sup>6</sup> *Ballew v. Roler*, 1 N. E. 976; *Highland v. Adm.*, 13 Ky. L. Rep. 866; *Tuck v. Calver*, 60 Myres v. Yapple, 60 Mich. 536; *Torp v. Gulseth*, 37 N. W. 550; *Smith v. Smith*, 447; *Fulkerson v. Brutton*, 371; *Ex parte Pettillo*, 8 Stenhouse v. Davis, 8 Deitzler v. Mishler, 37 v. Galliher, 10 Lea, 23; *v. Hatcher's Exrs.*, 1 R.

which the surety is liable, the latter on paying the debt is subrogated to the lien;<sup>7</sup> as he is likewise to the creditor's right against a fund held by the State for the security of creditors of the principal debtor.<sup>8</sup> So the sureties of a sheriff who have been forced to satisfy his liability to the owner of property which he had wrongly seized for the debt of a third party, succeed to the owner's right to reclaim the property or its value.<sup>9</sup>

**§ 1267. The surety is subrogated to intangible advantages of the creditor.**

Not only is a surety who has paid the debt subrogated to the creditor's claim against property of any kind held as security, but also to other advantages of the creditor in enforcing his claim. Thus a surety for a debtor of the Government on payment of the debt is entitled to the same priority as the Government.<sup>10</sup> So if the sureties of a trustee are made liable and have satisfied those injured by a breach of trust, they are subrogated both to the trustee's rights and to those of the *cestuis que trust* against those who participated in the wrongful acts.<sup>11</sup>

<sup>7</sup> So in the case of a corporation's lien on its stockholder's shares; *Young v. Vough*, 23 N. J. Eq. 325; *Klopp v. Lebanon Bank*, 46 Pa. 88; *Petersburg Savings & Ins. Co. v. Lumsden*, 75 Va. 327; a vendor's lien on land; *Lang v. Constance*, 20 Ky. L. Rep. 502, 46 S. W. 693; *Ellis v. Roscoe*, 4 Baxter, 418; *Ussell v. Mack*, 4 Humph. 319, 40 Am. Dec. 648. (But see *Allen v. Caylor*, 120 Ala. 251, 24 So. 512, 74 Am. St. Rep. 31.) Statutory liens of various kinds. *Turner v. Teague*, 73 Ala. 554; *Watts v. Eufaula Bank*, 76 Ala. 474; *Cummings v. May*, 110 Ala. 479, 20 So. 307; *Singleton v. United States & Guaranty Co.*, 195 Ala. 506, 70 So. 169; *Richeson v. Crawford*, 94 Ill. 165, 101 Ill. 351; *Hook v. Richeson*, 115 Ill. 431, 5 N. E. 98; *McCoy v. Wood*, 70 N. C. 125; *Barger v. Buckland*, 28 Gratt. 850.

But a surety on a bond given to discharge an admiralty lien, will not on paying the bond be subrogated to the lien, for that was discharged when the bond was given. *The Robertson*, 8 Biss. C. C. 180.

<sup>8</sup> *National Surety Co. v. Berggren*, 126 Minn. 188, 148 N. W. 55.

<sup>9</sup> *Skiff v. Cross*, 21 Iowa, 459; *Philbrick v. Shaw*, 61 N. H. 356.

<sup>10</sup> *In re Churchill*, 39 Ch. Div. 174; *United States v. Herron*, 20 Wall. 251, 22 L. R. A. 275; *Richeson v. Crawford*, 94 Ill. 165; *Bolts' Estate*, 133 Pa. 77, 19 Atl. 303. On the same principle a surety was subrogated to a right of priority of the creditor against an insolvent railroad company in *Love v. North American Co.*, 229 Fed. 103, 143 C. C. A. 379.

<sup>11</sup> *Richeson v. Crawford*, 94 Ill. 165; *Wheeler v. Hawkins*, 116 Ind. 515, 19

### § 1268. Subrogation to rights of the creditor which legally destroyed by the surety's payment

Under a narrow view taken by the English courts held that a surety could not be subrogated to the rights of the creditor which were legally destroyed by the debt. That is, the advantage which the creditor has as a bond creditor, or a judgment creditor enure to the benefit of the surety, since his payment satisfied the bond or the judgment.<sup>12</sup> And this rule followed more or less completely in a few of the States.<sup>13</sup> As subrogation is an equitable doctrine seems no difficulty in keeping alive for the benefit of the surety an obligation which has been satisfied at the refusal of equity to allow a legal defence its operation when injustice will thereby be caused, is maintained. This result has been achieved in England by stating that the same principle is largely adopted in the United

N. E. 470; *Blake v. Traders' Nat. Bank*, 145 Mass. 13, 12 N. E. 414; *Wernecke v. Kenyon*, 66 Mo. 275; *Clark v. First Bank of Harrisonville*, 57 Mo. App. 277; *Brown v. Houck*, 41 Hun, 16; *Bunting v. Ricks*, 2 Dev. & B. Eq. 130, 32 Am. Dec. 699; *Thompson v. Humphrey*, 83 N. C. 416; *Rhame v. Lewis*, 13 Rich. Eq. 269; *Edmunds v. Venable*, 1 Pat. & H. 121; *Pinckard v. Woods*, 8 Gratt. 140.

<sup>12</sup> *Jones v. Davis*, 4 Russell, 277; *Armitage v. Baldwin*, 5 Beav. 278; *Dowbiggen v. Bourne*, 2 Y. & C. Ex. 462.

<sup>13</sup> *Whittier v. Heminway*, 22 Me. 238, 38 Am. Dec. 309; *Adams v. Drake*, 11 Cush. 504; *Holmes v. Day*, 108 Mass. 563; *New Bedford Savings Inst. v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289; *Frevert v. Henry*, 14 Nev. 191; *Moore v. Campbell*, 36 Vt. 361.

<sup>14</sup> *Mercantile Law Amendment Act*, 19-20 Victoria, c. 97, Sec. 5.

<sup>15</sup> *Schindelholz v. Cullum*, 55 Fed. 885, 889, 5 C. C. A. 293, 12 U. S. App. 242; *Bragg v. Patterson*, 85 Ala. 233, 4 So. 716 (statutory); *Talbot v.*

*Wilkins*, 31 Ark. 411, *v. Riehl*, 127 Cal. 368, 762, 78 Am. St. Rep. 609; *Godwin*, 2 Del. Ch. 101; *Wilson*, 4 Del. Ch. 101; *Clark*, 101 Ga. 214 (statutory); *Rice v. Richmond*, 68 Ind. 130; *Traylor*, 130 Ind. 130; *N. E. 486*, 16 L. R. A. 101; *worth v. Pearson*, 53 I. 818; *Schleissman v. La.* 338, 33 N. W. 459; *129 Kans.* 200 (statute); *Schram*, 73 Kan. 368; *Roberts v. Bruce*, 12 932, 15 S. W. 872; *Co. 16 La. Ann.* 108, 79 *Wallace v. Jones*, 110 Atl. 769 (statutory); *St. 33 Mich.* 183; *Kimm Minn.* 265, 9 N. W. 54; *Smith*, 57 Miss. 54; *Benne v. Schnecko*, 10 S. W. 82; *Bledsoe v. N. 521*; *Rice v. Hearn*, 1 13 S. E. 895; *Fowle v. N. C.* 537, 84 S. E. 8

though the procedure in the various States which is essential for the protection of the surety is not uniform.

**§ 1269. Subrogation is allowed only when the debt is fully paid.**

The surety's right of subrogation does not arise until the debt is paid in full. A partial payment of the debt even though it may be of the full amount for which the surety has bound himself, will not entitle him to subrogation to the creditor's rights and securities.<sup>16</sup> But "while it is true that the rights of the sureties to the remedies of the principal do not become complete and are incapable of present enforcement until they shall have discharged their principal's obligation, yet their right becomes an inchoate one as soon as they have entered into the relation of suretyship; and their equitable assignment of their principal's rights and remedies, when completed by their performance of his obligation, relates back, as against each other and their principal, to that earlier time."<sup>17</sup> And all persons who have in the meantime received any securities or payments from either party to the principal contract, with notice of the facts and of the surety's responsibilities and consequent rights, must in equity hold them for his benefit."<sup>18</sup>

Trusdell, 44 N. J. L. 597 (statutory); McKenna v. Corcoran, 70 N. J. Eq. 627, 61 Atl. 1026; Brewer v. Franklin Mills, 42 N. H. 292; Wilson v. Burney, 8 Neb. 39; Townsend v. Whitney, 75 N. Y. 425; City Trust Co. v. American Brewing Co., 70 N. Y. App. D. 511, affirmed, 174 N. Y. 486, 67 N. E. 62; Peters v. McWilliams, 36 Oh. St. 155 (statutory); Cottrell's App., 23 Pa. 294; Richter v. Cummings, 60 Pa. 441; Bolts's Estate, 133 Pa. 77, 19 Atl. 303; Garvin v. Garvin, 27 S. C. 472, 4 S. E. 148; M'Nairy v. Eastland, 10 Yerg. 310; Krall v. Campbell Printing Press Co., 79 Tex. 556, 15 S. W. 565.

<sup>16</sup> Cooper v. Jenkins, 32 Beav. 337; Peoples v. Peoples Bros., Inc., 254 Fed. 489; Schoonover v. Allen, 40

Ark. 132; Rice v. Morris, 82 Ind. 204; Swan v. Patterson, 7 Md. 164; Wilcox v. Fairhaven Bank, 7 Allen, 270; Musgrave v. Dickson, 172 Pa. 629, 33 Atl. 705, 51 Am. St. Rep. 765.

<sup>17</sup> Labbe v. Bernard, 196 Mass. 551, 82 N. E. 688, 14 L. R. A. (N. S.) 457; citing Rice v. Southgate, 16 Gray, 142; Wood v. Lake, 62 Ala. 489; Lewis v. Faber, 65 Ala. 460; Conner v. Howe, 35 Minn. 518, 29 N. W. 314; McArthur v. Martin, 23 Minn. 74; Forbes v. Jackson, 19 Ch. D. 615. See also Stavrelis v. Zacharias, (N. H. 1919), 106 Atl. 306.

<sup>18</sup> Labbe v. Berrard, 196 Mass. 551, 82 N. E. 688, 14 L. R. A. (N. S.) 457; citing Norton v. Soule, 2 Greenl. 341; Atwood v. Vincent, 17 Conn. 575; Greene v. Ferrie, 1 Desaus. Eq.

### § 1270. Surety of a surety is entitled to subrogation.

The surety of a surety is entitled to the same right of subrogation to which the prior surety is entitled; for as to the subsequent surety, the prior one is a principal and the subsequent surety having paid the debt stands in the shoes of the prior surety, and, by right of the latter, in the shoes of the creditor.<sup>19</sup>

### § 1271. A surety is entitled to subrogation against a co-surety.

If one co-surety pays the debt he is generally held entitled to enforce by way of subrogation the creditor's right against co-sureties; being limited, however, in the enforcement of the right to the amount necessary to repay him for any excess beyond what as between himself and his co-sureties he ought to pay.<sup>20</sup> This principle, however, has not been universally recognized in the decisions.<sup>21</sup>

In effect the same result is thus achieved if the co-sureties are solvent as by enforcing contribution. Where, however,

164; *Drew v. Lockett*, 32 Beav. 499. See also *Empire State Surety Co. v. Cohen*, 93 N. Y. Misc. 299, 156 N. Y. S. 935.

<sup>19</sup> *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. See also *Hall v. Smith*, 5 How. 96, 12 L. Ed. 66.

<sup>20</sup> *Pratt v. Law*, 9 Cranch, 456, 3 L. Ed. 791, s. c. *sub nom.* *Campbell v. Pratt*, 5 Wheat. 429, 5 L. Ed. 126; *Reber v. Gundy*, 13 Fed. 53. *Dowdy v. Blake*, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88; *Sumner v. Rhodes*, 14 Conn. 135; *Simpson v. Gardiner*, 97 Ill. 237; *Schoenewald v. Dieden*, 8 Ill. App. 389; *Hall v. Hall*, 34 Ind. 314; *Koboliska v. Swehla*, 107 Iowa, 124, 77 N. W. 576; *Smith v. Latimer*, 15 B. Mon. 75; *Whitehead's Succ.*, 3 La. Ann. 396; *Henderson v. McDuffie*, 5 N. H. 38, 20 Am. Dec. 557; *Crafts v. Mott*, 4 N. Y. 603; *Vincent v. Logsdon*, 17 Ore. 284, 20 Pac. 429; *Ackerman's App.*, 106 Pa. 1 (overruling contrary intimations in earlier Pennsylvania cases. But

see *In re Hoge's Estate*, 188 Pa. 527, 533, 41 Atl. 621, 1119; *Haverford L. & B. Assoc. v. Fire Ass'n*, 180 Pa. 522, 37 Atl. 179, 57 Am. St. Rep. 657; *Stokes v. Hodges*, 11 Rich. Eq. 135; *Greenlaw v. Pettit*, 87 Tenn. 467, 11 S. W. 357; *Stebbins v. Willard*, 53 Vt. 665; *Dobyns v. Rawley*, 76 Va. 537.

<sup>21</sup> *Bartlett v. McRae*, 4 Ala. 688; *Hogan v. Reynolds*, 21 Ala. 56, 56 Am. Dec. 236; *Clark v. Warren*, 55 Ga. 575; *Montgomery v. Vickery*, 110 Ind. 211, 11 N. E. 38; *Frank v. Traylor*, 130 Ind. 145, 29 N. E. 486; *Walsh v. McBride*, 72 Md. 45, 19 Atl. 4; *Hammatt v. Wyman*, 9 Mass. 138; *Brackett v. Winslow*, 17 Mass. 153; *Bryant v. Smith*, 10 Cush. 169; *Adams v. Drake*, 11 Cush. 504; *Stanley v. Nutter*, 16 N. H. 22; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Booth v. Farmers' Bank*, 74 N. Y. 228; *Towe v. Felton*, 7 Jones (N. C.) 216; *Baldwin v. Merrill*, 8 Humph. 132; *Maxwell v. Owen*, 7 Coldw. 630.

the co-sureties are insolvent this is not the case. A right of contribution against an insolvent co-surety gives merely a provable claim for the amount due. Not so the right of subrogation. Where one of two sureties pays the debt in full and his co-surety is bankrupt, the surety who has paid is subrogated to the creditor's proof against the bankrupt's estate if already made, or if the creditor has not proved, the surety may prove for the full amount of the debt, being restricted, however, in the recovery of dividends to an amount equal to the share of the debt, which the bankrupt equitably ought to pay.<sup>22</sup> Any other rule would enable the creditor to vary the ultimate payments of the two sureties, for the creditor unquestionably can either prove against the bankrupt surety for the full debt, and then recover from the solvent surety the deficiency; or at his option sue the latter for the whole debt without proving against the bankrupt estate. If the solvent surety cannot then by subrogation prove for the full debt against the bankrupt estate, the ultimate situation of the parties will be varied according as the creditor chooses one or the other course.

#### § 1272. Security for several debts.

Where a surety pays his entire indebtedness he is entitled to subrogation to any right or security of the creditor exclusively applicable to that debt. But where the creditor holds security for several debts, payment of his entire obligation by a surety for one of those debts will not entitle him to subrogation to any part of the security until the creditor has satisfied all the debts to which the security was applicable.<sup>23</sup>

<sup>22</sup> *Ex parte* Stokes, De Gex, 618; *In re* Parker, [1894], 3 Ch. 400; Hess's Estate, 69 Pa. 272; *Pace v. Pace's Adm'r*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459. See also Federal Bankruptcy Act, Sec. 57 (i). But see *contra*—*Maxwell v. Heron*, 3 Ross, L. C. 129, s. c. *sub nom.* *Keith v. Forbes*, 3 Paton, 350; *Apperson v. Wilbourn*, 58 Miss. 439, 444; *New*

*Bedford Institution v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289.

<sup>23</sup> *Rice v. Morris*, 82 Ind. 204; *Welch v. Parran*, 2 Gill, 320; *Parker v. Mercer*, 7 Miss. 320, 38 Am. Dec. 438; *Mathews v. Switzler*, 46 Mo. 301 (compare *Allison v. Sutherlin*, 50 Mo. 274); *Grubbs v. Wysora*, 32 Gratt. 127. See also *National City Bank v. Zimmer, etc., Co.*, 132 Minn. 211,

### § 1273. Subrogation against a bankrupt principal surety for part of a debt.

It is obvious that if a surety pays the whole for which he is bound, he is entitled to be subrogated to the creditor's claim against a bankrupt principal, though the creditor has other claims against the principal not fully satisfied, he should not receive, and the surety received should not keep, the dividends of the claim against the principal. This principle has been extended to a bankrupt land,<sup>24</sup> and it is there held that "when a surety pays for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal pays in respect of that sum which the surety has paid. And similarly such a surety is entitled to subrogate to the ratable portion of the securities held by the creditor for the whole debt, to the exclusion of any right of the creditor to apply that portion to the balance of the debt. A distinction very difficult of application is to be made between a surety for part of the debt and a surety for the whole with liability limited to a fixed sum. In the latter case the surety is not subrogated to the dividends unless the debt is fully paid."<sup>25</sup> The English doctrine has been criticised, and is not generally followed in the United States. There is no equity on which to base the deprivation of the creditor of any of his legal rights until he has received full payment. To impute any intention of the sort to the surety involves the baldest fiction. If indeed the creditor

156 N. W. 265; *Patch v. First Nat. Bank*, 90 Vt. 4, 96 Atl. 423.

<sup>24</sup> The extended principle was first announced in *Ex parte Rushforth*, 10 Ves. 409.

<sup>25</sup> *Gray v. Seckham*, L. R. 7 Ch. App. 680.

<sup>26</sup> *Harmer v. Gibb*, [1911] Sc. Sess. Cas. 1341.

<sup>27</sup> *Ellis v. Emmanuel*, 1 Ex. D. 157; *In re Sass*, [1896] 2 Q. B. 12. The surety may by his contract with the creditor surrender this right. *Midland Banking Co. v. Chambers*, L. R. 4 Ch. 398.

<sup>28</sup> *Knaff v. Knoxville Co.*, 133 Tenn. 655, Ann. Cas. 1917 C. *Board of Health v. etc., Co.*, 137 La. 422 Cas. 1916 B. 1251 *of Banking v. Chels* 161 Mich. 691, 125 N. W. 351. But see *C. Neb.* 480, 160 N. W. German Ins. Co. v. etc., Co., 51 N. Y. M. S. 883.



with the surety that the total debt should not exceed the guaranteed amount, there would not only be such an equity, but the surety would be discharged altogether by the creditor's breach of contract if he permitted a greater indebtedness,<sup>29</sup> but this is not the situation supposed in the English cases.

#### § 1274. The surety's right of reimbursement.

It was customary formerly for sureties to take from the principal at whose request they entered into an obligation a counter-bond of indemnity, but it early became recognized that even in the absence of any express contract of indemnity the principal was bound impliedly. This was first so held in equity,<sup>30</sup> and later an implied contract was enforced at law.<sup>31</sup> Where there are several sureties who jointly pay the whole or part of the debt, the principal is under an implied obligation to them jointly, for the whole, as well as to each of them severally for the share he has paid.<sup>32</sup> The implied obligation to indemnify a surety matures only when he has been injured by being compelled to make payment of the debt;<sup>33</sup> but this principle has been extended generally so as to allow a surety who has given the creditor a negotiable instrument in payment of the debt to sue the principal though the negotiable instrument has not been paid.<sup>34</sup> The extension, however, is confined to negotiable

<sup>29</sup> *Supra*, §§ 1239 *et seq.*

<sup>30</sup> *Ford v. Stobridge*, Nelson Ch. 24. See also *Scot v. Stephenson*, 1 Lev. 71. In *Layer v. Nelson*, 1 Vernon, 456, the surety's right was rested on the custom of London.

<sup>31</sup> *Decker v. Pope*, cited in 1 Selwyn, N. P. (13th ed.), 91; *Toussaint v. Martinant*, 2 T. R. 100, 105; *Appleton v. Bascom*, 3 Metc. 169; and see cases on indemnity cited *infra, passim*.

<sup>32</sup> *Osborne v. Harper*, 5 East, 224; *Dussol v. Bruguere*, 50 Cal. 456; *Hull v. Myers*, 90 Ga. 674, 686, 16 S. E. 653; *Lombard v. Cobb*, 14 Me. 222, 224; *Clapp v. Rice*, 15 Gray, 557, 77 Am. Dec. 387; *Pearson v. Parker*, 3 N. H. 366; *Commonwealth v. Cox*, 36 Pa. 442.

But see *contra* *Kelby v. Steel*, 5 Esp. 194; *Gould v. Gould*, 8 Cow. 168.

<sup>33</sup> *Blanchard v. Blanchard*, 201 N. Y. 134, 94 N. E. 630, and see cases in the following notes.

<sup>34</sup> *Barclay v. Gooch*, 2 Esp. 571; *M'Kenna v. Harnett*, 13 Ir. L. Rep. 206; *Smith v. Pitts*, 167 Ala. 461, 466, 52 So. 402; *Bone v. Torry*, 16 Ark. 83; *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; *Mims v. McDowell*, 4 Ga. 182; *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Sapp v. Aiken*, 68 Ia. 699, 28 N. W. 24; *Riser v. Callen*, 27 Kan. 339; *Stubbins v. Mitchell*, 82 Ky. 535; *Green v. Anderson*, 19 Ky. 1187, 43 S. W. 195;

obligations. If other obligations are given to pay them before suing the principal for indemnity on the contract, however, a party may promise on maturity an obligation for which the promisee indemnify the promisee from liability. At least a contract of indemnity before payment of is dependent on the construction of the contract are broad enough to amount to an indemnity and not merely an indemnity against payment of liability, recovery will be allowed as soon as indemnified has incurred liability.<sup>36</sup> But even in the absence of words expressly guaranteeing from liability as distinguished from freedom from liability to enforce the obligation and compel the promisee to indemnify before payment of it by

§ 1275. The surety's right of exoneration.

The hardship upon a surety of compelling the creditor and thereafter seek redress against the principal is in some degree mitigated by equity which, as stated in the preceding section, enforces specifically the principal's implied obligation to indemnify the surety—allowing the surety to sue the principal on maturity of the obligation and compelling that the principal shall pay the creditor, the

*Doolittle v. Dwight*, 2 Met. 561; *Hearne v. Keath*, 63 Mo. 84; *Chapman v. Garber*, 46 Neb. 16, 19, 64 N. W. 362; *Pearson v. Parker*, 3 N. H. 366; *Rodman v. Hedden*, 10 Wend. 498; *Howe v. Buffalo Co.*, 37 N. Y. 297; *Morrison v. Berkey*, 7 S. & R. 238, 246; *Peters v. Barnhill*, 1 Hill (S. C.), 234; *Bell v. Boyd*, 76 Tex. 133, 13 S. W. 232. But see *Maxwell v. Jameson*, 2 B. & Ald. 51; *Brisendine v. Martin*, 1 Ired. 286.

<sup>36</sup> *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & Ald. 51; *Romine v. Romine*, 59 Ind. 346; *Cumming v. Hackley*, 8 Johns, 202; *Brisendine v. Martin*, 1 Ired. 286; *Morrison v. Berkey*, 7 S. & R. 238; *Peters v. Barnhill*, 1 Hill (S. C.), 234, 236, 237;

*Boulware v. Robins*, 10 Am. Dec. 117.

<sup>37</sup> *Gage v. Lewis*, 10 D. & W. 117; *Hill v. Hunt*, 3 D. & W. 117; *Teer*, 21 U. Can. Q. 17, 24; also *infra*, § 1275.

<sup>38</sup> *Lacy v. Hill*, 10 D. & W. 117; *In re Law Guaranty Co.*, [1914] 2 Ch. 617; *First Nat. Ins. Co. v. Rawson*, 100 Fed. 541, 87 Fed. 23; *194 Pa. 94*, 44 Atl. 460. the following note: *Salvage Assoc.*, 100 Fed. 541, 87 Fed. 23; 194 Pa. 94, 44 Atl. 460.

ing the surety;<sup>38</sup> and where the principal has expressly or impliedly promised the surety to pay the debt, a breach of this promise enables the surety to recover as damages the amount of the debt, even though he has not paid it, since he has been wrongfully subjected to liability.<sup>39</sup>

A co-surety has an equitable right to exact from another surety payment by the latter of his share of the debt. In some decisions it is required that the surety seeking relief shall have had the claim against him established by judgment or decree of court;<sup>40</sup> in others no such requirement is made.<sup>41</sup>

**§ 1276. The surety's right to compel the creditor to resort first to security, or to the principal debtor.**

"In their main features, the English common law and the Roman Civil law differed radically from each other touching the right of the surety to require the creditor to proceed against the principal debtor or the security the debtor had given the creditor before coercing payment by the surety. In the earlier period of Roman jurisprudence, the right of the surety to compel the creditors to resort first to the principal to collect

<sup>38</sup> *Ranelaugh v. Hayes*, 1 Vern. 189; *Lloyd v. Dimmack*, 7 Ch. D. 398; *Southwestern Surety Ins. Co. v. Wells*, 217 Fed. 294; *Merwin v. Austin*, 58 Conn. 22, 24, 18 Atl. 1029, 7 L. R. A. 84; *Hayden v. Thrasher*, 18 Fla. 795; *Macfie v. Kilauea Sugar Co.*, 6 Hawaiian, 440; *Street v. Chicago, etc., Storage Co.*, 157 Ill. 605, 41 N. E. 1108; *Keach v. Hamilton*, 84 Ill. App. 413; *Hoppes v. Hoppea*, 123 Ind. 397, 24 N. E. 139; *Morrison v. Poynts*, 7 Dana, 307, 308, 32 Am. Dec. 92; *Meador v. Meador*, 88 Ky. 217, 10 S. W. 651; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Bellows v. Lovell*, 5 Pick. 307, 310; *Comstock v. Corbin*, 191 Mich. 639, 158 N. W. 106; *Huey v. Pinney*, 5 Minn. 310, 322 (statutory); *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Holcombe v. Fetter*, 70 N. J. Eq. 300, 67 Atl. 1003; *Marsh v. Pike*, 10 Paige, 595; *Ferrer v. Barrett*, 4 Jones Eq. 455;

*Hale v. Wetmore*, 4 Oh. St. 600; *Ardesco Co. v. North American Oil Co.*, 66 Pa. 375; *Norton v. Reid*, 11 S. Car. 593; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684; *Saylor v. Saylor*, 3 Heisk. 525 (but see *Gilliam v. Esselman*, 5 Sneed, 86); *Bishop v. Day*, 13 Vt. 81; *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. 172; *Carr v. Davis*, 64 W. Va. 522, 63 S. E. 326; *Harris v. Newell*, 42 Wis. 687, 691; *Dobie v. Fidelity, etc., Co.*, 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135; *Mathews v. Saurin*, L. R. 31 Ir. 181.

<sup>39</sup> See *infra*, § 1408.

<sup>40</sup> *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *McKenna v. Witherspoon*, 2 Rich. Eq. 20.

<sup>41</sup> *Hyde v. Tracy*, 2 Day, 491; *Hodgson v. Baldwin*, 65 Ill. 532; *Morrison v. Poynts*, 7 Dana, 307, 32 Am. Dec. 92; *Reeder v. Union Trust Co.*, 26 Pa. Dist. Ct. 833.

his demand appears to have been well established. The rule was gradually departed from. Justinian stored it, and from his time the doctrine was recognized throughout the empire. It has been the prudence of many of the nations of Europe.<sup>42</sup> It secured a footing in England. There the common law has prevailed from the earliest times. The common law is that the surety must pay and seek reimbursement from the principal or out of the securities the latter has. This was always the rule in courts of law, and in bankruptcy proceedings a rule somewhat to that of the Civil law grew up. In all such cases required that the creditor should be saved from loss, expense, and from all risk.<sup>43</sup> When the object of an appeal to equity was to compel the creditor to release his collaterals in his hands before proceeding against the principal, the foundation of equitable relief was the inability of the creditor himself to enforce such collateral after paying the debt, or the possibility that the creditor by some act had lost his value or destroyed the legality. The mere fact that the creditor held security for the debt did not entitle the creditor to equity for a decree that the creditor look for reimbursement from the security for his pay. In such a case the surety must pay himself by paying the claim, and by being substituted in the creditor's rights to the security."<sup>44</sup> In some cases, however, the right of the surety to compel the creditor

<sup>42</sup> *Bingham v. Mears*, 4 N. D. 437, 440, 61 N. W. 808, 27 L. R. A. 257, citing *Burge, Sur.*, pp. 329-341; *Hayes v. Ward*, 4 Johns. Ch. 123, 133, 8 Am. Dec. 554. See also the German Civ. Code, §§ 771, 772.

<sup>43</sup> *Ibid.*, citing 1 Brandt, *Surety*, § 238; 24 Am. & Eng. Enc. Law, p. 799, and cases.

<sup>44</sup> *Ibid.* See also *Davis v. Patrick*, 57 Fed. 909, 6 C. C. A. 632, 12 U. S. App. 629; *Wilds v. Attix*, 4 Del. Ch. 253, 258; *Thorn v. Pinkham*, 84 Me. 101, 104, 24 Atl. 718, 30 Am. St. Rep. 335; *Allen v. Woodard*, 125 Mass. 400, 28 Am. Rep. 250; *Lee v.*

*Griffin*, 31 Miss. (1854) 100; *Co. v. Smith*, 52 Me. 100; *v. Farmers' State Bank*, 101 N. W. 252; *Freehold v. Brick*, 37 N. J. 100; *Nat. Bank v. Wood*, 100 Am. Rep. 66; *Stein v. Hun*, 368, 35 N. Y. 100; *v. Portland Sav. B.*, 64 Pac. 388; *Erwin v. De Nemours Power Co.*, 156 S. W. 100; *Steppenson* (Tex. S. W. 121; *Montrou*, 21 Up. Can. C. P.

the security before suing the surety has been more broadly stated or applied.<sup>45</sup> How far the surety may affect the creditor's position by a request *in pais* to sue the principal has been previously considered.<sup>46</sup> In view of the attitude of many American courts on the latter point it is not surprising that it has been held or suggested in a number of cases that on application to a court of equity by a surety, after maturity of the debt, the court will order the creditor to sue the principal debtor,<sup>47</sup> but no such right is universally conceded.<sup>48</sup>

### § 1277. Contribution.

The right of one of two or more sureties who has paid more than the share which as between himself and his co-sureties, he ought to pay, to recover the excess from them, was early allowed in equity (though not at law) on general principles of justice,<sup>49</sup> and has been continuously recognized subsequently. At law the right was first recognized about the end of the eighteenth century,<sup>50</sup> and has since become well established. At law, however, the plaintiff can generally recover but an aliquot share from a co-surety,<sup>51</sup> and each co-

<sup>45</sup> *Re Babcock*, 3 Story, 393; *Richards v. Osceola Bank*, 79 Ia. 707, 713, 45 N. W. 294; *Philadelphia & Reading R. v. Little*, 41 N. J. Eq. 519, 7 Atl. 356; *Kidd v. Hurley*, 54 N. J. Eq. 177, 33 Atl. 1057; *Wright v. Austin*, 56 Barb. 13; *Sheppard v. Conley*, 9 N. Y. S. 777; *Polk v. Gallant*, 2 Dev. & B. Eq. 395; *Egerton v. Alley*, 6 Ired. Eq. 188; *Hatcher's Adm. v. Hatcher's Ex.*, 1 Rand. 53.

<sup>46</sup> *Supra*, § 1236.

<sup>47</sup> *Re Babcock*, 3 Story, 393; *Rice v. Downing*, 12 B. Mon. 44, 45; *Sasscer v. Young*, 6 Gill & J. 243, 248; *Whitridge v. Durkee*, 2 Md. Ch. 442; *Bellows v. Lovell*, 5 Pick. 307, 310; *King v. Baldwin*, 17 Johns. 384, 390, 8 Am. Dec. 415, 2 Johns. Ch. 554, 561; *Bingham v. Mears*, 4 N. Dak. 437, 61 N. W. 808, 27 L. R. A. 257; *Hogaboom v. Herrick*, 4 Vt. 131, 134; *Harris v. Newell*, 42 Wis. 687, 691. In many of these cases

the qualification is made that indemnity for costs of the suit against the principal shall be given by the surety.

<sup>48</sup> *Woffington v. Sparks*, 2 Ves. 569; *First Nat. Bank v. Wood*, 71 N. Y. 405, 411, 27 Am. Rep. 66; *Meade v. Grigsby's Adm.*, 26 Gratt. 612; *Penn v. Ingles*, 82 Va. 65. But where the creditor goes into equity to enforce his claim against principal and sureties, the burden will be laid first on the principal. *Penn v. Ingles, supra*; *Paxton v. Rich*, 85 Va. 378.

<sup>49</sup> *Wormleighton and Hunter's Case*, *Godbolt*, 243; *Fleetwood v. Charnock*, *Nelson*, 10; *Peter v. Rich*, 1 Reports in Ch. 34.

<sup>50</sup> *Turner v. Davies*, 2 Esp. 479; *Cowell v. Edwards*, 2 B. & P. 268.

<sup>51</sup> *Cowell v. Edwards*, 2 B. & P. 268; *Brown v. Lee*, 6 B. & C. 689, 697; *United States Fidelity & Co. v. Naylor*, 237 Fed. 314, 323, 151

surety from whom contribution is claimed separately.<sup>52</sup> In equity, however, insolvent those residing outside the jurisdiction<sup>54</sup> are not

C. C. A. 20; *Chipman v. Morrill*, 20 Cal. 130; *Trego v. Cunningham's Est.*, 267 Ill. 367, 108 N. E. 350; *Morrison v. Poynts*, 7 Dana, 307, 308, 32 Am. Dec. 92; *Young v. Lyons*, 8 Gill, 162, 165; *Griffin v. Kelleher*, 132 Mass. 82; *Dodd v. Winn*, 27 Mo. 501; *Stothoff v. Dunham*, 19 N. J. (4 Harrison) 181; *Easterly v. Barber*, 66 N. Y. 433; *Adams v. Hayes*, 120 N. C. 383, 386, 27 S. E. 47; *Fischer v. Gaither*, 32 Oreg. 161, 51 Pac. 736; *Croft v. Moore*, 9 Watts, 451, 453; *Aikin v. Peay*, 5 Strob. 15 (but see *Harris v. Ferguson*, 2 Bail. 397, 401); *Riley v. Rhea*, 5 Lea, 115; *Gross v. Davis*, 87 Tenn. 226, 230, 11 S. W. 92, 10 Am. St. Rep. 635; *Acers v. Curtis*, 68 Tex. 423, 4 S. W. 551; *Tarr v. Ravenscroft*, 12 Gratt. 642, 652. In some States, however, courts of law like courts of equity disregard insolvent sureties. *Couch v. Terry's Adm.*, 12 Ala. 225 (statutory); *McAllister v. Irwin's Est.*, 31 Col. 253, 254, 73 Pac. 47; *Michael v. Allbright*, 126 Ind. 172, 25 N. E. 902; *Sanders v. Herndon*, 122 Ky. 760, 765, 93 S. W. 14, 5 L. R. A. (N. S.) 1072, 121 Am. St. Rep. 493 (statutory); *Van Petten v. Richardson*, 68 Mo. 379 (statutory); *Cass v. Stearns*, 66 N. H. 301, 303, 23 Atl. 80; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. 680; *Wetmore & Morse Granite Co. v. Ryle* (Vt.), 107 Atl. 108; *Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294 (statutory).

<sup>52</sup> *Chipman v. Morrill*, 20 Cal. 130; *Voss v. Lewis*, 126 Ind. 155, 25 N. E. 892; *Powell v. Matthis*, 4 Ired. 83, 40 Am. Dec. 427; *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47; *Burnham v. Choat*, 5 Up. Can. Q. B. (O. S.) 736.

<sup>53</sup> *Peter v. Rich*, 1 Reports in Ch. 34; *Lowe v. Dixon*, 16 Q. B. D. 455,

458; *United States v. Naylor*, 237 Fed. C. C. A. 20; *W. Kahn*, 93 Ala. 201, 4 v. Riehl, 127 Cal. 78 Am. St. Rep. 60 v. St. Paul Ins. Co. *Hayden v. Thrash* 805; *Trego v. Cur* 267 Ill. 367, 108 N v. Pence, 10 Ind. A. 484; *Greene v. A* 216, 43 S. W. 194; *Donahue*, 104 Ky. Young v. Lyons, 8 v. Kelleher, 132 Ma v. Goulden, 52 Mic 731; *Comstock v.* 629, 158 N. W. 10 27 Mo. 501, 502; 44 Neb. 610, 63 N Wyckoff, 42 N. J. 679; *Jones v. Blau* 115, 51 Am. Dec. George, 2 Rich. Eq. 87 Tenn. 226, 230, Am. St. Rep. 635 68 Tex. 423, 425, 4 v. Harrington, 18 v. Duncan (Va.), 9 blom v. Johnston, 9 Pac. 972; *Faurot* 569, 57 N. W. 294 110 Wis. 276, 85 McDonaghs, Jr. R. Kelvey v. Davis, 1

<sup>54</sup> *United States v. Naylor*, 237 Fed. C. C. A. 20; *Secur* Paul Ins. Co., 50 v. Taylor, 5 Dana, 677; *Wood v. Lelan* 387; *Stewart v. G* 143, 17 N. W. 731; 51 N. H. 613; *Jones* Eq. 115, 51 Am.

the calculation. At law, moreover, in order to make out his case, a plaintiff seeking contribution need not allege or prove the insolvency of the principal debtor;<sup>55</sup> whereas in equity the insolvency of the principal must be alleged and proved or he must be joined as a party defendant,<sup>56</sup> and all solvent co-sureties within the jurisdiction must also be made parties.<sup>57</sup>

The right of contribution may frequently be given by express contract or by a contract implied in fact, but the existence of the right does not depend on such a contract. It, therefore, makes no difference as to the right to claim contribution that each of the sureties was ignorant that the other was also bound for payment of the debt;<sup>58</sup> and it is immaterial that sureties are bound by different contracts. If they are liable for the same debt, one of them who pays is entitled to contribution from the others.<sup>59</sup>

*Kenna v. George*, 2 Rich. Eq. 15; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. 680; *Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294.

<sup>55</sup> *Buckner's Adm. v. Stewart*, 34 Ala. 529; *Taylor v. Reynolds*, 53 Cal. 686; *Sloo v. Pool*, 15 Ill. 47; *Rankin v. Collins*, 50 Ind. 158; *Goodall v. Wentworth*, 20 Me. 322; *Mosely v. Fullerton*, 59 Mo. App. 143; *Smith v. Mason*, 44 Nev. 610, 63 N. W. 41; *Odlin v. Greenleaf*, 3 N. H. 270; *Lucas v. Curry's Ex'rs*, 2 Bail. 403. But see *contra*—*Bolling v. Doneghy*, 1 Duv. 220; *Glasscock v. Hamilton*, 62 Tex. 143.

<sup>56</sup> *Lawson v. Wright*, 1 Cox Eq. 275; *Couch v. Terry's Adm.*, 12 Ala. 225, 229; *Chrisman v. Jones*, 34 Ark. 73; *Johnson's Adm. v. Vaughn*, 65 Ill. 425; *Daniel v. Ballard*, 2 Dana, 296; *Byers v. McClanahan*, 6 Gill, & J. 250; *Stone v. Buckner*, 20 Miss. 73; *Allen v. Wood*, 3 Ired. Eq. 396; *Fischer v. Gaither*, 32 Oreg. 161, 51 Pac. 736; *Gross v. Davis*, 87 Tenn. 226, 230, 11 S. W. 92, 10 Am. St. Rep. 635.

<sup>57</sup> *Johnson's Adm. v. Vaughn*, 65 Ill. 425; *Young v. Lyons*, 8 Gill, 162;

*Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47; *Bruce v. Bickerton*, 18 W. Va. 342.

<sup>58</sup> *Muckenthaler v. Noller* (Kan.), 180 Pac. 453; *Warner v. Morrison*, 3 Allen, 566.

<sup>59</sup> *Deering v. Winchelsea*, 2 B. & P. 270; *In re Ennis*, [1893] 3 Ch. 238; *Dugger v. Wright*, 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48; *Powell v. Powell*, 48 Cal. 234; *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Stevens v. Tucker*, 87 Ind. 109; *Muckenthaler v. Noller* (Kan.), 180 Pac. 453; *Cobb v. Haynes*, 8 B. Mon. 137; *Stockmeyer v. Oertling*, 35 La. Ann. 467; *Craig v. Ankeney*, 4 Gill. 225; *Brooks v. Whitmore*, 142 Mass. 399, 8 N. E. 117; *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 641; *Young v. Shunk*, 30 Minn. 503, 16 N. W. 402; *Wood v. Williams*, 61 Mo. 63; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Unangst v. Roe*, 177 N. Y. S. 706; *Yawger v. American Surety Co.*, 212 N. Y. 292, 106 N. E. 64, L. R. A. 1915 D. 481; *Robinson v. Boyd*, 60 Oh. St. 57, 53 N. E. 494; *Thompson v. Dekum*, 32 Oreg. 506, 52 Pac. 517, 755; *Commonwealth v. Cox*, 36 Pa.

## § 1278. Nature and limits of

The obligation exists from the time of suretyship is entered into until after payment is made. It is that at the time of payment the surety contribute is no longer liable, where one of several joint sureties, or by another, or where the obligation is against one but not the others.

In order to entitle himself to reimbursement that a surety shall have paid as soon as, but not before, the creditor has borne the share which as between them he ought to bear.<sup>61</sup> The reason is that he has paid more than his share and has a right to contribution. By such payment he has released the creditor and hence they ought to reimburse him his share of the loss; and, though he is not a surety because of an agreement with the creditor, to the creditor can be under no obligation as surety, unless by contract or by estoppel he has subjected

442; *Enicks v. Powell*, 2 Strob. E. 196; *Odom v. Owens*, 2 Baxt. 44; *Remage v. Marple*, 76 W. Va. 37, 85 S. E. 663.

<sup>60</sup> See *infra*, § 1286.

<sup>61</sup> *Davies v. Humphreys*, 6 M. W. 153; *Ex parte Snowdon*, 17 C. D. 44; *Stirling v. Burdett*, [1911] Ch. 418; *Preslar v. Stallworth*, 3 Ala. 402, 405; *Richter v. Henningsen*, 110 Cal. 530, 42 Pac. 1077; *Paris v. Wilmington Trust Co.*, (Dec. 1918), 104 Atl. 691, 1 A. L. R. 135; *Robinson v. Jennings*, 7 Bush 63; *Hooper v. Hooper*, 81 Md. 155, 17 Atl. 508, 48 Am. St. Rep. 49; *Pass v. Granada County*, 71 Miss. 426, 14 So. 447; *Singleton v. Townsend*, 45 Mo. 379; *Singleton v. Shepherd*, (Mo. App. 1916), 183 S. W. 107.



**§ 1279. Contribution where sureties are liable for different amounts.**

Not infrequently sureties by their contracts limit the amount of their liability to a fixed sum, and co-sureties sometimes thus fix different limits for themselves or sign bonds with different penalties. In such a case where one surety pays more than his proportion of the debt, the contribution between the sureties must be in proportion to their several contractual liabilities, that is if one surety contracts to be answerable for the common debt to the extent of \$10,000 and another to the extent of \$5,000, the contribution must be so adjusted that the former pays two-thirds of the debt and the latter one-third.<sup>63</sup>

procured by the principal's fraud. The court held that the former having paid the judgment could not recover from the latter, and added:—

"If the rule be stated in the form that the utmost extent of the claim of a surety who has made payment is subrogation to the rights of the creditor, so that he will rank against the co-surety as would the main creditor, as was said in *Russell v. Failor*, 1 Ohio St. 327, 330, 59 Am. Dec. 631, the same conclusion is reached. Another phase of this principle is shown by the cases which hold that a surety, who has had no notice of an action against a co-surety, may show in an action by such co-surety against him any legal defence which he might have shown in an action against himself on the bond. *Briggs v. Boyd*, 37 Vt. 534, 539; *Lowndes v. Pinckney*, 1 Rich. Ch. 155, 178, 179; *Deering v. Winchelsea*, 2 B. & P. 270. Although the universal accuracy of these last two statements may be doubted (*Warner v. Morrison*, 3 Allen, 566, 568), they are sound as applicable to the facts here disclosed.

"This conclusion does not depend upon the doctrine of *res judicata*,

but flows from fundamental conceptions of the law of suretyship.

"The sentence in *Clapp v. Rice*, 15 Gray, 557, at page 559, 77 Am. Dec. 387, that the 'discharge of one' co-surety 'from his principal obligation, if the others are not discharged, will not release him from the liability to contribute to their indemnity,' was used in a quite different connection relating to the short statute of limitations in favor of the estate of a deceased co-surety as to whose original liability there was no question. This statement cannot be wrested from its connection, and distended to other facts for which it was not intended. *Swan v. Justices of the Superior Court*, 222 Mass. 542, 455, 111 N. E. 386." See further, *infra*, § 1286.

<sup>63</sup> *United States Fidelity, etc., Co. v. Naylor*, 237 Fed. 314, 322, 151 C. C. A. 20, citing *Armitage v. Pulver*, 37 N. Y. 494; *Jones v. Blanton*, 41 N. C. 115 (6 Ired. Eq.), 51 Am. Dec. 415; *Loring v. Bacon*, 57 Mass. (3 Cush.) 465, 468; *Deering v. Winchelsea*, 2 Bos. & Pul. 270; *Bosley v. Taylor*, 5 Dana, 157, 30 Am. Dec. 677; *Moore v. Boudinot*, 64 N. C. 190. See also *Young v.*

### § 1280. Compensated sureties are entitled to

Where some of the co-sureties for a company have been compensated, but not indemnified, for their services, and others signed gratuitously for the benefit of their principals, that fact is immaterial, and all compensated co-sureties who have paid more than their share of the common liability, are entitled to contribution from the accommodation co-sureties.<sup>64</sup>

### § 1281. A surety must share with his co-sureties of security.

The principle of equity requiring co-sureties to share the burden of any loss caused by default of the principal debtor involves the consequence that all securities held by one surety enures equally for the benefit of all.<sup>65</sup> The mere fact, however, that a surety

Shunk, 30 Minn. 503, 16 N. W. 402; Bell v. Jasper, 2 Ired. Eq. 597; Hughes v. Boone, 81 N. C. 204.

<sup>64</sup> United States Fidelity, etc., Co. v. Naylor, 237 Fed. 314, 321, 151 C. C. A. 20, citing United States Fidelity, etc., Co. v. McGinnis, 147 Ky. 781, 145 S. W. 1112, 1115; Lewis' Adm'r v. United States Fidelity, etc., Co., 144 Ky. 425, 138 S. W. 305, 306; Ann. Cas. 1913 A. 564; Fidelity & Deposit Co. v. Phillips, 235 Pa. 469, 84 Atl. 432, 434.

<sup>65</sup> Steel v. Dixon, 17 Ch. D. 825; In re Arcedeckne, 24 Ch. D. 709; Berridge v. Berridge, 44 Ch. D. 168; Vandiver v. Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118; Fishback v. Weaver, 34 Ark. 569; Gibson v. Shehan, 5 App. Cas. Dist. Col. 391; Cannon v. Connaway, 5 Del. Ch. 559; Simmons v. Camp, 71 Ga. 54; Frink v. Peabody, 26 Ill. App. 390; Keiser v. Beam, 117 Ind. 31, 19 N. E. 534; Reinhart v. Johnson, 62 Iowa, 155, 17 N. W. 452; Hoover v. Mowrer, 84 Iowa, 43, 50 N. W. 62, 35 Am. St. Rep. 293; Seibert v. Thompson, 8 Kans. 65; Teeter v. Pierce, 11

B. Mon. 399; See La. Ann. 579; See 73 Me. 541; Lab Mass. 551, 552, L. R. A. (N. S.) Der Horck, 57 M 630; Broussard v. App. 281, 173 S. v. Lucas' Ex. (Mo 154; Currier v. Fel Wolcott v. Hagerm 13 Atl. 605; Cri 127 N. Y. 315, 2 ham v. Green, 64 v. Hanie, 163 N. 57; Farmers' Bank St. 36; Farmers' 29 Oreg. 395, 45 St. Rep. 797; Sh 100 Pa. 565; Field Eq. 369; Bobbitt 511; Lacy v. Rol 12 S. W. 314; Ur Tex. Civ. App. 6 Miller v. Sawyer, v. Johnson, 57 Vt. 5 Munf. 187; Mc 2 Rand. 514, 1 Neely v. Bee, 32 V

compelled to pay, holds security for his indemnity will not bar recovery in an action for contribution, except to the extent that payment has been realized from the security.<sup>66</sup> After the recovery of contribution the contributing surety may seek the benefit of the security, and any sums realized by the party who obtained contribution must be accounted for. The obligation to share security does not continue after the sureties have finally contributed the amounts equitably due from each one and if, thereafter, one of them receives property for his indemnity, he need not share the benefit of it.<sup>67</sup> From the duty of a surety who has received security to share the benefit with his co-sureties, it follows that he is under the duties of a fiduciary with reference to his conduct in connection with the security. If he wastes it either wilfully or negligently, he is chargeable with the loss in accounting with his co-sureties.<sup>68</sup>

Where a surety has security to protect him against loss on two claims, he is not obliged to share the benefit of the security, or a ratable portion of it, with a co-surety on one of the claims.<sup>69</sup> It has also been held that a debt due from one surety to the principal is not within the rule requiring the sharing of benefits by co-sureties, and that the indebted

898. But the principle is inapplicable where several sureties bind themselves respectively each for a distinct fraction of a total liability. *Assets Realisation Co. v. American Bonding Co.*, 88 Ohio St. 216, 102 N. E. 719, Ann. Cas. 1915 A. 1194.

<sup>66</sup> *Done v. Walley*, 2 Exch. 198; *Anthony v. Percifull*, 8 Ark. 494; *Williams v. Riehl*, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; *Johnson's Adm. v. Vaughn*, 65 Ill. 425; *Bachelder v. Fiske*, 17 Mass. 464; *Mosely v. Fullerton*, 59 Mo. App. 143; *Paulin v. Kaighn*, 29 N. J. L. 480; *Vliet v. Wyckoff*, 42 N. J. Eq. 642, 9 Atl. 679. But see *contra Morrison v. Taylor*, 21 Ala. 779; *Morrison v. Poynts*, 7 Dana, 307, 32 Am. Dec. 92.

<sup>67</sup> *Harrison v. Phillips*, 46 Mo. 520; *Hall v. Cushman*, 16 N. H. 462, 43

Am. Dec. 562; *Urbahn v. Martin*, 19 Tex. Civ. App. 93, 97, 46 S. W. 291.

<sup>68</sup> *Taylor v. Morrison*, 26 Ala. 728, 62 Am. Dec. 747; *Simmons v. Camp*, 71 Ga. 54; *Frink v. Peabody*, 26 Ill. App. 390; *White v. Carlton*, 52 Ind. 371; *Sanders v. Weelburg*, 107 Ind. 266, 7 N. E. 573; *Teeter v. Pierce*, 11 B. Mon. 399; *Schmidt v. Coulter*, 6 Minn. 492; *Chilton v. Chapman*, 13 Mo. 470; *Crisfield v. Murdock*, 127 N. Y. 315, 27 N. E. 1046; *Kerns v. Chambers*, 3 Ired. Eq. 576; *Neely v. Bee*, 32 W. Va. 519, 9 S. E. 898.

<sup>69</sup> *Titcomb v. McAllister*, 81 Me. 399, 17 Atl. 315. See also *supra*, § 1272. But in *Moore v. Moberly*, 7 B. Mon. 299, it was held that the security must be ratable apportioned to the several debts.

surety if he makes payment may recover his 1 co-sureties without regard to such advantages surety may derive from his ability to set o principal debtor the amount which the latte though in case of the principal's insolvency, it that a court of equity having all the parties k give relief.<sup>71</sup> And where the debt due from the to the principal exceeded in amount the debt wl paid he has been denied contribution altogeth no more than just that the surety from whor is sought should be allowed to defeat or red of contribution by means of any indebtedness of the paying surety to the principal, which co in litigation between them; but it may be desi surety sued for contribution should be require defence by a bill in equity in which the princi party.

### § 1282. Co-sureties and successive sureties.

The rights of two parties who are sureties obligation depend on whether they are both su principal or whether one is surety for the prin other surety for the prior surety. What the one another is, depends upon the proper inf drawn from their contracts and the circumst case. It is not doubted that it is always possib to agree with one another on entering into t or for sufficient consideration subsequently, the themselves one shall be primarily liable.<sup>73</sup>

Whether an agreement by a new obligor witl or principal debtor when signing that he did surety for the principal with a surety who had a but as surety for the surety, is effectual has l

<sup>70</sup> *Davis v. Toulmin*, 77 N. Y. 280; *Neely v. Bee*, 32 W. Smith *v. Dickinson*, 100 Wis. 574, 76 898.  
N. Y. 766.

<sup>71</sup> *Davis v. Toulmin*, 77 N. Y. 280; <sup>72</sup> *Reed v. Rogers* 973; *Hayden v. Thra* Smith *v. Dickinson*, 100 Wis. 574, 76 *Hoyt v. Griggs*, 16- N. W. 766. N. W. 745; *Blake* :

<sup>73</sup> *Bessell v. White*, 13 Ala. 422; 97.

It has been held that the prior surety, by requesting the later surety to bind himself or in some other way, must have consented to the arrangement.<sup>73a</sup> But there seems no sound reason to question the right of a later obligor, who is under no duty to enter into any obligation, to dictate the terms upon which he will bind himself, to agree to become surety for one already bound as surety, rather than a co-surety with him. This does not enlarge the liabilities or vary the obligations of prior signers. Accordingly other decisions, including the more recent ones, allow the creation of such a relation without the knowledge or assent of the prior surety,<sup>73b</sup> and proof of the relation may be made by parol.<sup>73c</sup>

Instances of successive suretyship are common in negotiable instruments,<sup>74</sup> and are also to be found where in the course of legal proceedings to enforce a debt for which both a principal and a surety are bound, a bond with sureties is entered into at the request of the principal. In such a case if the original surety is forced to pay the debt, he is subrogated to the creditor's rights upon the bond, and may enforce it against the surety thereon.<sup>75</sup> And conversely if the surety on the bond pays the debt, he has no right to contribution from the surety on the original debt.<sup>76</sup> These rules are only

<sup>73a</sup> *Whitehouse v. Hanson*, 42 N. H. 9; *Warner v. Price*, 3 Wend. 397; *Norton v. Coons*, 3 Denio, 130; *Lathrop v. Wilson*, 30 Vt. 604. (Cf. *Adams v. Flanagan*, 36 Vt. 400.) See also *Simmons v. Camp*, 64 Ga. 726; *Fernald v. Dawley*, 26 Me. 470; *Crouse v. Wagner*, 41 Ohio St. 470.

<sup>73b</sup> *Craythorne v. Swinburne*, 14 Ves. 160; *Bulkeley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; *Baldwin v. Fleming*, 90 Ind. 177; *Houck v. Graham*, 123 Ind. 277, 24 N. E. 113; *Chepeze v. Young*, 87 Ky. 476, 9 S. W. 399; *Schram v. Werner*, 83 Hun, 293; *Oldham v. Broom*, 28 Ohio St. 41; *Harrison v. Lane*, 5 Leigh, 414, 27 Am. Dec. 607; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Huffman v. Manley* (W. Va.), 98 S. E. 613.

<sup>73c</sup> See cases in the preceding note.

<sup>74</sup> See *supra*, §§ 644, 1163.

<sup>75</sup> *Opp v. Ward*, 125 Ind. 241, 24 N. E. 94, 21 Am. St. Rep. 220; *Kellar v. Williams*, 10 Bush, 216; *Culliford v. Walser*, 158 N. Y. 65, 705, 52 N. E. 648, 53 N. E. 1124, 70 Am. St. Rep. 437; *Schnitzel's Appeal*, 49 Pa. 23, 78 Am. Dec. 477; *Winchester v. Beardin*, 10 Humph. 247, 51 Am. Dec. 702; *Hanner v. Douglass*, 4 Jones Eq. 262; *Denier v. Myers*, 20 Oh. St. 336; *Hanby's Adm'r v. Henritse's Adm'r*, 85 Va. 177, 7 S. E. 204. In Maine and Massachusetts, however, the principles of subrogation are not applied as between sureties on successive obligations in judicial proceedings. *Morse v. Williams*, 22 Me. 17; *Holmes v. Day*, 108 Mass. 563.

<sup>76</sup> *Fidelity & Deposit Co. v. Bowen*, 123 Ia. 356, 98 N. W. 897, 6 L. R. A.

applicable, however, where the second surety at the request of the principal only. If the surety was entered into at the express or implied request of the original surety as well as of the principal, the second surety on paying the debt is entitled to be subrogated to the original surety's right against the original surety.<sup>77</sup>

**§ 1283. A surety who pays unnecessarily is entitled to indemnity or contribution.**

If a surety is under no obligation to pay a debt, he is a volunteer if he makes payment, and though the transaction takes the form of a purchase and taking from the creditor he may become owner of the debt and enforce it against the debtor, there is no obligation of indemnity or contribution.<sup>78</sup> The application of this rule to cases where the surety is under an implied obligation though one not enforceable against him is true. It has been held that one who has made an oral promise to pay the principal the amount paid.<sup>79</sup> Similarly a surety whom the Statute of Limitations has run has been held to recover from the principal against whom the claim is barred;<sup>80</sup> and where a claim against the principal was still valid, a surety discharged by alteration of the contract,<sup>81</sup> by an extension of time given by the principal,<sup>82</sup> a failure to make proper protest,<sup>83</sup>

(N. S.) 1021; *Daniel v. Joyner*, 3 Ired. Eq. 513; *Dent v. Wait's Adm'r*, 9 W. Va. 41; *Hammock v. Baker*, 3 Bush, 208.

<sup>77</sup> *Dessar v. King*, 110 Ind. 69, 10 N. E. 621; *Dillon v. Scofield*, 11 Neb. 419, 9 N. W. 554; *Hartwell v. Smith*, 15 Oh. St. 200; *Yeager's Appeal* (Pa.), 8 Atl. 225; *Coffman v. Hopkins*, 75 Va. 645. In Louisiana the assumption seems always made in favor of the second surety that his obligation was entered into on the faith of the prior obligation of the first surety. *Howe v. Fraser*, 2 Rob. (La.) 424. See also *Smith v. Anderson*, 18 Md. 520.

<sup>78</sup> *Sleigh v. Sleigh*, 112 Ala. 112; *Murray v. Curtis*, 55 Cal. 55; *Ritchey v. Hinton*, 14 Lea, 2; *Rich v. Vt.* 324, 791.

<sup>79</sup> *Beal v. Brown*, 435, 7 N. W. 76.

<sup>80</sup> *McClatchie v. Houck*, 594.

<sup>81</sup> *Brown v. Ma*, 247, 93 Atl. 1023.

<sup>82</sup> *Tredway v. An*, 48 N. W. 956.

give notice required by law,<sup>84</sup> has been allowed on payment of the debt to recover indemnity or contribution. Such decisions seem sound, though at variance with statements frequently made that unless the surety's payment was under legal necessity he cannot recover. Where the principal or co-surety is still bound to the creditor he is not injured if the surety pays the debt and recovers from him. Therefore, where there is a moral obligation on the part of the surety, he should not be required, on peril of acquiring no right over, to refuse to pay the debt. The surety, however, cannot be allowed to extend the obligation of the creditor merely for his own satisfaction. Accordingly if the Statute of Limitations has run in favor both of the principal and the surety, a payment thereafter by the surety cannot be recovered from the principal nor can contribution be recovered from a co-surety against whom the creditor no longer had at the time of the payment an enforceable right.<sup>85</sup>

The mere fact that the Statute of Limitations has run against the creditor in favor of the principal debtor or a co-surety prior to the action for indemnification or contribution will not defeat the action if the Statute had not run when payment was made.<sup>86</sup>

It has been said<sup>87</sup> that "the liability of the principal cannot

<sup>84</sup> *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545.

<sup>85</sup> *Hatchett v. Pegram*, 21 La. Ann. 722; *Godfrey v. Rice*, 59 Me. 308, 309; *Hooper v. Hooper*, 81 Md. 155, 174, 31 Atl. 508; *Barnsback v. Reiner*, 8 Minn. 59; *Gronna v. Goldammer*, 26 N. Dak. 122, 143 N. W. 394, Ann. Cas. 1916 A. 165; *Wheatfield v. Brush Valley*, 25 Pa. 112; *Cocke v. Hoffman*, 5 Lea, 105, 40 Am. Rep. 23; *Glasscock v. Hamilton*, 62 Tex. 143, 153; *Turner's Adm'r v. Thom*, 89 Va. 745, 17 S. E. 323. For other illustrations of the same principle, see *infra*, § 1286, n. 10.

<sup>86</sup> *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Gardner v. Brooke*, [1897] 2 Ir. Rep. 6; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Wood v. Leland*, 1 Met. 387; *Hard v. Mingle*, 206 N. Y. 179, 99 N. E. 542, 42 L. R. A. (N. S.) 1131;

*Camp v. Bostwick*, 20 Oh. St. 337, 5 Am. Rep. 669; *McCormick v. Sener*, 200 Pa. 11, 49 Atl. 311; *Fullerton v. Bailey*, 17 Utah, 85, 53 Pac. 1020; *Cawthorne v. Weisinger*, 6 Ala. 714; *Mentzer v. Burlingame*, 78 Kans. 219, 97 Pac. 371, 18 L. R. A. (N. S.) 585; *Crosby v. Wyatt*, 23 Me. 156; *Seabury v. Sibley*, 183 Mass. 105, 66 N. E. 603; *Sibley v. McAllaster*, 8 N. H. 389; *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178; *Boardman v. Paige*, 11 N. H. 431; *Koelsch v. Mixer*, 52 Oh. St. 207, 39 N. E. 417; *Martin v. Frantz*, 127 Pa. 389, 18 Atl. 20, 14 Am. St. Rep. 859; *Marshall v. Hudson*, 9 Yerg. 57; *Reeves v. Pulliam*, 7 Baxt. 119; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791.

<sup>87</sup> *Lane v. Westmoreland*, 79 Ala. 372, 374.

be increased nor accelerated by the voluntary act of the surety. He must wait until he is to pay, and subject to be coerced to pay. Of course, of the general rule; for if there be special stipulations to determine the mode and measure of liability; if a defence has arisen at the date when the claim would mature, a surety who has paid it before maturity may recover contribution after the date of maturity.<sup>90</sup>

### § 1284. Measure of surety's recovery.

"Where a surety is sued with his principal, or sued alone and notifies the principal so as to defend or to furnish a surety with a defence against the surety is the measure of his damages as principal."<sup>90</sup> And so where a co-surety is joined and contribution is afterwards claimed.<sup>91</sup> Unless a co-surety is thus in effect made responsible for the judgment or unless his promise is in terms made the result of the litigation, the correctness of the judgment may be questioned in a subsequent action for contribution.<sup>92</sup> Not only may a surety pay though he has become liable on the obligation without

<sup>90</sup> Citing *Brandt on Suretyship*, §§ 191, 194; *Reynolds v. Magness*, 2 Ired. Law, 26; *St. Albans v. Curtis*, 1 D. Chipm. 164; *Gennings v. Norton*, 35 Me. 308; *Gilbert v. Wiman*, 1 Comst. 550, 49 Am. Dec. 359; *Gibbs v. Menard*, 6 Paige, 258; *Shepard v. Shepard*, 6 Conn. 37; *Duncan v. Keiffer*, 3 Bin. 126; *M'Lean v. Ragsdale*, 31 Miss. 701; *Hollinsbee v. Ritchey*, 49 Ind. 261; *Pope v. Davidson*, 5 J. J. Marsh. 400.

<sup>91</sup> *Golsen v. Brand*, 75 Ill. 148; *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545; *Tillotson v. Rose*, 11 Met. 299; *Felton v. Bissel*, 25 Minn. 15; *Barber v. Gillson*, 18 Nev. 89, 1 Pac. 452; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Williams v. Williams*, 5 Oh. 444; *Craig v. Craig*, 5 Rawle, 91; *Guckenheimer & Bros. Co. v. Kann*, 243 Pa. 75, 89 Atl. 807.

<sup>92</sup> *Hare v. Grant*. And see *Smith v. Coe*, 407; *Rice v. Rice*, Littleton v. Rich. 179, 66 Am. Dec.

<sup>91</sup> *Love v. Gibson* if the co-surety party and obtains issue not going to not bound by the his co-surety. *Kennedy v. Ohio St.* 207, 39 N.

<sup>92</sup> *Cathcart v. Fea* *Guay v. Eastman*, Atl. 840; *Thomas Y.* 405, 69 Am. Dec. 52 Pa. *Pinckney*, 1 Rich. also *Smith v. Coe* 407.



claim, and by subrogation or otherwise recover indemnity<sup>94</sup> or contribution,<sup>94</sup> but if the surety does without reasonable grounds contest liability, he cannot charge the principal or co-surety with costs incurred in the action;<sup>95</sup> and if the surety's property is sold at a sacrifice to satisfy the creditor's execution, the surety can recover only the amount which the property actually brought.<sup>96</sup> The surety, however, may include in his claim for indemnity or contribution costs incurred in a defence reasonably undertaken,<sup>97</sup> or incurred in an action in which the principal or co-surety was a co-defendant.<sup>98</sup>

### § 1285. The surety is limited to reimbursement.

The law is solicitous to insure the surety, by the various remedies it allows, reimbursement as against the principal debtor, and the enforcement against co-sureties of their due share of any loss; but on the other hand it forbids the surety

<sup>94</sup> *Fishback v. Weaver*, 34 Ark. 569, 580; *Odlin v. Greenleaf*, 3 N. H. 270; *Bradley v. Burwell*, 3 Denio, 61.

<sup>95</sup> *Pitt v. Pursord*, 8 M. & W. 538; *Love v. Gibson*, 2 Fla. 598; *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 562; *Warner v. Morrison*, 3 Allen, 566; *Bradley v. Burwell*, 3 Denio, 61; *Hardell v. Carroll*, 90 Wis. 350, 63 N. W. 275.

<sup>96</sup> *Fisher v. Fallows*, 5 Esp. 171; *Pierce v. Williams*, 23 L. J. Exch. 322; *John v. Jones*, 16 Ala. 454, 462; *Beckley v. Munson*, 22 Conn. 299; *Comegys v. State Bank*, 6 Ind. 357; *Newcomb v. Gibson*, 127 Mass. 396, 399; *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 694; *Van Petten v. Richardson*, 68 Mo. 379; *Boardman v. Paige*, 11 N. H. 431; *Stothoff v. Dunham*, 4 Harr. (N. J.) 181; *Bright v. Lennon*, 83 N. C. 183, 188; *Wynn v. Brooke*, 5 Rawle, 106. But see *Kemp v. Finden*, 12 M. & W. 421; *Van Winkle v. Johnson*, 11 Oreg. 469, 5 Pac. 922, 50 Am. Rep. 495; *Briggs v. Boyd*, 37 Vt. 534.

<sup>97</sup> *Taylor's Ex. v. Jefferson*, 167 Ky. 454, 180 S. W. 801.

<sup>98</sup> *United States Fidelity, etc., Co. v. Naylor*, 237 Fed. 314, 151 C. C. A. 20; *Carter v. Fidelity, etc., Co.*, 134 Ala. 369, 32 So. 632, 92 Am. St. Rep. 41; *Wagenseller v. Prettyman*, 7 Ill. App. 192, 197; *Bosley v. Taylor*, 5 Dana, 157; *Backus v. Coyne*, 45 Mich. 584, 8 N. W. 694; *Bright v. Lennon*, 83 N. C. 183; *Cleveland v. Covington*, 13 Strob. 184; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92; *Briggs v. Boyd*, 37 Vt. 534.

<sup>99</sup> *Kemp v. Finden*, 12 M. & W. 421; *Security Ins. Co. v. St. Paul Ins. Co.*, 50 Conn. 233; *Bosley v. Taylor*, 5 Dana, 157; *Davis v. Emerson*, 17 Me. 64; *Newcomb v. Gibson*, 127 Mass. 396; *Boardman v. Paige*, 11 N. H. 431; *Stothoff v. Dunham*, 4 Harr. (N. J.) 181, 185; *Bright v. Lennon*, 83 N. C. 183; *Van Winkle v. Johnson*, 11 Oreg. 469, 5 Pac. 922, 50 Am. Rep. 495; *McKenna v. George*, 2 Rich. Eq. 15; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635; *Marsh v. Harrington*, 18 Vt. 150.

to seek anything beyond these limits. He can in regard to the claim either against the principal or a co-surety. Therefore, the surety's right on the obligation of indemnity is limited to the surety and if he obtains a discharge of the debt without the creditor in full, he can recover only his actual contribution.

Similarly if he seeks to be subrogated to the creditor's rights he must give the principal the advantage of a payment made with the creditor.<sup>1</sup> Nor are his rights affected if instead of paying the debt, he purchases at auction the creditor's claim and seeks to enforce it for its face against the principal.<sup>2</sup> The same principle is applied to the rights among co-sureties. The calculation of the amount a co-surety is liable must be based on the amount paid by the surety seeking contribution, not on the amount of the debt where it has been settled for less than the face.

**§ 1286. When a surety who has paid the debt is subrogated to the creditor's rights against the principal or co-surety, the surety is entitled to the defence of the latter.**

As has been seen,<sup>4</sup> a surety may sometimes be subrogated to the creditor's rights against his principal if the principal is not, and similarly cases may be found where one surety is liable and a co-surety is not. The

<sup>\*</sup> Reed v. Norris, 2 M. & Cr. 361; (N. S.) 498; Pao Martin v. Ellerbe, 70 Ala. 326; Jordan N. C. 550; Burton v. Adams, 7 Ark. 348; Coggeshall Gratt. 914. But in v. Ruggles, 62 Ill. 401; Goodwin v. land, 107 Mass. 5 tion indorser wh Davis, 15 Ind. App. 120, 43 N. E. 881; Crozier v. Grayson, 4 J. J. Marsh. 514; Gillespie v. Creswell, 12 Gill & J. 36; Delaware, L. & W. R. Co. v. the note at a dis Oxford Iron Co., 38 N. J. Eq. 151; to enforce it for Bonney v. Seely, 2 Wend. 481; Faires against the maker v. Corkerell, 88 Tex. 428, 434, 437, 31 S. W. 190, 639, 28 L. R. A. 528; Kendrick v. Forney, 22 Gratt. 748; Southall v. Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641; Matthews v. Hall, 21 W. Va. 510.

<sup>1</sup> Dinkgrave's Succession, 31 La. Ann. 703; Eaton v. Lambert, 1 Neb. 339.

<sup>2</sup> Dorsey v. Creditors, 7 Mart. <sup>3</sup> Owen v. McG Smith v. Pitts, 16 So. 402; Williams 365, 59 Pac. 762, 60; Paul v. Berry, man v. McCurdy, Fuselier v. Babin 764; Sinclair v. R 146; Acers v. Curt 4 S. W. 551; T 12 Gratt. 642.

<sup>4</sup> Supra, §§ 1213

cumstances whether the surety who is liable can recover indemnity from the principal or contribution from the co-surety depends upon the nature of the latter's defence. If the principal or co-surety is an infant his infancy will be as good a defence to an action by a surety who has paid the debt as it would be to an action by the principal.<sup>5</sup> On the other hand, the principal or co-surety may be excused from liability to the creditor because of the Statute of Limitations, but the surety who pays may still be liable. Under such circumstances the surety, if forced to pay, may recover indemnity from the principal,<sup>6</sup> and under similar circumstances may recover contribution from a co-surety.<sup>7</sup> So the death of one joint co-surety, though it relieves his estate from liability to the creditor will not relieve it from an obligation to contribute to a co-surety who pays more than his share of the debt.<sup>8</sup> The defence of bankruptcy is specifically provided for by the Bankruptcy Act.<sup>9</sup> The vital questions where the surety seeks re-

<sup>5</sup> See *supra*, § 1278.

<sup>6</sup> *Hooks v. Branch Bank*, 8 Ala. 580; *Sichel v. Carrillo*, 42 Cal. 493; *Reid v. Flippen*, 47 Ga. 273; *Gieseke v. Johnson*, 115 Ind. 308, 311, 17 N. E. 573; *Brought v. Griffith*, 16 Iowa, 26, 33; *Leslie v. Compton*, 103 Kan. 92, 172 Pac. 1015; *Godfrey v. Rice*, 59 Me. 308; *Bullock v. Campbell*, 9 Gill, 182; *Barnesback v. Reiner*, 8 Minn. 59; *Scott v. Nichols*, 27 Miss. 94; *Miller v. Woodward*, 8 Mo. 169; *Marshall v. Hudson*, 9 Yerg. 57; *Brooks*, 12 Heisk. 12; *Bevill v. Boyd*, 16 Tex. Civ. App. 491, 495-496, 41 S. W. 670, 42 S. W. 318; *Norton v. Hall*, 41 Vt. 471.

<sup>7</sup> *Preslar v. Stallworth*, 37 Ala. 402; *Williams v. Ewing*, 31 Ark. 229; *May v. Vann*, 15 Fla. 553; *Hill v. Morse*, 61 Me. 541; *Wood v. Leland*, 1 Met. 387; *Clapp v. Rice*, 15 Gray, 557, 77 Am. Dec. 387; *Kelly v. Sproul*, 153 Mich. 691, 117 N. W. 327, 15 Ann. Cas. 1029; *Burton v. Rutherford*, 49 Mo. 255; *Frew v. Scoular*, 101 Neb. 131, 162 N. W. 496, L. R. A.

1917 F. 1065; *Boardman v. Paige*, 11 N. H. 431; *Camp v. Bostwick*, 20 Oh. St. 337, 5 Am. Rep. 669; *Martin v. Frants*, 127 Pa. 389, 18 Atl. 20, 14 Am. St. Rep. 859; *Knotts v. Butler*, 10 Rich. Rq. 143; *Reeves v. Pulliam*, 7 Baxt. 119, 9 Baxt. 153; *Fairies v. Cockerell*, 88 Tex. 428, 434, 31 S. W. 190, 639, 28 L. R. A. 528; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791. Contrary decisions are: *Shelton v. Farmer*, 9 Bush, 314; *Cochran v. Walker's Ex.*, 82 Ky. 220, 56 Am. Rep. 891.

<sup>8</sup> *Ashby v. Ashby*, 7 B. & C. 444, 449, 451; *Bradley v. Burwell*, 3 Denio, 61; *Johnson v. Harvey*, 84 N. Y. 363, 38 Am. Rep. 515; *McKenna v. George*, 2 Rich. Eq. 15; *Stephens v. Meek*, 6 Lea, 226; *Tarr v. Ravenscroft*, 12 Gratt. 642, 652. See also *Hecht v. Skaggs*, 53 Ark. 291, 13 S. W. 930, 22 Am. St. Rep. 192. But see *contra*, *Waters v. Riley*, 2 Har. & G. 305; *Kennedy v. Carpenter*, 2 Whart. 344.

<sup>9</sup> See *infra*, § 1992.

imbursement or contribution are these: Is between him and the principal or co-surety to make liable, and if so is there a defence or if there is no contract, has the surety's pay enriched the principal or co-surety that rec allowed?

As has been seen,<sup>92</sup> where the defence of co-surety is of such a character that the sure debt could have set up the defence effectively t he cannot, if he knew the facts upon which based, recover indemnity or contribution if he But if the surety pays in good faith in i which would furnish a defence to the credit entitled to recover indemnity,<sup>11</sup> or contributio

### § 1287. Laches.

The right of subrogation may be lost laches if the rights of innocent third persons i so may the right of contribution.<sup>14</sup>

<sup>92</sup> See *supra*, § 1283, n. 85.

<sup>10</sup> *Whitehead v. Peck*, 1 Ga. 140; *Hollinsbee v. Ritchey*, 49 Ind. 261; *Craven v. Freeman*, 82 N. C. 361; *Russell v. Failor*, 1 Oh. St. 327, 59 Am. Dec. 631; *Davis v. Bauer*, 41 Oh. St. 257; *Worthington v. Peck*, 24 Ont. 535. See also *Halsey v. Murray*, 112 Ala. 185, 20 So. 575; *Bancroft v. Abbott*, 3 Allen, 524.

<sup>11</sup> *Gasquet v. Oakley*, 19 La. 76; *Hyde v. Miller* (N. Y. App. Div.),

60 N. Y. S. 974

Oh. St. 327, 59

son v. Brennan,

<sup>12</sup> *Cave v. Bur*

born v. Fletcher,

Rep. 562; *Wal*

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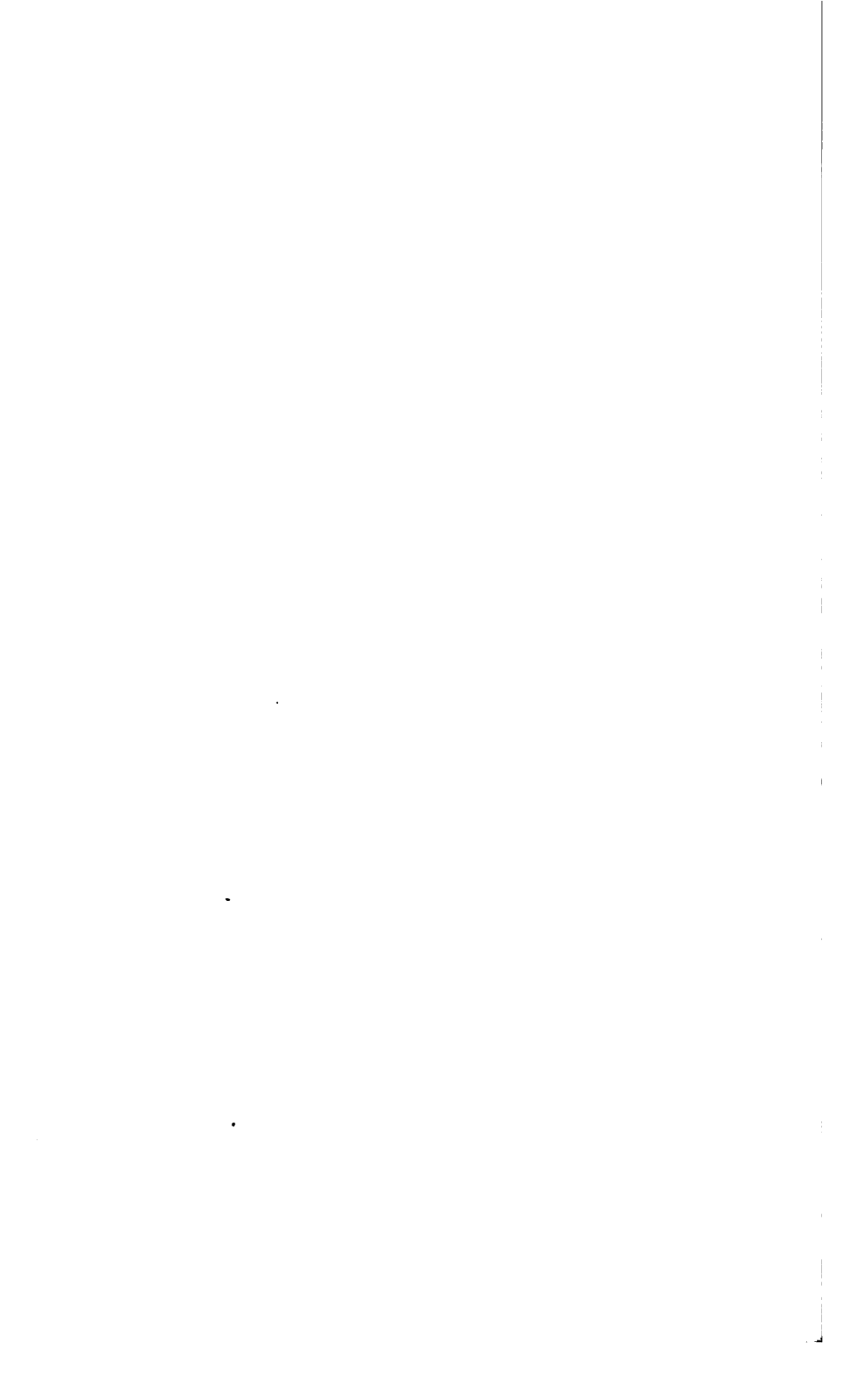
Vict. L. R. 70.

<sup>13</sup> *Douglass' v*

*In re Searight's*

29 Atl. 973.

<sup>14</sup> *Owen v. M*











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